**NO:**

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**IN THE**

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 2022**

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**WARREN JACKSON,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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

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## PETITION FOR WRIT OF CERTIORARI

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**June 5, 2023**

# APPENDIX

## TABLE OF APPENDICES

**A-1**

58 F.4th 1331
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Warren Lavell JACKSON, Defendant-Appellant.

No. 19-11955
|
Filed: 02/03/2023

**Synopsis**

**Background:** Prisoner filed motion for reduced sentence under First Step Act, relating to conviction for possessing with intent to distribute more than 50 grams of crack cocaine, without a jury finding as to specific drug quantity. The United States District Court for the Southern District of Florida, No. 2:99-cr-14021-DMM-1, Donald M. Middlebrooks, J., denied the motion. Prisoner appealed. The Court of Appeals, 962 F.3d 1290, affirmed, and prisoner's petition for rehearing en banc was denied, 995 F.3d 1308. The Supreme Court summarily granted certiorari, vacated the judgment, and remanded for further consideration.

**Holdings:** The Court of Appeals, William Pryor, Chief Judge, held that:

[1] on a motion for reduced sentence under First Step Act, a district court is bound by a previous finding of drug quantity, and

[2] prisoner, whose direct appeal had been pending when Supreme Court issued its *Apprendi* decision, could not use First Step Act to correct an *Apprendi* error.

Affirmed.

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

West Headnotes (9)

**[1] Criminal Law** Review De Novo

The Court of Appeals reviews de novo questions of statutory interpretation.

**[2] Criminal Law** Review De Novo

The Court of Appeals reviews de novo whether a district court had the authority to modify a term of imprisonment.

1 Case that cites this headnote

**[3] Criminal Law** Sentencing

The Court of Appeals reviews for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act. Pub. L. No. 115-391, § 404(a, b).

2 Cases that cite this headnote

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

On a motion for reduced sentence under the First Step Act, which allows sentence reduction "as if" the Fair Sentencing Act, which increased the quantity of crack cocaine necessary to trigger mandatory statutory penalties, had been in effect when the covered offense was committed, a district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing; determining how much of a drug the defendant possessed is an issue that arises before the district court's discretion to reduce a sentence comes into play, i.e., the finding must occur before the district court can define the substantive offense. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(iii), (b)(1)(B)(iii); Pub. L. No. 115-391, § 404(a, b).

11 Cases that cite this headnote

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

**Sentencing and Punishment** Change in facts

District courts deciding First Step Act motions may consider intervening changes of law or fact in exercising their discretion to reduce a

  

sentence, that is, they may consider whether a movant's evidence of rehabilitation or other changes in law counsel in favor of a sentence reduction for an eligible defendant. Pub. L. No. 115-391, § 404(a, b).

1 Case that cites this headnote

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

Prisoner, whose direct appeal had been pending when Supreme Court issued its *Apprendi* decision that a fact that increases a defendant's punishment must be found by a jury based on a standard of proof of beyond a reasonable doubt, could not use a motion for reduced sentence under First Step Act, which allows sentence reduction "as if" the Fair Sentencing Act had been in effect when the covered offense was committed, to correct an error based on *Apprendi*, relating to drug-quantity findings that increased his punishment. U.S. Const. Amend. 6; Pub. L. No. 111-220; Pub. L. No. 115-391, § 404(a, b).

7 Cases that cite this headnote

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

When a district court considers a motion for reduced sentence under the First Step Act, it may rely on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified, and those facts include a previous drug-quantity finding that was necessary to trigger the statutory penalty if it was made by a judge. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(iii), (b)(1)(B)(iii); Pub. L. No. 115-391, § 404(b).

7 Cases that cite this headnote

**[8]** **Courts** In general; retroactive or prospective operation

**Criminal Law** Effect of change in law or facts

A new rule of criminal procedure applies to cases on direct review, even if the defendant's trial has already concluded.

**[9]** **Courts** In general; retroactive or prospective operation

The Supreme Court's *Apprendi* decision, that a fact that increases a defendant's punishment must be found by a jury based on a standard of proof of beyond a reasonable doubt, does not apply retroactively to cases on collateral review. U.S. Const. Amend. 6.

***1332** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 2:99-cr-14021-DMM-1

**Attorneys and Law Firms**

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Michael Caruso, Tracy Michele Dreispul, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before William Pryor, Chief Judge, Grant, Circuit Judge, and Jung, District Judge. *

**ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES**

William Pryor, Chief Judge:

***1333** This appeal on remand from the Supreme Court requires us to reconsider, following the Supreme Court's decision in *Concepcion v. United States*, —— U.S. ——, 142 S. Ct. 2389, 213 L.Ed.2d 731 (2022), whether the district court erred in denying Warren Jackson's motion for a reduced sentence under the First Step Act of 2018. Following supplemental briefing, we conclude that *Concepcion* did not abrogate the reasoning of our decision in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), which forecloses

Jackson's claim for relief. We also disagree with the parties that Jackson is entitled to relief because his original sentence was pending on direct appeal when the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). So, we reinstate our prior decision and affirm the denial of relief.

## I. BACKGROUND

In 1999, a grand jury charged Jackson with one count of possessing with intent to distribute more than 50 grams of crack cocaine in violation of 21 U.S.C. section 841(a)(1). *See Jones*, 962 F.3d at 1295. Jackson proceeded to trial, where a jury found him guilty. The jury did not make a finding as to the specific drug quantity involved in Jackson's crime; Jackson "was prosecuted before *Apprendi v. New Jersey* made clear that drug-quantity findings that increase a defendant's punishment must be made by a jury based on a standard of proof of beyond a reasonable doubt." *Id.* at 1293 (citing 530 U.S. at 490, 120 S.Ct. 2348). The district court found that the offense involved 287 grams of crack cocaine. Based on this drug-quantity finding and after applying a sentencing enhancement for three prior felony drug convictions, the district court imposed a statutorily mandated sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(iii) (1994); *see also* United States Sentencing Guidelines § 5G1.1(b) (1998).

Following the district court's decision, Jackson has had multiple opportunities to challenge his sentence. We affirmed his conviction and sentence on direct appeal. The district court denied at least four habeas petitions, 28 U.S.C. § 2255(a), and a motion to vacate his sentence pursuant to Rule 60, FED. R. CIV. P. 60. And it denied his motions for a reduction of his sentence. 18 U.S.C. § 3582(c)(2). Afterward, the President commuted Jackson's sentence to 300 months' imprisonment.

In 2019, Jackson moved to reduce his sentence under the First Step Act, which permits "[a] court that imposed a sentence for a covered offense [to] ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (internal citation omitted). The Act defines a "covered offense" 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, that was committed before August 3, 2010." *Id.* § 404(a) (internal citation omitted). Section 2(a) of the Fair Sentencing Act of 2010, ***1334** Pub. L. No. 111-220, 124 Stat. 2372, 2372, increased the quantity of crack cocaine necessary to trigger the mandatory penalties under 21 U.S.C. sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii). *Jones*, 962 F.3d at 1297. "A defendant now must traffic at least 280 grams of crack cocaine to trigger the highest penalties." *Id.*

Because the First Step Act retroactively applies the reduced penalties for crack-cocaine offenses under the Fair Sentencing Act, movants ordinarily argue that the drug-quantity finding that determined their statutory penalty at the time of sentencing would permit a lower penalty under the Fair Sentencing Act. Jackson did not make that argument because, at his sentencing hearing, the judge found that the offense involved 287 grams of crack cocaine. That amount—because it is above 280 grams—still triggers "the highest penalties" under the Fair Sentencing Act. *Id.*

Instead, Jackson argued he was eligible for a sentence reduction because a judge, not a jury, made the drug-quantity finding that increased his statutory range. Jackson maintained that under *Apprendi* and *Alleyne v. United States*, 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), "the statutory penalties [in 21 U.S.C. section 841(b)] may be based only on a ... [drug quantity] found as an element by a jury beyond a reasonable doubt." Jackson argued that the judge-made drug-quantity finding was thus invalid and that he should have been sentenced within a lower statutory range. He argued that the district court should reduce his sentence under the First Step Act.

The district court denied Jackson's motion. It ruled that the Fair Sentencing Act "would have had no impact on [Jackson's] sentence ... [b]ecause the offense involved 2[87] grams of cocaine." So, after accounting for Jackson's enhancements, he would still be subject to the same statutory mandatory minimum of life imprisonment.

In *United States v. Jones*—a consolidated appeal involving four unrelated appellants—we affirmed the denial of Jackson's motion. We held that although Jackson was convicted of a "covered offense," he did not prove that the reduction he sought would be "as if ... the Fair Sentencing Act ... were in effect at the time the covered offense was committed." *Jones*, 962 F.3d at 1303 (quoting First Step Act § 404(b)). We held that the " 'as-if' requirement imposes two [relevant] limits." *Id.*; *see also United States v. Jackson*, 995 F.3d 1308, 1309 (11th Cir. 2021) (Pryor, C.J., respecting denial of rehearing en banc). "First, it does not permit

  

reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Jones*, 962 F.3d at 1303. "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Id.*

We clarified that "previous finding[s] of drug quantity that *could have been used* to determine the movant's statutory penalty" include "a previous drug-quantity finding that was necessary to trigger the statutory penalty [even] if it was made by a judge." *Id.* at 1302. We acknowledged that, under *Apprendi*, a jury must make a drug-quantity finding if it increases the statutory penalty. *Id.* But we held that "just as a movant may not use *Apprendi* to collaterally attack his sentence, he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion." *Id.* (internal citation omitted). So, we concluded that "in deciding motions for reduced sentences under the First Step Act," the ***1335** district court may "rely[ ] on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified." *Id.* at 1303.

We held that the district court was bound by the judge's earlier drug-quantity finding of 287 grams of crack cocaine. *Id.* at 1304. Based on this amount, we held that "[t]he district court correctly concluded that it could not reduce Jackson's sentence because his drug-quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act." *Id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii) (2012)). Because Jackson's sentence "would have necessarily remained the same," following the consideration of the drug-quantity finding, "[a]ny reduction the district court would grant would not be 'as if' the Fair Sentencing Act had been in effect." *Id.* at 1303.

Following our decision, Jackson petitioned for rehearing *en banc*. We denied his petition. *See Jackson*, 995 F.3d at 1308. Jackson then petitioned for a writ of certiorari from the Supreme Court. During the pendency of his petition, the Supreme Court decided in *Concepcion v. United States*, 142 S. Ct. at 2396, which factors, besides the changes to the crack-cocaine sentencing ranges, a district court may consider in deciding whether to exercise its discretion to reduce a sentence for a covered offense under the First Step Act. The Supreme Court explained that the "as if" clause did not "limit the information a district court may use to inform its decision whether and how much to reduce a sentence." *Concepcion*, 142 S. Ct. at 2402. The Supreme Court held that a district court "may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion." *Id.* at 2396. In October 2022, the Supreme Court granted Jackson's petition, vacated our judgment, and remanded the case for further consideration in the light of *Concepcion*. *Jackson v. United States*, —— U.S. ——, 143 S. Ct. 72, 214 L.Ed.2d 121 (2022).

## II. STANDARD OF REVIEW

**[1]** **[2]** **[3]** "We review *de novo* questions of statutory interpretation and whether a district court had the authority to modify a term of imprisonment." *Jones*, 962 F.3d at 1296 (internal citation omitted). "We review for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act." *Id.*

## III. DISCUSSION

We divide our discussion into two parts. First, we explain that *Concepcion* did not abrogate our holding that "the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Jones*, 962 F.3d at 1303. Second, we explain that Jackson cannot use a motion for a reduced sentence to correct an error based on *Apprendi*.

### *A. The District Court Correctly Relied on the Judge-Made Drug-Quantity Finding to Calculate Jackson's Sentencing Range.*

**[4]** Jackson argues that *Concepcion* "cannot be squared" with *Jones*'s holding that district courts are bound by judge-made drug-quantity findings in First Step Act proceedings. Jackson maintains that "the [Supreme] Court rejected *Jones*'[s] core premise that the 'as if' language in § 404(b) imposes a substantive limit on the information a court can consider under the [First Step] Act." Jackson interprets *Concepcion* to give district courts complete discretion—without "any limitations" imposed by the "as-if" provision—to consider ***1336** arguments "in favor of, or against, sentence modification." Jackson maintains that the district court was "free to consider intervening changes in law,

  

including ... *Apprendi*, in deciding whether to reduce [Jackson's] sentence under the First Step Act." The district court's discretion, Jackson suggests, includes the authority to ignore the earlier judge-made drug-quantity finding in calculating his statutory sentencing range. We disagree.

We do not read *Concepcion* so broadly. In *Concepcion*, the Supreme Court addressed which factors a district court may consider when a prisoner who was convicted of a "covered offense" seeks a reduced sentence under the First Step Act. 142 S. Ct. at 2396. The movant in *Concepcion* was convicted of a "covered offense" for which the penalty range had been lowered in the Fair Sentencing Act. *Id.* at 2396–97. But he wanted the district court to consider other criteria during his First Step Act sentencing modification hearing. For example, he wanted the court to acknowledge legal changes that postdated his original sentencing. These changes included the vacatur of one of his state convictions and the Supreme Court's decision that his other convictions would no longer count as "crimes of violence." *Id.* And he wanted the court to consider new factual developments. He maintained that he had been rehabilitated, citing his drug treatment, job training, and spiritual growth. *Id.* The district court had refused to consider these factors. It ruled that it could "consider[ ] only the changes in law that the Fair Sentencing Act enacted," not other evidence. *Id.*

**[5]** The Supreme Court disagreed. It cited the traditional "discretion federal judges hold at ... sentencing modification hearings." *Id.* at 2399. In the First Step Act, Congress "did not contravene this well-established sentencing practice." *Id.* at 2401. The Supreme Court concluded that district courts deciding First Step Act motions may "consider intervening changes of law or fact in exercising their discretion to reduce a sentence." *Id.* at 2404. That is, they may consider whether a movant's "evidence of rehabilitation or other changes in law counsel in favor of a sentence reduction" for an eligible defendant. *Id.* at 2404–05.

*Concepcion* does not alter our decision in *Jones*, which, unlike *Concepcion*, was concerned with an issue that arises before the sentencing court's discretion comes into play: determining how much of a drug the defendant possessed. *Jones*, 962 F.3d at 1303. This finding must occur before the district court can define the substantive offense. *Id.* at 1302. In *Jones*, we held that a district court considering a First Step motion is bound by "earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified." *Id.* at 1303. Those facts include "previous finding[s] of drug quantity." *Id.*

*Concepcion*, by contrast, addressed an issue that arises only after drug quantity and the corresponding statutory penalties have been established: which factors the district court may consider in deciding an appropriate sentence. For instance, had the movant shown evidence of rehabilitation? Such questions are hardly unusual during a sentencing proceeding. The only peculiarity is that the First Step Act permits movants to raise them a second time at a modification proceeding. Put differently, in *Concepcion*, the Supreme Court held that the movant effectively receives a new sentencing determination if he was convicted of a "covered offense" under the First Step Act. During its deliberations, the district court may consider intervening factual and legal developments. It may also decline to modify the movant's sentence and choose to leave the earlier sentence ***1337** intact. *See* *Concepcion*, 142 S. Ct. at 2404–05.

*Concepcion* did not hold that First Step Act movants could relitigate their cases from the ground up. In fact, the Court suggested the opposite. It cautioned that "[a] district court cannot ... recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act." *Concepcion*, 142 S. Ct. at 2402 n.6; *see also id.* at 2403 n.8. This guidance is fully consistent with *Jones*, in which we held that a movant "cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion." 962 F.3d at 1302. If a movant could use *Apprendi* to redefine his offense, then the district court would have to recalculate his guideline range in violation of the guidance in *Concepcion*. So *Concepcion* reinforces our conclusion in *Jones* that movants may not use a First Step Act proceeding to relitigate a drug-quantity finding.

If we concluded otherwise, we would transform the First Step Act into a more powerful remedy than a motion to vacate. *See* 28 U.S.C. § 2255. Jackson maintains that district courts weighing a motion to reduce a sentence may consider any intervening change of law or fact, regardless of its nexus to sentencing. If that proposition were true, then movants could use the First Step Act to relitigate not only their drug-quantity finding but also any other factual findings—including their guilt. District courts do not traditionally have *that* kind of discretion during initial sentencings or sentencing modification hearings. *Concepcion*, 142 S. Ct. at 2399 ("The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings.").

  

"Nothing in the text [of the First Step Act]" implies such discretion or invites district courts to "change other variables" than the modified statutory penalty. *Jackson*, 995 F.3d at 1310 (Pryor, C.J., respecting denial of rehearing en banc). Instead, the factual findings that support a conviction and statutory penalty may be challenged on direct appeal. Jackson pursued this route decades ago and failed. He also moved to vacate his sentence and lost. The First Step Act does not give him another chance.

### *B. Jackson Is Not Entitled to Relief Based on the Timing of His Direct Appeal.*

**[6]** Although the parties disagree about the impact of *Concepcion* on this appeal, they both urge us to remand the case "because of the particular procedural circumstances of ... Jackson's case." The parties correctly state that Jackson's sentence was pending on direct appeal when the Supreme Court decided *Apprendi*. And they seize on language from *Jones*, where we stated that "in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Jones*, 962 F.3d at 1303. The parties maintain that because *Apprendi* held that a jury must make a drug-quantity finding and was issued while Jackson's direct appeal was pending, the judge's drug-quantity finding "is not a finding that '*could have been used* to determine [Jackson's] statutory penalty at the time of sentencing.' " (Emphasis added.) We reject the argument that we may now correct an *Apprendi* error that was correctible on direct appeal.

**[7]** "[N]othing in [the First Step Act] suggests that a district court may revisit a drug-quantity finding for a trafficker's statutory penalty ...." *Jackson*, 995 F.3d at 1311 (Pryor, C.J., respecting denial of ***1338** rehearing en banc). As *Jones* explained, when the district court considers a motion for reduced sentence under the First Step Act, it may "rely[ ] on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified." 962 F.3d at 1303. Those facts include "a previous drug-quantity finding that was necessary to trigger the statutory penalty if it was made by a judge." *Id.* at 1302. "[T]he district court is bound by [its] previous finding of drug quantity in the same way that it is bound by its previous finding of drug type." *Jackson*, 995 F.3d at 1310 (Pryor, C.J., respecting denial of rehearing en banc) (internal quotation marks and citation omitted).

**[8]** That Jackson's direct appeal was pending when *Apprendi* was decided does not change this calculus. To be sure, "[a] new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1554, 209 L.Ed.2d 651 (2021). The parties repeatedly press this point and argue that *Apprendi* must apply here. But Jackson's direct appeal occurred long ago, and a First Step Act motion cannot masquerade as a direct appeal. "[J]ust as a movant may not use *Apprendi* to collaterally attack his sentence, he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion." *Jones*, 962 F.3d at 1302 (internal citation omitted). Jackson cannot use a motion for a reduced sentence to relitigate an earlier drug-quantity finding.

**[9]** Jackson had a remedy. After *Apprendi* was decided, he could have challenged his sentence as erroneous before we issued the mandate for his direct appeal on the ground that the issue of drug quantity was determined by the sentencing judge, not the jury. *See United States v. Cotton*, 535 U.S. 625, 628–29, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Other defendants took this approach. He apparently did not. Although Jackson argued in his motion to vacate, 28 U.S.C. § 2255, that his sentence violated the Sixth Amendment, "*Apprendi* does not apply retroactively [to cases] on collateral review." *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). The First Step Act does not offer Jackson a redo of his direct appeal.

## IV. CONCLUSION

We reinstate our prior decision and **AFFIRM** the order denying Jackson's motion to reduce his sentence.

### All Citations

58 F.4th 1331, 29 Fla. L. Weekly Fed. C 2193

  

## Footnotes

* Honorable William F. Jung, United States District Judge for the Middle District of Florida, sitting by designation.

**A-2**

995 F.3d 1308
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Warren Lavell JACKSON, Defendant-Appellant.

No. 19-11955
|
05/03/2021

Appeal from the United States District Court for the Southern District of Florida

**Attorneys and Law Firms**

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Michael Caruso, Federal Public Defender, Tracy Michele Dreispul, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, and BRASHER, Circuit Judges.

**Opinion**

BY THE COURT:

***1309** A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, it is ORDERED that this appeal will not be reheard en banc.

WILLIAM PRYOR, Chief Judge, joined by GRANT, Circuit Judge, respecting the denial of rehearing en banc:

A majority of the Court has voted not to rehear this appeal en banc. The panel resolved Warren Lavell Jackson's appeal in a consolidated decision that clarified the meaning of section 404 of the First Step Act of 2018. Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222; *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020). As the author of the panel opinion, I write to respond to my dissenting colleagues' arguments that the panel misread section 404(b).

Section 404(b) establishes the authority of a district court to "impose a reduced sentence" on a crack-cocaine trafficker. First Step Act § 404(b). The trafficker must have a covered offense as defined by section 404(a)—namely, a crack-cocaine offense for which section two or three of the Fair Sentencing Act of 2010 lowered the penalty. *Id.* § 404(a)–(b); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372; *Jones*, 962 F.3d at 1300. If he does, then the district court may reduce his sentence "as if" sections two and three were in effect when the trafficker committed that covered offense. First Step Act § 404(b).

As *Jones* explains, section 404(b) contains two implicit limits on the availability of relief. First, the district court may not grant a reduction if the trafficker already received the lowest statutory penalty that would be available to him under the Fair Sentencing Act. *Jones*, 962 F.3d at 1303. And second, "the district court is bound by a previous finding of drug quantity that [was] used to determine the [trafficker's] statutory penalty at the time of sentencing." *Id.*

The dissent unpersuasively reads these limits out of section 404(b). In its view, section 404(b) gives a district court unfettered authority to reduce the sentence of a crack-cocaine trafficker so long as he was convicted of a covered offense. It asserts that the "as if" language "merely tells courts to take into account the Fair Sentencing Act when considering a [First Step Act] motion." Dissent at 1314–15.

The dissent rejects the limits implied by section 404(b) because it commits three errors of statutory interpretation. First, it selectively fails to consider what the text fairly implies. Second, it neglects to read section 404 in the light of the statutory scheme. And third, it focuses on the general purpose of the First Step Act to the exclusion of its specific text.

***1310** The dissent selectively ignores our obligation to ask what the statutory text fairly implies. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012). On the dissent's reading, any limits on First Step Act relief must be explicit in the text of section 404. Dissent at 1313–14. But the dissent does not apply its literalism to the benefits of First Step Act relief—without any textual basis, the dissent would broadly invite district courts to alter sentences not directly affected by the penalty ranges of the

  

Fair Sentencing Act. *Cf. id.* at 1313–14 (speculating about how penalty ranges might "influence charging, pleading, and sentencing" for traffickers who do not "automatically" benefit from the new penalty ranges (emphasis omitted)).

The dissent's crabbed reading of the limits in section 404 leads it to overlook the logical consequence of the "as if" language in that provision. Before a district court can "impose a reduced sentence" on a trafficker "as if" the penalty ranges of the Fair Sentencing Act were in effect, First Step Act § 404(b), it must ask whether a lower sentence is available under the Fair Sentencing Act. After all, as our sister circuit explains, "[t]he First Step Act permits a district court to reduce a sentence *only* to the extent that the sentence could have been lower" under the Fair Sentencing Act. *United States v. Echeverry*, 978 F.3d 857, 859 (2d Cir. 2020) (emphasis added). If a trafficker was sentenced to the minimum penalty based on a drug quantity for which the Fair Sentencing Act left the statutory penalty unchanged, then there is no sentence reduction for the district court to give. The district court lacks the authority to reduce a sentence that "would have necessarily remained the same had the Fair Sentencing Act been in effect." *Jones*, 962 F.3d at 1303.

Meanwhile, the dissent's capacious reading of the benefits of section 404 reflects a second error: the dissent fails to read section 404 in the light of the statutory scheme governing sentence modifications. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Here, the statutory scheme is narrow. After a term of imprisonment has been imposed, the district court may reduce it based on a statutory change only to the extent "expressly permitted by statute." 18 U.S.C. § 3582(c)(1)(B); *see Jones*, 962 F.3d at 1297.

The dissent's reading of section 404 turns the clear-statement rule of section 3582(c)(1)(B) on its head. That provision requires us to ask what section 404 expressly permits, but the dissent would read section 404 to allow any relief that the provision does not explicitly *prohibit*. *See* Dissent at 1313–15.

Section 404(b) unambiguously directs a district court to consider only one variable in the sentencing calculus: the modified statutory penalty. Nothing in the text states or suggests that the district court may change other variables too, like the specific quantity of crack cocaine attributed to the trafficker for determining his statutory penalty. *See United States v. Moore*, 975 F.3d 84, 92 (2d Cir. 2020). Because section 404(b) does not expressly grant a district court the authority to reevaluate the drug-quantity element, "the district court is bound by [its] previous finding of drug quantity," *Jones*, 962 F.3d at 1303, in the same way that it is bound by its previous finding of drug type.

Taken together, the dissent's errors point to a third problem: it elevates the ***1311** general purpose of the First Step Act over the specific text of the statute. True, Congress enacted section 404 to address the disparity in penalties between crack- and powder-cocaine offenses. Dissent at 1314. But no statute "pursues its purpose at all costs." Scalia & Garner, *Reading Law* § 2, at 57. So we must give due regard to "what a [statute] chooses *not* to do." *Id.* Section 404 allows a district court to proceed "as if" the penalty ranges of the Fair Sentencing Act "were in effect at the time the covered offense was committed," First Step Act § 404(b), but it does not say that the district court may proceed "as if" other factual or legal changes were in effect, *cf. United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020). Moreover, the Fair Sentencing Act did not change the penalties associated with every drug quantity; for some quantities, the Act left the old penalties intact. *Jones* gives effect to these legislative choices.

Because *Jones* is correct, this Court had no reason to reconsider *Jones* or its application to Warren Jackson en banc. "Correct decisions are never worthy of en banc review." *United States v. Matchett*, 837 F.3d 1118, 1129 (11th Cir. 2016) (W. Pryor, J., respecting the denial of rehearing en banc). And in any event, the dissent makes no effort to square its pursuit of en banc rehearing with the governing criteria for en banc worthiness. *See* Fed. R. App. P. 35(a).

The dissent's justifications for en banc review fail on their own terms. The dissent observes that several circuits have afforded sentence reductions to traffickers ineligible to receive relief under *Jones*. Dissent at 1314–15 & n.4. But with one exception, *United States v. White*, 984 F.3d 76, 86–87 (D.C. Cir. 2020), those circuits have not considered the effect of the "as if" language in section 404(b). And aside from *White*, which commits the same mistakes as the dissent, the circuits that have considered the "as if" issue have adopted our reading in *Jones*, *United States v. Winters*, 986 F.3d 942, 951 (5th Cir. 2021), or cited it favorably, *Echeverry*, 978 F.3d at 859. The failure of other circuits to consider a dispositive

  

textual issue does not give this Court license to overlook the issue as well.

Nor is it true that *Jones* disfavors crack-cocaine traffickers like Jackson who were sentenced before *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The dissent complains that pre-*Apprendi* traffickers are bound by judge-found drug quantities, while post-*Apprendi* traffickers receive the benefit of jury-found drug quantities. Dissent at 1315–16. But this "discrepancy" is not the doing of the First Step Act, much less of *Jones*. It instead reflects the settled rule that neither *Apprendi* nor *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), has retroactive effect, *Jeanty v. Warden, FCI–Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014). Just as nothing in section 404 suggests that a district court may revisit a drug-quantity finding for a trafficker's statutory penalty, nothing in that provision suggests that the First Step Act sought to give a subset of pre-*Apprendi* defendants a benefit that retroactivity doctrine denies. The First Step Act is not a vehicle to evade limits that the law elsewhere imposes.

MARTIN, Circuit Judge, joined by ROSENBAUM, Circuit Judge, dissenting from the denial of rehearing en banc:

I write in dissent because I believe the panel opinion in United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), wrongly interprets § 404 of the First Step Act of 2018 in a way that does harm to Warren ***1312** Lavell Jackson.[1] The panel ruled that Mr. Jackson cannot get relief under the First Step Act because the quantity of drugs involved in his 1999 offense would have still triggered a mandatory minimum under the Fair Sentencing Act of 2010. But the panel opinion attributes a drug amount to Mr. Jackson that was neither found by a jury nor charged in his indictment. In so ruling, and despite saying it employs a textual analysis, the panel creates a limit on First Step Act relief found nowhere in the text of the statute. The result is that Jones drastically curtails the reach of the First Step Act in our Circuit and creates a troubling disparity between defendants sentenced before and after Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). I therefore respectfully dissent from the denial of en banc rehearing.

Mr. Jackson was convicted of possession with intent to distribute more than 50 grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1). Jones, 962 F.3d at 1295. Based on the sentencing laws in effect in 2000, Mr. Jackson faced nothing less than a mandatory life sentence. Id. at 1304. After Mr. Jackson's life sentence was imposed, the Fair Sentencing Act amended the penalties for crack cocaine offenses, including the penalty applied to Jackson. See Fair Sentencing Act of 2010, § 2(a), Pub. L. No. 111-220, 124 Stat. 2372, 2372 (2010). Ultimately, § 404 of the First Step Act made these amendments retroactive by allowing defendants sentenced before passage of the Fair Sentencing Act to seek a sentence reduction in the district court.[2] See First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Based on this change in the law, and like many defendants sentenced for crack cocaine offenses before enactment of the Fair Sentencing Act, Mr. Jackson requested a sentence reduction under § 404 of the First Step Act. See Jones, 962 F.3d at 1295.

In Jones, our court held that Mr. Jackson could not be resentenced. Id. at 1304. Although the panel concluded Mr. Jackson had been convicted of a "covered offense" under § 404(a) and was thus eligible for relief, it nonetheless held that the District Court "lacks the authority" to reduce Jackson's sentence because his offense involved 287 grams of crack cocaine. Id. at 1302–04. The panel reached this conclusion by reasoning that Mr. Jackson's 1999 drug amount would have still triggered the same mandatory penalty under the Fair Sentencing Act. Id. at 1303–04. However, because Mr. Jackson was prosecuted before Apprendi made clear that drug quantity findings that increase a defendant's punishment must be made by a jury beyond a reasonable doubt, 530 U.S. at 490, 120 S. Ct. at 2362–63, the 287-gram quantity in Jackson's case was neither found by a jury nor charged in his indictment. Jones, 962 F.3d at 1295. Instead the sentencing court simply took the drug amount found ***1313** in Mr. Jackson's Presentence Investigation Report ("PSR").

Jones's holding that the drug quantity taken from Mr. Jackson's PSR disentitles him to First Step Act relief has no basis in the text of that Act. I first set out the panel's reading. Then I explain why I believe this reading is in error and why I favor the approach taken by the vast majority of other circuit courts.

Jones interprets § 404(b)'s requirement that "[a]ny reduction must be 'as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed' " to impose two limitations on district courts' authority to resentence eligible defendants. 962 F.3d at 1303 (quoting First Step Act § 404(b), 132 Stat. at 5222). First, Jones holds that courts "lack[ ] the authority" to reduce a defendant's sentence if he "received the lowest statutory penalty that also would

be available to him under the Fair Sentencing Act." Id. And second, it holds that, in deciding whether a person got the "lowest statutory penalty," "the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." Id. (emphasis added).

In practice, these holdings mean that a district court must, after determining that it previously sentenced the defendant for a "covered offense," look to the "previous finding of drug quantity that could have been used ... at the time of sentencing" and ask whether, based on that quantity, the defendant's sentence "would have necessarily remained the same" under the Fair Sentencing Act. Jones, 962 F.3d at 1303. Jones says that if the drug quantity would require the same penalty under the Fair Sentencing Act, then the court "lacks the authority" to reduce the defendant's sentence. Id. The practical result of this approach is that in our Circuit, for pre-Fair Sentencing Act defendants who received a mandatory minimum sentence, § 404 relief is available only if their drug quantities fell between the old and new threshold amounts. That is from five to 28 grams for an offense under 21 U.S.C. § 841(b)(1)(B)(iii) and 50 to 280 grams for an offense under 21 U.S.C. § 841(b)(1)(A)(iii).

Nothing in the text of the statute supports this limitation on who can receive First Step Act relief. To the contrary, the statute plainly permits discretionary relief to a broad class of people serving sentences for crack cocaine offenses. Section 404(b) is quite straightforward. It says "[a] court that imposed a sentence for a covered offense may ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. at 5222. Having been convicted of a "covered offense" is the only requirement § 404(b) imposes for who "may" receive a new sentence. This means § 404(b) permits courts to consider motions for a sentence reduction for any defendant sentenced for "a covered offense." Id. The "as-if" clause merely tells courts to consider the impact of the Fair Sentencing Act when exercising their authority to grant or deny relief. And because penalty ranges influence charging, pleading, and sentencing, the set of defendants whose sentences would have been impacted by the Fair Sentencing Act is not limited to those who would have automatically benefitted from its amendments.[3] See ***1314** United States v. Davis, 961 F.3d 181, 192 (2d Cir. 2020) (rejecting the "assumption that there is a knowable set of pre-Fair Sentencing Act defendants who would have received the same sentence regardless of the Fair Sentencing Act" because, had penalty ranges been different, defendants might not have been indicted or convicted for the same drug amounts).

This reading makes sense. Congress enacted the First Step Act as part of its effort to undo the harsh, racially disparate penalty differentials between sentences for crack- and powder-cocaine offenses. See Jones, 962 F.3d at 1296–97. To effectuate this remedial purpose and "ensure[ ] all potentially worthy defendants receive the Congressionally provided relief under both the Fair Sentencing Act and the First Step Act, [while] also ensur[ing] protection against unwarranted windfalls," Congress designed § 404 so judicial discretion does the heavy lifting. United States v. Boulding, 960 F.3d 774, 782 (6th Cir. 2020) (quotation marks omitted). Congress "tied eligibility [for resentencing] to the statute of conviction—but left sentencing judges with the discretion to deny resentencing because, among other reasons, the specific conduct of the original offense still warrants the originally imposed sentence." Id.

Jones somehow derives its prohibition on relief to defendants who had high drug quantities from § 404(b)'s instruction that district courts reduce sentences "as if sections 2 and 3 of the Fair Sentencing Act were in effect." 962 F.3d at 1303. But this language imposes no such prohibition. As I've noted, this "as if" language of § 404(b) merely tells courts to take into account the Fair Sentencing Act when considering a defendant's motion. It says nothing about the court's authority to consider a defendant's motion in the first place. Neither does any other part of § 404 say that defendants cannot get relief on account of drug amounts. This limitation created by the Jones panel is not even found in § 404(c), entitled "Limitations," which sets forth two express limits (unrelated to drug quantity) on a district court's authority to resentence eligible defendants. See First Step Act § 404(c), 132 Stat. at 5222. The idea that courts can categorically deny relief due to defendant-specific drug quantities is simply not found in the statute. If Congress meant to exclude an entire class of defendants from First Step Act relief based on drug quantity, it would have said so.

In almost any other circuit, defendants like Mr. Jackson can have a district court consider their motions. The vast majority of circuits to consider the question have held that the availability of § 404 relief turns only on the statute of conviction.[4] ***1315** Jones cannot be reconciled with these decisions. These courts have remanded for discretionary resentencings and even affirmed reductions of mandatory

minimum sentences for defendants with quantities far above the Fair Sentencing Act's amended thresholds. See, e.g., Boulding, 960 F.3d at 776 (remanding where offense involved 650.4 grams of crack cocaine); Davis, 961 F.3d at 183 (affirming reduction where offense involved 1.5 kilograms of crack cocaine). District judges in our Circuit are now deprived of any ability to even consider resentencing these defendants. Jones strips them of the authority to do so, despite the fact that its quantity-based limitation "has no basis in the text of section 404(b)." White, 984 F.3d at 87.

Jones's erroneous reading of § 404 is especially harmful for defendants like Mr. Jackson who were sentenced before Apprendi and its progeny stopped the use of judge-found facts to boost statutory penalties. [5] In determining whether a defendant has satisfied the "as if" requirement in § 404(b), Jones says courts are "bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." 962 F.3d at 1303 (emphasis added). This sets up a disparity between pre- and post-Apprendi defendants. Before the Fair Sentencing Act, all that was needed to trigger the higher penalties in §§ 841(b)(1)(B)(iii) or (A)(iii) was five or 50 grams of crack cocaine, respectively. This meant a defendant's PSR could attribute a large quantity of crack to him, without any corresponding responsibility on the government to prove that amount beyond a reasonable doubt. Thus, in many pre-Fair Sentencing Act cases, the PSR gives a drug quantity far higher than the amount charged in the indictment, admitted in a plea, or found by a jury beyond a reasonable doubt.

Even so, under Jones, for defendants sentenced before Apprendi, the (often) higher quantity found in their PSR is "a ***1316** previous finding of drug quantity that could have been used ... at the time of sentencing." Jones, 962 F.3d at 1303 (emphasis added). So for these defendants, that higher quantity controls the availability of § 404 relief. For post-Apprendi defendants, in contrast, the only drug quantity that "could have been used ... at the time of sentencing," id., is one found by a jury beyond a reasonable doubt. See Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362–63; see also United States v. Russell, 994 F.3d 1230, 1237 n.7, No. 19-12717 (11th Cir. 2021) (explaining this discrepancy). Any higher quantity in the PSR is irrelevant. [6]

The injustice of this discrepancy is apparent in our caselaw. Compare Mr. Jackson's case with the case of Bruce Hermitt Bell in United States v. Bell, 822 F. App'x 884 (11th Cir. 2020) (per curiam) (unpublished). Both Mr. Jackson and Mr. Bell were found guilty by a jury of offenses involving at least 50 grams of crack cocaine and subject to a mandatory minimum sentence of life imprisonment. Jones, 962 F.3d at 1295, 1304; Bell, 822 F. App'x at 885. Like in Mr. Jackson's case, Mr. Bell was held responsible for a higher quantity at sentencing—for Bell, 1.5 kilograms—based on a finding in his PSR. See Bell, 822 F. App'x at 885. Unlike in Mr. Jackson's case, however, the District Court found Mr. Bell eligible for a sentence reduction under § 404 of the First Step Act and reduced his sentence from life to a 30-year term of imprisonment. See id. at 886. Our court affirmed Mr. Bell's shortened sentence. Id. The only difference between Mr. Bell and Mr. Jackson—other than Bell having been found responsible for a far higher drug quantity—is that Bell was sentenced after Apprendi. See id. at 885. And based on mere timing, the 1.5 kilogram finding was not a fact that "could have been used ... at the time of sentencing." Jones, 962 F.3d at 1303. The random injustice of this result is clear. Although Mr. Bell was found responsible for a far greater quantity of crack cocaine than Mr. Jackson, the Jones opinion gives Bell relief while denying Jackson entirely.

* * *

The Jones decision prohibits an entire class of prisoners in Alabama, Florida, and Georgia from getting relief Congress meant for them to have. And relief would be available to them almost anywhere else in our country. The tortured interpretation of the First Step Act found in Jones has no grounding in the text or purpose of the statute.

I respectfully dissent from our court's decision not to rehear this case en banc.

**All Citations**

995 F.3d 1308 (Mem), 28 Fla. L. Weekly Fed. C 2816

  

## Footnotes

1 Mr. Jackson's appeal was one of the four consolidated appeals decided by the Jones opinion. Jones, 962 F.3d at 1293.

2 When Mr. Jackson was sentenced in 2000, the penalties for offenses involving crack cocaine were far harsher than those for the same offenses involving powder cocaine. To trigger certain mandatory minimum sentences, an offense would have to involve 100 times more powder cocaine than crack. Jones, 962 F.3d at 1296. In 2010, Congress enacted the Fair Sentencing Act, which dramatically reduced the disparity between crack and powder cocaine offenders. See Dorsey v. United States, 567 U.S. 260, 269, 132 S. Ct. 2321, 2329, 183 L.Ed.2d 250 (2012). But these changes were not retroactive. Jones, 962 F.3d at 1297. In 2018, the First Step Act remedied this wrong by authorizing district courts to resentence prisoners sentenced before the Fair Sentencing Act was enacted. See First Step Act § 404(b), 132 Stat. at 5222.

3 Resentencings under the First Step Act do not require the sentencing court to "reevaluate the drug-quantity element." Contra W. Pryor Statement at 5. Courts in other circuits routinely conduct § 404 resentencings for defendants responsible for drug quantities above the Fair Sentencing Act's new penalty thresholds without revisiting the original quantity determinations. See, e.g., United States v. Hill, 466 F. Supp. 3d 319, 323, 326–27 (N.D.N.Y. 2020) (reducing sentence of defendant responsible for 469 grams of crack cocaine, without revisiting the drug quantity determination, after considering the § 3553(a) factors); United States v. McDonald, No. 10-338(4) ADM/JSM, 2020 WL 7169520, at *4–5 (D. Minn. Dec. 7, 2020) (reducing sentence of defendant held responsible for between 840 grams and 2.8 kilograms of crack cocaine, without revisiting the drug quantity determination, after considering the sentences of his co-defendants and the § 3553(a) factors).

4 See, e.g., Davis, 961 F.3d at 183, 191–93 (concluding that offense involving 1.5 kilograms of crack cocaine was a "covered offense" and holding that defendant was eligible for resentencing and affirming District Court's grant of a reduced sentence); United States v. Jackson, 964 F.3d 197, 205 (3d Cir. 2020) ("It seems incongruent with the historical context of the First Step Act for Congress to have intended § 404 to apply only to the select pre-Fair Sentencing Act defendants whose quantities fell between the old and new threshold amounts ...."); United States v. Woodson, 962 F.3d 812, 817 (4th Cir. 2020) ("[E]ven defendants whose offenses remain within the same subsection after Section 2's amendments are eligible for relief, and modification of the range of drug weights to which the relevant subsection applies may have an anchoring effect on their sentence."); Boulding, 960 F.3d at 776, 778 (holding that "eligibility for a reduced sentence under the First Step Act distils to whether [the defendant] was convicted of a 'covered offense' " and remanding for discretionary resentencing where defendant's offense involved 650.4 grams of crack cocaine); United States v. Shaw, 957 F.3d 734, 738–40, 743 (7th Cir. 2020) (holding that "the statute of conviction alone determines eligibility for First Step Act relief" and remanding where defendants' offenses involved drug quantities above the amended thresholds); United States v. McDonald, 944 F.3d 769, 772 (8th Cir. 2019) ("The First Step Act applies to offenses, not conduct, and it is McDonald's statute of conviction that determines his eligibility for relief." (citation omitted)); United States v. Goolsby, 806 F. App'x 502, 503–04 (8th Cir. 2020) (per curiam) (unpublished) (rejecting argument that defendant was ineligible for reduction because his offense involved 1.5 kilograms of cocaine base as "foreclosed by United States v. McDonald" and affirming reduction); United States v. White, 984 F.3d 76, 88 (D.C. Cir. 2020) ("[T]he court may not deem relief categorically unavailable due to defendant-specific drug quantities."); see also United States v. Bagby, 835 F. App'x 375, 378 (10th Cir. 2020) (unpublished) (noting that government abandoned argument that defendant was ineligible for relief based on drug quantity above the amended amount because "[e]very Court of Appeals to consider this argument has rejected it," and remanding for discretionary resentencing) (quotation marks omitted); but see United States v. Winters, 986 F.3d 942, 951 (5th Cir. 2021) (agreeing with Jones).

5 See Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362–63 (holding that judge-found facts cannot increase statutory maximum); Alleyne v. United States, 570 U.S. 99, 114–16, 133 S. Ct. 2151, 2161–63, 186 L.Ed.2d 314 (2013) (holding that judge-found facts cannot increase the statutory minimum).

  

6 The statement respecting the denial of en banc rehearing says this disparity results from the retroactivity doctrine. See W. Pryor Statement at 7. My argument today is not that Mr. Jackson's March 2000 sentence should be revisited on account of the Supreme Court's June 2000 decision in Apprendi. I say Mr. Jackson is entitled to be resentenced under the First Step Act passed in 2018. Nothing retroactive about that.

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**A-3**

962 F.3d 1290
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Steven JONES, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Alfonso Allen, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Warren Lavell Jackson, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Thomas Johnson, Defendant-Appellant.

No. 19-11505, No. 19-10758,
No. 19-11955, No. 19-12847
|
(June 16, 2020)

**Synopsis**

**Background:** Defendants filed motions for reduced sentences under the First Step Act. The United States District Court for the Southern District of Alabama, No. 1:94-cr-00067-WS-1, William H. Steele, Senior District Judge, and the United States District Court for the Southern District of Florida, No. 1:05-cr-20916-WPD-3, William P. Dimitrouleas, J., No. 2:99-cr-14021-DMM-1, Donald M. Middlebrooks, J., No. 1:08-cr-20190-JEM-1, Jose E. Martinez, J., denied motions. Defendants appealed, and appeals were consolidated.

**Holdings:** The Court of Appeals, William H. Pryor, Circuit Judge, held that:

[1] as matter of first impression, movant has "covered offense" under First Step Act if his offense triggered statutory penalty that has since been modified by Fair Sentencing Act;

[2] as matter of first impression, movant's "covered offense" is not determined by actual quantity of crack cocaine involved in movant's violation;

[3] as matter of first impression, in making its "covered offense" determination, district court may consider previous drug-quantity finding that was necessary to trigger statutory penalty, even if it was made by judge rather than jury;

[4] as matter of first impression, district court is bound by previous finding of drug quantity that could have been used to determine movant's statutory penalty at time of sentencing;

[5] defendant could not relitigate district court's drug-quantity finding;

[6] defendant who faced same statutory penalty under Fair Sentencing Act was not eligible for sentence reduction;

[7] fact that defendant's commuted sentence was at bottom of guideline range did not render him ineligible for further reduction of his sentence; and

[8] First Step Act did not bar district court from reducing defendant's sentence below revised guideline range.

Affirmed in part, vacated in part, and remanded.

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

West Headnotes (18)

**[1] Criminal Law** Review De Novo

Court of Appeals reviews de novo questions of statutory interpretation, and whether district court had authority to modify term of imprisonment.

24 Cases that cite this headnote

**[2] Criminal Law** Sentencing

Court of Appeals reviews for abuse of discretion denial of eligible movant's request for reduced sentence under First Step Act. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

  

59 Cases that cite this headnote

[3] **Sentencing and Punishment** Authority to Reconsider or Modify Sentence

District court lacks inherent authority to modify term of imprisonment, but may do so to extent that statute expressly permits. 18 U.S.C.A. § 3582(c).

23 Cases that cite this headnote

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

Movant has "covered offense" under First Step Act if his offense triggered statutory penalty that has since been modified by Fair Sentencing Act. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

118 Cases that cite this headnote

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

To determine offense for which district court imposed sentence, for purposes of discerning defendant's eligibility for sentence reduction under First Step Act, district courts must consult record, including movant's charging document, jury verdict or guilty plea, sentencing record, and final judgment. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

24 Cases that cite this headnote

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

In evaluating movant's eligibility for sentence reduction under First Step Act, movant's "covered offense" is not determined by actual quantity of crack cocaine involved in movant's violation. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

81 Cases that cite this headnote

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

District court may consider its previous findings of relevant conduct, including actual quantity of crack cocaine involved in his violation, in deciding whether to exercise its discretion to reduce eligible movant's sentence under First Step Act. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

26 Cases that cite this headnote

[8] **Jury** Drug offenses

**Sentencing and Punishment** Change in law

In making its "covered offense" determination under First Step Act, district court may consider previous drug-quantity finding that was necessary to trigger statutory penalty, even if it was made by judge rather than jury. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

11 Cases that cite this headnote

[9] **Jury** Drug offenses

Jury is constitutionally required to find nature and quantity of controlled substance involved in offense if that finding increases statutory penalty. U.S. Const. Amend. 6.

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

First Step Act does not permit reducing movant's sentence if he received lowest statutory penalty that also would be available to him under Fair Sentencing Act. Pub. L. No. 111-220, 124 Stat. 2372; Pub. L. No. 115-391, § 404, 132 Stat. 5194.

12 Cases that cite this headnote

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

For purposes of evaluating motion for sentence reduction pursuant to First Step Act, in determining what movant's statutory penalty would be under Fair Sentencing Act, district court is bound by previous finding of drug quantity that could have been used to determine

  

movant's statutory penalty at time of sentencing. Pub. L. No. 111-220, 124 Stat. 2372; Pub. L. No. 115-391, § 404, 132 Stat. 5194.

53 Cases that cite this headnote

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

If movant's sentence would have necessarily remained same had Fair Sentencing Act been in effect, then district court lacks authority to reduce movant's sentence pursuant to First Step Act. Pub. L. No. 111-220, 124 Stat. 2372; Pub. L. No. 115-391, § 404, 132 Stat. 5194.

45 Cases that cite this headnote

[13] **Jury** Drug offenses

**Sentencing and Punishment** Change in law

Constitution does not prohibit district courts, in deciding motions for reduced sentences under First Step Act, from relying on earlier judge-found facts that triggered statutory penalties that Fair Sentencing Act later modified. U.S. Const. Amend. 6; Pub. L. No. 111-220, 124 Stat. 2372; Pub. L. No. 115-391, § 404, 132 Stat. 5194.

15 Cases that cite this headnote

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

Unlike statutory penalties that applied when movants were originally sentenced, amended statutory penalties in First Step Act apply to movants as act of legislative grace left to district court's discretion. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

11 Cases that cite this headnote

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

Defendant could not relitigate district court's drug-quantity finding of 75 kilograms of crack cocaine in evaluating his motion for sentence reduction under First Step Act. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(iii); Pub. L. No. 115-391, § 404, 132 Stat. 5194.

17 Cases that cite this headnote

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

District court's finding that defendant was responsible for 287 grams of crack cocaine, along with his three prior felony drug convictions, meant that he would face same statutory penalty of life imprisonment under Fair Sentencing Act, and thus defendant was not eligible for sentence reduction pursuant to First Step Act. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(iii); Pub. L. No. 115-391, § 404, 132 Stat. 5194.

15 Cases that cite this headnote

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

Fact that defendant's commuted sentence was at bottom of guideline range did not render him ineligible for further reduction of his sentence pursuant to First Step Act, where defendant's statutory range would have been lower if Fair Sentencing Act had been in effect when he committed his offense. Pub. L. No. 111-220, 124 Stat. 2372; Pub. L. No. 115-391, § 404, 132 Stat. 5194.

12 Cases that cite this headnote

[18] **Sentencing and Punishment** Reduction of sentence

First Step Act did not bar district court from reducing defendant's sentence below revised guideline range. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

17 Cases that cite this headnote

  

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Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:94-cr-00067-WS-1

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:05-cr-20916-WPD-3, D.C. Docket No. 2:99-cr-14021-DMM-1, D.C. Docket No. 1:08-cr-20190-JEM-1

Before WILLIAM PRYOR, Chief Judge, GRANT, Circuit Judge, and JUNG, [*] District Judge.

**Opinion**

WILLIAM PRYOR, Chief Judge:

***1293** These appeals require us to determine whether the district courts erred in denying four motions for reduced sentences under the First Step Act of 2018. That Act permits district courts to apply retroactively the reduced statutory penalties for crack-cocaine offenses in the Fair Sentencing Act of 2010 to movants sentenced before those penalties became effective. Steven Jones, Alfonso Allen, Warren Jackson, and Thomas Johnson were sentenced for crack-cocaine offenses before the effective date of the Fair Sentencing Act and sought reduced sentences under the First Step Act. The district courts denied their motions. We affirm the denials of relief to Jones and Jackson, and we vacate the denials of relief to Allen and Johnson and remand because their orders do not make clear that the district court understood that it could reduce the movants' sentences.

## I. BACKGROUND

Steven Jones, Alfonso Allen, Warren Jackson, and Thomas Johnson each relied on the First Step Act of 2018 to seek a sentence reduction in the district courts. The district courts denied their motions. Because these appeals raise common issues of first impression in our Circuit, we resolve them in one opinion.

In 1994, a grand jury charged Jones with conspiracy to possess with intent to distribute "more than sixteen ... kilograms of cocaine and of a mixture and substance containing a detectable amount of [crack cocaine]," 21 U.S.C. §§ 841(a)(1), 846, aiding and abetting possession with intent to distribute "more than 600 grams of cocaine and of a mixture and substance containing a detectable amount of [crack cocaine]," *id.* § 841(a)(1), and traveling in interstate commerce with the intent to commit the crimes of "possession with intent to distribute and distribution of crack cocaine," *id.*, and later did perform an unlawful activity of distributing crack cocaine, 18 U.S.C. § 1952(a). A jury returned a general verdict that found him guilty of all three counts. But the jury made no specific drug-quantity finding because Jones was prosecuted before *Apprendi v. New Jersey* made clear that drug-quantity findings that increase a defendant's punishment

  

must be made by a jury based on a standard of proof of beyond a reasonable doubt. 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

At sentencing, the district court found that Jones was responsible for at least 75 kilograms of crack cocaine. Jones's statutory range for counts one and two was 10 years to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (1994). His guideline range, with a total offense level of 43 and a criminal history category of I, was life imprisonment. The district court imposed a term of life imprisonment for counts one ***1294** and two, and a term of 60 months of imprisonment for count three, all to run concurrently. It also imposed a five-year term of supervised release. Jones later filed several unsuccessful challenges of his convictions and sentence.

In 2019, Jones filed a motion for a reduced sentence under the First Step Act. He argued that he was eligible for a sentence reduction based on the statutory penalties in section 841(b)(1)(C) because the district court could consider only the drug quantity that a jury found beyond a reasonable doubt based on *Alleyne v. United States*, which held that *Apprendi* applies to facts that increase a defendant's statutory mandatory-minimum sentence. 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The district court denied his motion. It ruled that Jones was responsible for at least 75 kilograms of crack cocaine, and the First Step Act did not allow him to relitigate that finding. Jones filed a motion for reconsideration that again argued only that he was entitled to relief because the district court must apply the reduced penalties in section 841(b)(1)(C), and the district court denied that motion.

In 2006, a grand jury charged Allen with one count of conspiracy to distribute 50 grams or more of crack cocaine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii), 846 (2006), two counts of distributing a detectable amount of crack cocaine, *id.* § 841(a)(1), (b)(1)(C); 18 U.S.C. § 2, one count of possession with intent to distribute a detectable amount of powder cocaine, crack cocaine, and marijuana, 21 U.S.C. § 841(a)(1), (b)(1)(C)–(D); 18 U.S.C. § 2, possession of a short-barreled shotgun in furtherance of a felony drug offense, 18 U.S.C. §§ 2, 924(c)(1)(A), (c)(1)(B)(i), possession of a firearm and ammunition by a convicted felon, *id.* §§ 2, 922(g)(1), and possession of an unregistered short-barreled shotgun, 26 U.S.C. § 5861(d); 18 U.S.C. § 2. Before trial, the government filed notice of its intent to rely on Allen's two prior felony drug convictions to enhance his sentence. *See* 21 U.S.C. § 851(a). A jury convicted Allen on all counts and made a drug-quantity finding of 50 grams or more of crack cocaine for count one.

At sentencing, Allen's conviction for conspiracy to distribute 50 grams or more of crack cocaine carried a statutory mandatory sentence of life imprisonment because of his two prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (2006). Allen's criminal history classified him as a career offender under the Guidelines. *See* United States Sentencing Guidelines Manual § 4B1.1(a) (Nov. 2008). With a total offense level of 37 and a criminal history category of VI, *id.* § 4B1.1(b)(A), Allen's guideline range would have been 360 months to life imprisonment, but because of his statutory mandatory sentence of life imprisonment, his guideline sentence became life imprisonment, *id.* § 5G1.1(b). The district court sentenced Allen to a term of life imprisonment for the count involving the 50 grams of crack cocaine, 30 years of imprisonment for the other three drug counts, 10 years of imprisonment for two of the firearm counts, all to run concurrently, and a consecutive term of 10 years of imprisonment for the final firearm count. The district court also imposed a 10-year term of supervised release. After Allen filed several unsuccessful challenges to his convictions and sentence, the President commuted his sentence to 360 months of imprisonment in 2016.

In 2019, Allen filed a motion for a reduced sentence under the First Step Act. He argued that with the retroactive application of the Fair Sentencing Act and his commutation, his statutory and guideline ranges would be lower than when he was sentenced. The district court denied the motion and ruled that "[t]he retroactive ***1295** change in the law does not benefit Allen" because he had been "responsible for selling between 420 and 784 grams of crack cocaine per week" and would still be subject to a guideline range of 360 months to life imprisonment.

In 1999, a grand jury charged Jackson with one count of possessing with intent to distribute more than 50 grams of crack cocaine, 21 U.S.C. § 841(a)(1). Before trial, the government filed notice of its intent to rely on Jackson's three prior felony drug convictions to enhance Jackson's sentence. *See id.* § 851(a). A jury convicted Jackson without making a drug-quantity finding.

At sentencing, the district court found that Jackson was responsible for 287 grams of crack cocaine. Jackson faced a statutory mandatory sentence of life imprisonment because of the drug quantity and his prior felony drug convictions. *See*

  

*id.* § 841(b)(1)(A)(iii) (1994). His guideline range would have been 235 to 293 months of imprisonment based on his total offense level of 34 and criminal history category of V, but his statutory mandatory sentence of life imprisonment mandated a guideline sentence of life imprisonment. *See* U.S.S.G. § 5G1.1(b) (1998). The district court sentenced Jackson to life imprisonment. After Jackson filed multiple unsuccessful challenges to his conviction and sentence, the President commuted his sentence to 300 months of imprisonment in 2016.

In 2019, Jackson filed a motion for a reduced sentence under the First Step Act. He argued that he was entitled to a reduced statutory range because the district court set his statutory penalties based on a drug-quantity finding that the jury had not found beyond a reasonable doubt. The district court relied on the drug-quantity finding of 287 grams of crack cocaine to conclude that the Fair Sentencing Act "would have had no impact on [Jackson's] sentence," and it denied the motion.

In 2008, a grand jury charged Johnson with possession with intent to distribute five grams or more of crack cocaine, 21 U.S.C. § 841(a)(1), (b)(1)(B) (2006), possession with intent to distribute a detectable amount of powder cocaine, *id.* § 841(a)(1), (b)(1)(C), possession of a firearm and ammunition as a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(e), and knowingly using and carrying a firearm in furtherance of drug-trafficking felonies, *id.* § 924(c)(1)(A). Before trial, the government filed notice of its intent to rely on Johnson's four prior felony drug convictions to seek higher statutory penalties. *See* 21 U.S.C. § 851(a). A jury convicted Johnson of each count other than the count for using a firearm in furtherance of drug-trafficking felonies, and the jury found that his crack-cocaine offense involved five or more grams of crack cocaine.

At sentencing, Johnson's crack-cocaine count carried a statutory range of 10 years to life imprisonment because of the enhancement for his prior felony drug convictions. *See id.* § 841(b)(1)(B)(iii) (2006). Those prior convictions also meant the statutory range for his powder-cocaine count was zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C). His felon-in-possession count carried a statutory range of 15 years to life imprisonment. *See* 18 U.S.C. § 924(e)(1). As a career offender under the Guidelines, his guideline range was 360 months to life imprisonment based on a total offense level of 37 and a criminal history category of VI. *See* U.S.S.G. § 4B1.1(a), (b) (2007). The district court imposed three concurrent 360-month terms of imprisonment, followed by an eight-year term of supervised release. After Johnson filed several unsuccessful challenges to his convictions and sentence, the President commuted his sentence to a term of 240 months of imprisonment in 2017.

***1296** In 2019, Johnson filed a motion for a reduced sentence under the First Step Act in which he stressed the ways in which he has improved while in prison. The district court denied his motion. It rejected arguments by the government that Johnson was ineligible for a reduction because he was sentenced as a career offender and received a commutation, and it concluded that his statutory penalties would have been lower under the Fair Sentencing Act. But it ruled that "the First Step Act affords no further relief to" Johnson because he "is already serving a sentence below the bottom of the guideline range."

## II. STANDARD OF REVIEW

**[1]** **[2]** We review *de novo* questions of statutory interpretation, *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009), and whether a district court had the authority to modify a term of imprisonment, *United States v. Phillips*, 597 F.3d 1190, 1194 & n.9 (11th Cir. 2010). We review for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act. *See* First Step Act of 2018, Pub. L. No. 115-391, § 404(b)–(c), 132 Stat. 5194, 5222 (stating that a district court "may" reduce a sentence but is not "require[d]" to do so).

## III. DISCUSSION

We divide our discussion in three parts. First, we describe how the disparity in penalties for crack- and powder-cocaine offenses led Congress to enact the Fair Sentencing Act. Second, we discuss the authority of a district court to reduce a sentence under the First Step Act. Third, we conclude that the district courts did not err in denying the motions of Jones and Jackson but that we must vacate the orders denying Allen's and Johnson's motions and remand for further proceedings. The parties now agree, as do we, that the movants who received an executive grant of clemency—Allen, Jackson, and Johnson—are not ineligible for a reduction on that basis, so we need not discuss that issue further.

  

*A. The 100-to-1 Ratio for Crack- and Powder-Cocaine Offenses.*

When the movants were sentenced, the statutory penalties for drug-trafficking offenses involving crack cocaine were the same as the statutory penalties for drug-trafficking offenses involving 100 times as much powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 91, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (citing 21 U.S.C. § 841 (2006)). A statutory range of 10 years to life imprisonment applied to drug traffickers dealing in 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine. 21 U.S.C. § 841(b)(1)(A) (2006). A statutory range of five to 40 years of imprisonment applied to drug traffickers dealing in at least five grams of crack cocaine or at least 500 grams of powder cocaine. *Id.* § 841(b)(1)(B). And a statutory range of zero to 20 years of imprisonment applied to drug traffickers dealing in less than five grams of crack cocaine or less than 500 grams of powder cocaine. *Id.* § 841(b)(1)(C). Each subsection of the statute also provided for increased statutory penalties based on certain factual predicates, such as prior felony drug convictions. *See id.* § 841(b)(1)(A)–(C).

The United States Sentencing Commission condemned the disparity between the penalties for crack- and powder-cocaine offenses. *See, e.g.*, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2, 7–8 (May 2007); U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1–2, 9 (Apr. 1997). "[T]o keep similar drug-trafficking sentences proportional," the Commission based the offense levels in the Guidelines on the ***1297** mandatory-minimum penalties in the statute, which, of course, included the 100-to-1 ratio. *Dorsey v. United States*, 567 U.S. 260, 267–68, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012). But the Commission spent the next two decades urging Congress to amend those penalties. *Id.* at 268, 132 S.Ct. 2321; *see also Kimbrough*, 552 U.S. at 97–98, 128 S.Ct. 558. The Commission argued that the harsher penalties for offenses involving crack instead of powder cocaine were unjustified and undermined respect for the criminal justice system because of the "widely-held perception" that the disparate penalties "promote[d] unwarranted disparity based on race." *Kimbrough*, 552 U.S. at 97–98, 128 S.Ct. 558 (internal quotation marks omitted); *accord Dorsey*, 567 U.S. at 268, 132 S.Ct. 2321; Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 215–16 (2019).

Congress amended the penalties for crack-cocaine offenses when it enacted the Fair Sentencing Act of 2010. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). The Act increased the quantity of crack cocaine necessary to trigger the higher penalties in subsections (b)(1)(A)(iii) and (B)(iii). Fair Sentencing Act § 2(a). A defendant now must traffic at least 280 grams of crack cocaine to trigger the highest penalties, 21 U.S.C. § 841(b)(1)(A)(iii) (2012), and 28 grams of crack cocaine to trigger the intermediate penalties, *id.* § 841(b)(1)(B)(iii). *See* Fair Sentencing Act § 2(a). These amended penalties reduced the crack-to-powder-cocaine ratio from 100-to-1 to 18-to-1. *Dorsey*, 567 U.S. at 269, 132 S.Ct. 2321. The Act also eliminated the five-year mandatory-minimum sentence that had applied to simple possession of crack cocaine. Fair Sentencing Act § 3; *see also* 21 U.S.C. § 844(a) (2006). But the amended penalties applied only to defendants who were sentenced on or after the effective date of the Fair Sentencing Act. *Dorsey*, 567 U.S. at 264, 132 S.Ct. 2321.

*B. The First Step Act Permits District Courts to Reduce the Term of Imprisonment for Certain Previously Sentenced Crack-Cocaine Offenders.*

**[3]** When Congress enacted the First Step Act of 2018, it granted district courts discretion to reduce the sentences of crack-cocaine offenders in accordance with the amended penalties in the Fair Sentencing Act. *See* First Step Act § 404. A district court lacks the inherent authority to modify a term of imprisonment. 18 U.S.C. § 3582(c); *United States v. Puentes*, 803 F.3d 597, 606 (11th Cir. 2015). But it may do so, as relevant here, to the extent that a statute expressly permits. 18 U.S.C. § 3582(c)(1)(B). And the First Step Act expressly permits district courts to reduce a previously imposed term of imprisonment.

The First Step Act permits a district "court that imposed a sentence for a covered offense" to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed." First Step Act § 404(b). It defines "covered offense" 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 ... that was committed before August 3, 2010." *Id.* § 404(a). A district court may not "entertain a motion" from a defendant who already benefitted from the Fair Sentencing Act by having his sentence imposed or reduced "in accordance with"

  

sections two or three of the Fair Sentencing Act. *Id.* § 404(c). Nor may a district court "entertain a motion" from a defendant who already had a motion under section 404 of the First Step Act "denied after a complete review of the ***1298** motion on the merits." *Id.* The Act makes clear that the relief in subsection (b) is discretionary: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Id.*

To be eligible for a reduction, the district court must have "imposed a sentence" on the movant for a "covered offense." *Id.* § 404(a)–(b). The First Step Act defines covered offense 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* ..., that was committed before August 3, 2010." *Id.* § 404(a) (emphasis added). The meaning of "covered offense" depends on what the clause in italics—the "penalties clause"—modifies.

We see two possibilities. The penalties clause could modify the phrase "violation of a Federal criminal statute." Or it could modify only the shorter phrase "Federal criminal statute." *See United States v. Johnson*, 19-874, 2020 WL 3023063, at *7 (2d Cir. June 5, 2020); *United States v. Boulding*, No. 19-1590, 2020 WL 2832110, at *6 (6th Cir. June 1, 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020); *United States v. Smith*, 954 F.3d 446, 448–49 (1st Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. McDonald*, 944 F.3d 769, 771–72 (8th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175, 185–86 (4th Cir. 2019).

**[4]** The better reading is that the penalties clause modifies the whole phrase "violation of a Federal criminal statute." A violation of a federal criminal statute is commonly called an "offense." *Offense*, *Black's Law Dictionary* (11th ed. 2019) ("A violation of the law; a crime...."). This definition makes sense because the term we are defining is "covered offense." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 36, at 232 (2012) ("[T]he word being defined is the most significant element of the definition's context."); *id.* (explaining that there is a presumption that legal drafters give defined words their "general meaning" (internal quotation marks omitted)). A movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified its statutory penalties. Section two of the Fair Sentencing Act, the only section applicable in these appeals, modified the statutory penalties for crack-cocaine offenses that have as an element the quantity of crack cocaine provided in subsections 841(b)(1)(A)(iii) and (B)(iii). It did so by increasing the quantity of crack cocaine necessary to trigger those penalty provisions. *See* Fair Sentencing Act § 2(a). So a movant has a "covered offense" if his offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act.

The alternative interpretation primarily relies on the nearest-reasonable-referent canon, which provides that a "modifier normally applies only to the nearest reasonable referent." Scalia & Garner, *Reading Law* § 20, at 152. The relevant modifier in the definition of "covered offense" is the penalties clause. The movants argue that this canon suggests that the penalties clause modifies only the phrase "Federal criminal statute" because that is the referent that immediately precedes the penalties clause. *See, e.g.*, *Jackson*, 945 F.3d at 320; *Wirsing*, 943 F.3d at 185. But that reading ignores the fact that the canon does "not appl[y]" when a "modifier directly follows a concise and integrated clause," *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, —— U.S. ——, 138 S. Ct. 1061, 1077, 200 L.Ed.2d 332 (2018) (internal quotation marks omitted), such as "a violation of a Federal criminal statute," *see* Scalia & Garner, *Reading Law* § 20, at 152 (explaining that a modifier "applies only to ***1299** the nearest *reasonable* referent" (emphasis added)).

The decision of the Supreme Court in *Cyan* is instructive. In *Cyan*, the Court interpreted a statutory provision that stated: "Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b) of this section*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section." 138 S. Ct. at 1075 (emphasis added) (quoting 15 U.S.C. § 77p(c)). Subsection (b) requires dismissal of certain class actions—namely, those premised on state law that allege misconduct related to securities—whether the class action is brought in state or federal court. *Id.* at 1067, 1075 (citing 15 U.S.C. § 77p(b)). The Supreme Court explained that the natural reading of the relevant statutory provision is that when a class action set forth in subsection (b) is filed in state court, the defendant may remove it to federal court to ensure compliance with the mandatory-dismissal provision. *Id.* at 1075.

The Supreme Court rejected the government's argument that the "rule of the last antecedent" mandated a different interpretation. *Id.* at 1076 (internal quotation marks omitted). The government contended that the "as-set-forth" clause did not refer to the entire preceding clause but instead

referred only to the immediately preceding phrase "involving a covered security." *Id.* (internal quotation marks omitted). It argued that subsections (b)(1) and (b)(2) set forth specific types of misconduct related to the sale of a covered security. *Id.* So the government argued a covered class action that alleged the kind of misconduct in those subsections was subject to removal, regardless of whether it was premised on state law, that is, regardless of whether the class action was the type set forth in subsection (b). *Id.* In rejecting that argument, the Supreme Court explained that the "as-set-forth" clause "goes back to the beginning of the preceding clause" because the clause "hangs together as a unified whole, referring to a single thing (a type of class action)." *Id.* at 1077. The rule of the last antecedent was not to the contrary because that rule does not apply "when the modifier directly follows a concise and integrated clause." *Id.* (internal quotation marks omitted). *Contra Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1989–90, 192 L.Ed.2d 60 (2015) (applying the canon to the long and segmented phrase "convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section] 802)" to conclude that "relating to a controlled substance" did not reach all the way back to modify "violation" (alteration adopted) (quoting 8 U.S.C. § 1227 (a)(2)(B)(i))).

In the definition of "covered offense," the penalties clause directly follows the concise and integrated clause "a violation of a Federal criminal statute." The clause refers to a single thing—a type of violation. Indeed, this clause functions as a unified phrase elsewhere in the definition of covered offense. Recall, "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 ..., *that was committed before August 3, 2010*." First Step Act § 404(a) (emphasis added). The final clause modifies the unified phrase because one cannot "commit" a "Federal criminal statute," only a "*violation* of a Federal criminal statute."

The alternative interpretation—that the penalties clause modifies only "Federal criminal statute"—would mean that any movant sentenced for a drug-trafficking offense would have a covered offense even ***1300** if his offense did not involve crack cocaine. Section 841 is the applicable drug-trafficking statute. Subsection (a) provides that it is unlawful to traffic a variety of controlled or counterfeit substances. *See* 21 U.S.C. § 841(a). Subsection (b) provides the penalties for the various offenses involving those substances. *See id.* § 841(b). The Fair Sentencing Act modified some of the penalties that apply to this statute—whether defined as subsection (a) or the entire statute—by amending the quantity of crack cocaine necessary to trigger the higher penalties in two provisions of subsection (b). *See* Fair Sentencing Act § 2(a). So this alternative interpretation would mean that a movant with *any* drug-trafficking offense—even, say, a heroin offense—would have a "covered offense" because the movant violated section 841 and the Fair Sentencing Act modified some of the penalties that apply to section 841, even though the Act did not alter the penalties for heroin offenses. *See Smith*, 954 F.3d at 450 & n.5. In other words, this alternative interpretation would mean that the First Step Act covers offenses unaffected by the Fair Sentencing Act.

Interpreting "Federal criminal statute" to mean "statutory provision" is not a viable alternative. Some of our sister circuits have held that a movant has a covered offense if he violated section 841(b)(1)(A)(iii) or (B)(iii). *See Johnson*, 2020 WL 3023063, at *7 n.6; *Wirsing*, 943 F.3d at 186. But it is unnatural to read these subsections, which provide the *penalties* for violations of section 841(a) involving crack cocaine, as being the "statute" to which the penalties clause refers, especially because doing so requires concluding that the Fair Sentencing Act modified the penalties that apply to these "statutes" by modifying the provisions themselves. Our sister circuits attempt to avoid application of the First Step Act to movants with offenses involving a controlled substance other than crack cocaine by ignoring that drug-trafficking defendants who "violate" a penalty provision in subsection 841(b) *also* violate section 841, a statute for which the Fair Sentencing Act modified the statutory penalties.

Reading the penalties clause as modifying the unified phrase "violation of a Federal criminal statute" avoids these oddities. It makes clear that the clause refers to the crack-cocaine offenses for which sections 841(b)(1)(A)(iii) and (B)(iii) provide the penalties. Those provisions are two of the statutory penalty provisions that apply to violations of section 841(a), and they are the only provisions that the Fair Sentencing Act modified. *See* 21 U.S.C. § 841(b); Fair Sentencing Act § 2(a); *see also* Scalia & Garner, *Reading Law* § 2, at 56 ("[W]ords are given meaning by their context, and context includes the purpose of the text[, which, of course,] ... must be derived from the text."). Our interpretation leads to the same end result as the interpretation by our sister circuits, but it does so in a way that is consistent with the text and structure of section 404 of the First Step Act.

  

To be sure, the penalties clause uses the past tense—"were modified"—to describe the effect that the Fair Sentencing Act had on the statutory penalties. And the Fair Sentencing Act did not modify the penalties for any movant's earlier statutory violation because the Act did not apply retroactively. *See Jackson*, 945 F.3d at 320 (citing *United States v. Rose*, 379 F. Supp. 3d 223, 229 (S.D.N.Y. 2019)). But even so, the Fair Sentencing Act modified the statutory penalties for certain crack-cocaine offenses (that is, covered offenses), which means the First Step Act permits courts to review whether the Fair Sentencing Act altered the penalties for the movant's category of offense.

**[5]** To determine the offense for which the district court imposed a sentence, district ***1301** courts must consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment. From these sources, the district court must determine whether the movant's offense triggered the higher penalties in section 841(b)(1)(A)(iii) or (B)(iii). If so, the movant committed a covered offense.

**[6]** We reject the argument by the government that a district court must determine a movant's "covered offense" by considering the specific quantity of crack cocaine involved in the movant's violation. The government argues that because Congress used the term "violation" instead of "conviction," "covered offense" means all the movant's conduct underlying the statutory violation, not only the finding of drug quantity that triggered the statutory penalty. The government would have courts consider a finding of drug quantity anywhere in the record, such as a finding that was necessary for determining only relevant conduct under the Sentencing Guidelines or a finding in a postsentencing proceeding.

That argument impermissibly isolates the word "violation" from its context, which establishes that a covered offense is an *offense*. *See* First Step Act § 404(a). Offenses are made up of elements. *See Elements of Crime, Black's Law Dictionary* (11th ed. 2019). The elements for the movants' offenses are found in section 841. And the specific elements in that statute that matter for eligibility under the First Step Act are the two drug-quantity elements in sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii) because section two of the Fair Sentencing Act modified only offenses that include one of those drug-quantity elements. When the movants committed their offenses, the drug-quantity element in section 841(b)(1)(A)(iii) was 50 grams or more of crack cocaine, and the drug-quantity element in section 841(b)(1)(B)(iii) was five grams or more of crack cocaine. The range for each element meant that the movants did not need to be responsible for *exactly* 50 grams or five grams of crack cocaine—any quantity in the range sufficed and the offense would have as an element either 50 grams or more or five grams or more of crack cocaine, respectively. *See Mathis v. United States*, —— U.S. ——, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016) (explaining that some statutes "enumerate[ ] various factual means of committing a single element"). The ranges did *not* create an infinite number of crack-cocaine offenses based on the specific means by which the elements may be satisfied, such as distribution of 750.25 grams of crack cocaine. The actual drug-quantity involved in the movant's offense is irrelevant as far as the element and the *offense* are concerned. The actual quantity is only the *means* of satisfying the drug-quantity element. *See id.* That quantity constitutes relevant conduct under the Sentencing Guidelines, *see* U.S.S.G. § 1B1.3 (2018), but it does not define the offense.

**[7]** Although we reject the argument that a movant's covered offense is determined by the actual quantity of crack cocaine involved in his violation, we acknowledge that a district court, of course, could consider its previous findings of relevant conduct in deciding whether to exercise its discretion to reduce an eligible movant's sentence under section 404(b) of the First Step Act. *See* First Step Act § 404(b). The actual quantity of crack cocaine involved in a violation is a key factor for a sentence modification just as it is when a district court imposes a sentence. *See* 18 U.S.C. § 3553(a)(1) (instructing district courts to consider the nature and circumstances of the offense when imposing a sentence). But we do not read the Act as allowing the district court to use its earlier findings of ***1302** relevant conduct that were unrelated to the movant's statutory penalty to conclude that he did not commit a covered offense. These determinations of whether a movant is eligible for relief and whether to grant the movant relief are separate.

**[8]** **[9]** We also reject the movants' argument that district courts may not, in making the "covered offense" determination, consider a previous drug-quantity finding that was necessary to trigger the statutory penalty if it was made by a judge. The movants argue that when a jury did not make a drug-quantity finding, a district court should consider only that the offense involved a detectable amount of crack cocaine—punishable by section 841(b)(1)(C)—regardless of the statutory penalty that the district court applied at sentencing. To be sure, we now understand that a jury was constitutionally required to find the nature and quantity of the controlled

  

substance involved in the offense if that finding increased the statutory penalty. *See Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348; *see also Danforth v. Minnesota*, 552 U.S. 264, 271, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) ("[T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule."); *cf. Lester v. United States*, 921 F.3d 1306, 1312–15 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc) (explaining that the Guidelines were never truly mandatory because that practice *always* violated the Sixth Amendment). But just as a movant may not use *Apprendi* to collaterally attack his sentence, *see McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion. Moreover, taken to its logical end, the movants' argument would mean that a movant convicted before *Apprendi* is ineligible for relief under the First Step Act because the Fair Sentencing Act did not modify the statutory penalties for offenses involving only a detectable amount of crack cocaine.

All four of the movants were sentenced for a covered offense. The district court sentenced Jones for, among others, the offenses of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine and possession with intent to distribute 50 grams or more of crack cocaine. Those offenses were charged in his superseding indictment as conspiracy to possess with intent to distribute more than 16 kilograms of powder and crack cocaine and possession with intent to distribute more than 600 grams of powder and crack cocaine. But the final judgment lists both offenses as solely crack-cocaine offenses, and the district court's drug-quantity finding involved only crack cocaine. The record establishes that the district court treated both counts as crack-cocaine offenses when it "imposed a sentence" on Jones. *See* First Step Act § 404(b) (explaining that the district court must have "imposed a sentence for a covered offense"). The Fair Sentencing Act modified the statutory penalties for offenses like Jones's that involve 50 grams or more of crack cocaine from 10 years to life imprisonment to five to 40 years of imprisonment. *Compare* 21 U.S.C. § 841(b)(1)(A)(iii) (1994), *with id.* § 841(b)(1)(B)(iii) (2012). Jones's offenses qualify as covered offenses.

The district court sentenced Allen for, among others, the offense of conspiracy to distribute 50 grams or more of crack cocaine. That offense was charged in his indictment and found by a jury. The statutory penalty for that offense was originally life imprisonment because of Allen's two prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (2006). Under the Fair Sentencing Act, that same offense would lead to a statutory range of 10 years to life ***1303** imprisonment. *See id.* § 841(b)(1)(B)(iii) (2012). The larger quantity of crack cocaine that the district court found—"between 420 and 784 grams of crack cocaine per week"—did not trigger the statutory penalty for Allen's offense. Because the Fair Sentencing Act modified the statutory penalties for Allen's offense, he has a "covered offense."

The district court sentenced Jackson for the offense of possession with intent to distribute 50 grams or more of crack cocaine. Jackson's indictment charged him with that offense, and although the jury did not make a drug-quantity finding, the district court found at sentencing a drug quantity of at least 50 grams of crack cocaine. The statutory penalty for Jackson's offense was originally life imprisonment because of Jackson's drug quantity and three prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (1994). The Fair Sentencing Act modified the penalties for his offense to be 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2012). Jackson has a covered offense.

The district court sentenced Johnson for, among others, the offense of possession with intent to distribute five grams or more of crack cocaine. That is the offense in his indictment and found by a jury. Because of Johnson's four prior felony drug convictions, the statutory penalty for his offense was 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2006). After the Fair Sentencing Act, the statutory range for that same offense changed to zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C) (2012). Because the Fair Sentencing Act modified the statutory penalties for Johnson's offense, he too has a "covered offense."

The movants all have a "covered offense" because the district court sentenced them for violations of section 841 for which the Fair Sentencing Act modified the statutory penalties. But a movant's satisfaction of the "covered offense" requirement does not necessarily mean that a district court can reduce his sentence. Any reduction must be "as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed." First Step Act § 404(b).

**[10]** **[11]** This "as-if" requirement imposes two limits relevant to these appeals. First, it does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act. Second, in determining what a movant's statutory penalty

  

would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing.

**[12]** If the movant's sentence would have necessarily remained the same had the Fair Sentencing Act been in effect, then the district court lacks the authority to reduce the movant's sentence. Any reduction the district court would grant would not be "as if" the Fair Sentencing Act had been in effect. That is, the First Step Act does not permit a reduction when the Fair Sentencing Act could not have benefitted the movant.

**[13]** **[14]** To be clear, the Constitution does not prohibit district courts, in deciding motions for reduced sentences under the First Step Act, from relying on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified. In determining what a movant's statutory penalties would be under the Fair Sentencing Act, the district court is not increasing the movant's penalty. It is either maintaining the movant's penalty or *decreasing* it. *See Alleyne*, 570 U.S. at 103, 133 S.Ct. 2151 ("[A]ny fact that *increases* the mandatory minimum is an 'element' ***1304** that must be submitted to the jury." (emphasis added)); *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 ("Other than the fact of a prior conviction, any fact that *increases* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)); *cf. Dillon v. United States*, 560 U.S. 817, 825, 828–29, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010) (holding that the Sixth Amendment does not bar a district court from finding facts that determine a mandatory guideline range in a section 3582(c)(2) proceeding). And unlike the statutory penalties that applied when the movants were originally sentenced, the amended statutory penalties in the First Step Act apply to the movants as an act of legislative grace left to the discretion of the district court.

*C. The District Courts Did Not Err in Denying the Motions of Jones and Jackson but May Have Erred in Denying the Motions of Allen and Johnson.*

**[15]** **[16]** The district courts did not err in denying the motions of Jones and Jackson. When the district court sentenced Jones, its drug-quantity finding of 75 kilograms of crack cocaine subjected Jones to a statutory range of 10 years to life imprisonment. The only argument Jones made that the First Step Act entitled him to a reduced sentence was that the absence of a drug-quantity finding by the jury meant that his statutory range should be zero to 20 years of imprisonment. The district court did not err in refusing to allow Jones to relitigate his drug-quantity finding. Jackson was sentenced to a statutory mandatory sentence of life imprisonment based on a drug-quantity finding of 287 grams of crack cocaine and his three prior felony drug convictions. The district court correctly concluded that it could not reduce Jackson's sentence because his drug-quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2012).

The district court had the discretion to reduce the sentences of Allen and Johnson. At their sentencings, the district court determined their statutory penalties based on the drug quantities that the juries found beyond a reasonable doubt. The jury in Allen's trial found a drug quantity of 50 grams or more of crack cocaine. And Johnson's jury found a drug quantity of five grams or more of crack cocaine. Allen's and Johnson's statutory ranges would have been lower if the Fair Sentencing Act had been in effect when they committed their offenses. Allen's statutory range would have been 10 years to life imprisonment instead of a mandatory sentence of life imprisonment. *Compare id.* § 841(b)(1)(A)(iii) (2006), *with id.* § 841(b)(1)(B)(iii) (2012). And Johnson's statutory range would have been zero to 30 years of imprisonment instead of 10 years to life imprisonment. *Compare id.* § 841(b)(1)(B)(iii) (2006), *with id.* § 841(b)(1)(C) (2012).

The district court had the authority to reduce Allen's and Johnson's sentences, but it was not required to do so. The First Step Act states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." First Step Act § 404(c). District courts have wide latitude to determine whether and how to exercise their discretion in this context. In exercising their discretion, they may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a). *See United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020). A district court abuses its discretion when it "applies an incorrect legal standard." *Diveroli v. United States*, 803 F.3d 1258, 1262 (11th Cir. 2015) (internal quotation marks omitted).

***1305** The order denying relief to Allen is ambiguous as to whether the district court understood that it could reduce Allen's sentence. As a reminder, the district court sentenced Allen to a statutory mandatory sentence of life imprisonment,

  

and the President later commuted his sentence to 360 months of imprisonment. In denying Allen's motion, the district court explained that "[t]he retroactive change in the law does not benefit Allen" because it "found that Allen was responsible for selling between 420 and 784 grams of crack cocaine per week. As a career offender, Allen would still score out to a Level 37, with a Criminal History Category Six for a range of 360 months-life."

**[17]** The district court might have incorrectly concluded that Allen was ineligible for a reduction either because of the drug-quantity finding or because of his designation as a career offender. The government stated at oral argument that it viewed the district court as ruling that it lacked the authority to reduce Allen's sentence. Allen's commuted sentence is at the bottom of the guideline range, which may have caused the district court to conclude that Allen was ineligible for a further reduction to his sentence. So we vacate the order and remand for further consideration.

The order denying relief to Johnson is also ambiguous as to whether the district court understood its authority to reduce Johnson's sentence below the revised guideline range. As a reminder, the district court sentenced Johnson as a career offender to 360 months of imprisonment, and the President later commuted his sentence to 240 months of imprisonment. In denying Johnson's motion, the district court correctly rejected arguments by the government that Johnson was ineligible for a reduced sentence because of his commutation and career-offender status. It then explained that Johnson "appear[ed] eligible for relief" but that "[n]otwithstanding the statutory revisions, all parties appear to agree" that because of the commutation, Johnson's sentence is already nearly two years less than the bottom of his revised guideline range. The district court concluded by "find[ing] that the First Step Act affords no further relief to [Johnson] in this case."

**[18]** We cannot be sure that the district court understood its authority to reduce Johnson's sentence below the revised guideline range. The ambiguous phrase that the First Step Act "affords no further relief" leaves us unsure of the grounds for the ruling. The government erroneously argued in the district court that Johnson was ineligible for a reduction because his sentence was already below the revised guideline range. If the district court ruled that it could not grant Johnson's motion, that ruling would be erroneous because neither the First Step Act nor section 3582(c)(1)(B) barred the district court from reducing Johnson's sentence below the revised guideline range. It is also possible that the district court correctly understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what it believed to be sufficient relief. We cannot tell which of these readings is correct, so we vacate the order and remand for further proceedings.

## IV. CONCLUSION

We **AFFIRM** the orders denying Jones's and Jackson's motions to reduce their sentences. We **VACATE** the orders denying Allen's and Johnson's motions and **REMAND** for further proceedings.

### All Citations

962 F.3d 1290, 28 Fla. L. Weekly Fed. C 1225

## Footnotes

* Honorable William F. Jung, United States District Judge for the Middle District of Florida, sitting by designation.

**A-4**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-14021-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WARREN LAVELL JACKSON,

Defendant.
_____/

**ORDER ON DEFENDANT'S MOTION TO REDUCE SENTENCE**

**THIS CAUSE** comes before the Court pursuant to Defendant's Motion to Impose Reduced Sentence Pursuant to the First Step Act of 2018 (D.E.167). After consideration of the government and probation's responses, the defendant's reply and notice of supplemental authorities and response to probation office memorandum, had Section 2 of the Fair Sentencing Act been in effect at the time of the defendant's sentencing, it would have had no impact on the defendant's sentence. Because the offense involved 278 grams of cocaine base, Section 841(b)(1)(A) would still have applied, resulting in the same statutory range of imprisonment of 10 years to life. With the § 851 enhancement his statutory range would still be life because the underlying predicate convictions are not subject to challenge in a § 3582 proceeding. As a result, his guideline range would have been unchanged. Mr. Jackson received a commutation down to 300 months; no further reduction is warranted. Therefore, it is

**ORDERED and ADJUDGED** that Defendant's Motion to Impose Reduced Sentence Pursuant to the First Step Act of 2018 (**D.E.167**) is hereby **DENIED**.

**DONE AND ORDERED** at West Palm Beach, Florida this 7 day of May, 2019.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

**A-5**

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

21 U.S.C.A. § 841

# § 841. Prohibited acts A

Effective: December 21, 2018
Currentness

**(a) Unlawful acts**

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

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

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

**(b) Penalties**

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

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

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

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

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

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

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

  

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a 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 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 Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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

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

**(ii)** If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

  

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

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

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

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

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

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

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

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

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

or both.

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

  

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

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

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

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

**(7) Penalties for distribution**

**(A) In general**

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

**(B) Definition**

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

**(c) Offenses involving listed chemicals**

Any person who knowingly or intentionally--

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

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

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

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

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

  

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

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

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

**(e) Ten-year injunction as additional penalty**

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

**(f) Wrongful distribution or possession of listed chemicals**

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

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

**(g) Internet sales of date rape drugs**

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

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

**(B)** the person is not an authorized purchaser;

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

**(2)** As used in this subsection:

  

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

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

**(ii)** ketamine;

**(iii)** flunitrazepam; or

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

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

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

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

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

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

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

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

**(1) In general**

  

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

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

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

**(2) Examples**

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

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

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

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

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

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

**(3) Inapplicability**

**(A)** This subsection does not apply to--

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

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

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

  

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

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

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

**(4) Knowing or intentional violation**

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

**CREDIT(S)**

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 115-391, Title IV, § 401(a)(2), Dec. 21, 2018, 132 Stat. 5220.)

Notes of Decisions (8220)

**Footnotes**

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

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

21 U.S.C.A. § 841, 21 USCA § 841

Current through PL 117-41.

  

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