In the
Supreme Court of the United States

No:

Ervin Thornton, II,
Petitioner,

v.

United States of America,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

No. 23-1635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERVIN THORNTON, II,

Defendant-Appellant.

ORDER

BEFORE: SUTTON, Chief Judge; SILER and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: August 01, 2025

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Re: Case No. 23-1635, *USA v. Ervin Thornton, II*
Originating Case No. : 4:97-cr-50021-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Kinikia D. Essix

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 25a0383n.06

Case No. 23-1635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 01, 2025
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERVIN THORNTON, II, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN OPINION

Before: SUTTON, Chief Judge; SILER and WHITE, Circuit Judges.

SILER, J., delivered the opinion of the court in which SUTTON, C.J. and WHITE, J., concurred. WHITE, J. (pg.7), delivered a separate concurring opinion.

SILER, Circuit Judge. The First Step Act retroactively lowered the statutory penalties for many crack-cocaine crimes. Ervin Thornton, II, now serving life sentences for murder and drug offenses, seeks a reduction under § 404 of the First Step Act of 2018. The district court denied relief after finding that his drug counts involved only powder cocaine—offenses the Act does not cover. Because the conviction documents support that finding and because the court committed no clear error in reading the historical record, we affirm.

I.

In the mid-1990s, Thornton helped run a cocaine pipeline in Flint, Michigan. Jewell Allen bought powder cocaine from Lee Strickland and delivered the drugs to Thornton and Tederick Jones, who "cooked" portions of it into crack for street sale. *United States v. Thornton*, 234 F.3d 1271, 2000 WL 1597928, at *1 (6th Cir. 2000) (per curiam) (table). When Strickland landed in

federal court on his own drug indictment, Allen feared that his supplier might testify against him, so he paid Thornton and Jones $5,000 each to make sure Strickland never talked. Armed with handguns, the pair riddled Strickland's car with bullets, killing Strickland and his sister and wounding a third passenger. The murders did not slow Thornton's trafficking, as he kept selling "both crack and powder cocaine and marijuana" from several locations. Police searches later uncovered quantities of all three types of drugs together with the murder weapon.

In April 1998, a second superseding indictment charged Thornton with 10 counts. Relevant here, Count 1 alleged a conspiracy "to distribute cocaine . . . and marijuana," in violation of 21 U.S.C. §§ 846 and 841(a)(1), and Count 8 charged him with possession with intent to distribute "cocaine," in violation of 21 U.S.C. § 841(a)(1). The indictment never specified whether the "cocaine" was powder, crack, or both, and it cited no penalty subsection of § 841(b).

At trial, the government introduced evidence of both forms: witnesses described Thornton cooking powder into crack and selling each; agents seized rocks of crack, baking soda, a scorched measuring cup, and other tools of the trade; and the prosecutor reminded jurors of "the crack or cocaine end of" the case in closing argument. The court instructed the jury that "cocaine and crack cocaine are Schedule II controlled substances." The jury convicted on all counts.

Before sentencing, the prosecutor sent Probation a letter stating that Thornton faced "a ten-year statutory minimum pursuant to 21 U.S.C. § 841(b)(1)(A)(ii) and (iii)," thus invoking the penalty provisions for five kilograms of powder or 50 grams of crack. The presentence report found Thornton responsible for "over 1.5 kilograms of crack cocaine," producing a base-offense level of 38. It made no separate powder-quantity finding.

Thornton objected, insisting that the record was "horribly conflicted" and showed only that he possessed substantial amounts of powder cocaine, not the requisite crack quantity.

The government countered by reading transcript excerpts that pegged the total at far more than 1.5 kilograms of crack. The court overruled the objection, noting that the record contained evidence of both "vast amounts of powder cocaine" and more than 1.5 kilograms of crack. After adopting the PSR without change, it imposed concurrent life sentences on Count 1 (the drug conspiracy), Count 2 (the murder conspiracy), and Counts 3 and 4 (murder), to be served concurrently with a 40-year term on Count 8 (possession with intent to distribute cocaine), 20-year terms on Counts 6 (distribution of cocaine) and 10 (possession with intent to distribute cocaine), and 5-year terms on Counts 9 and 11 (possession with intent to distribute marijuana), along with a 5-year term on Count 5 (firearm use during the commission of a felony drug offense), to be served consecutively to all other sentences.

This court affirmed the convictions and sentences in 2000. *Thornton*, 2000 WL 1597928, at *3. Two decades later Thornton sought compassionate release and First Step Act relief. The district court first granted compassionate release and deemed the § 404 motion moot, but we reversed. *United States v. Thornton*, 2023 WL 2293101, at *2 (6th Cir. Mar. 1, 2023). On remand the district court denied the renewed § 404 motion, concluding that the indictment's reference to "cocaine" alone meant powder and that sentencing-stage crack findings could not transform the statute of conviction. A follow-up motion for reconsideration met the same fate. Thornton appeals.

II.

Relief under § 404 comes in two steps. Step one asks whether the defendant's drug count is a "covered offense," meaning an offense whose statutory penalties the Fair Sentencing Act altered. First Step Act of 2018, Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222 (2018). That is a historical question we review for clear error. *United States v. Thomas*, 933 F.3d 605, 608 (6th

Cir. 2019). A finding survives unless we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation and quotation marks omitted). Only if the defendant clears that threshold do we proceed to step two, where we review the district court's ultimate decision to grant or deny a sentence reduction for abuse of discretion. *United States v. Maxwell*, 991 F.3d 685, 689 (6th Cir. 2021). Because Thornton's appeal turns entirely on step one, our task is to decide whether the district court's powder-cocaine finding is clearly erroneous.

The relevant penalty statute, 21 U.S.C. § 841(b)(1)(A)(ii)–(iii), distinguishes between cocaine powder and "cocaine base" (crack). Eligibility "turns on the statute of conviction alone"—as reflected in the indictment, verdict, and judgment. *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020).

The indictment here charged a conspiracy "to distribute cocaine . . . and marijuana" (Count 1) and possession with intent to distribute "cocaine" (Count 8). It never mentioned "cocaine base." The verdict and judgment mirror the same language. Based on these documents, the district court did not clearly err in finding that Thornton was convicted for distributing powder cocaine.

Thornton advances four reasons to look past the indictment. First, he stresses that he was tried and sentenced prior to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), so drug type and quantities were questions for the court, not elements that the jury must decide. He believes that the district court clearly erred by disregarding the presentence report and findings at sentencing, which held him responsible for "over 1.5 kilos of crack cocaine" and applied the § 841(b)(1)(A)(iii) minimums when computing the guidelines. But the indictment, verdict, and judgment were all clear on the drug that he was charged with, namely, powder cocaine. The mere fact that the district court used Thornton's crack cocaine conduct for sentencing purposes does not make him eligible

under the statute. Even if the district court *could* consider the sentencing materials, it did not clearly err by finding the charging materials to be better evidence of the statute of conviction.

Second, Thornton cites trial evidence of crack rocks and "cooking" paraphernalia and notes that the jury was told powder and crack are both Schedule II substances. But *Boulding* forecloses any argument that general trial evidence can "back-fill" an element omitted from the indictment. *Boulding*, 960 F.3d at 781. Where, as here, the charging document required no finding on drug type, neither the breadth of the proof nor the generic instruction answers the statutory-penalty question.

Third, Thornton relies on a 1998 presentence letter in which the prosecutor stated that Thornton faced the 10-year minimums of § 841(b)(1)(A)(ii) (powder) and (iii) (crack). A prosecutor's statement, however, is not a judicial determination; it never amended the indictment and was never adopted by the court. Because the statement was never adopted by the court, it cannot constitute a "court's determination" that might trigger judicial estoppel. *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217 n.3 (6th Cir. 1990).

Fourth, Thornton argues that the rule of lenity should apply to resolve any ambiguity about the covered offenses in his favor. But Thornton fails to identify any ambiguity in the statutory text. Instead, he challenges whether the district court's powder cocaine finding constitutes clear error. And the rule of lenity "does not apply to factual ambiguities." *United States v. Anderson*, 517 F.3d 953, 962 (7th Cir. 2008).

Because Counts 1 and 8 rest on § 841(b)(1)(A)(ii), a provision the Fair Sentencing Act did not change, they are not covered offenses. The district court's finding is not clearly erroneous, and we need not reach step two.[1] The judgment is **AFFIRMED**.

[1] Because we hold that Counts 1 and 8 are not "covered offenses," we need not reach the government's alternative reliance on the concurrent-sentence doctrine.

WHITE, Circuit Judge, concurring. Because Thornton was charged, tried, convicted, and sentenced before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it is unclear whether he was sentenced for a "covered offense" under the First Step Act of 2018, Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222 (2018). As the majority observes, the indictment and judgment refer to cocaine without specifying powder cocaine or crack cocaine, and without reference to a penalty provision that would clarify the type of cocaine at issue. Under these circumstances, I agree with the Third Circuit that the proper approach is to examine the entire record to determine the statute of conviction. *See United States v. Coleman*, 66 F.4th 108, 110–12 (3d Cir. 2023).

The sentencing record provides support for the conclusion that Thornton was convicted of a covered offense. At the time of his conviction, a life sentence for a powder-cocaine offense required a finding that the defendant was responsible for at least five kilograms of powder-cocaine. 21 U.S.C. § 841(b)(1)(A)(ii)(1998). But the district court made no such finding when it sentenced Thornton to life on Count 1; the only drug-quantity finding it made was that Thornton was responsible for at least 1.5 kilograms of crack cocaine, which exceeded the then-applicable 50-gram threshold for a life sentence based on a crack-cocaine conviction. *Id.* § 841(b)(1)(A)(iii).

I nonetheless concur because the record, taken as a whole, can reasonably be viewed as supporting either conclusion—that Thornton was convicted of a crack-cocaine offense, or that he was convicted only of a powder-cocaine offense. It therefore was not clear error for the district court to hold that Thornton was ineligible for § 404 relief because he was not convicted of a covered offense.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1635

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERVIN JUNIUS THORNTON, II,

Defendant - Appellant.

FILED
Aug 01, 2025
KELLY L. STEPHENS, Clerk

Before: SUTTON, Chief Judge; SILER and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Flint.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal Action No. 97-cr-50021
HON. BERNARD A. FRIEDMAN

vs.

ERVIN JUNIUS THORNTON, II,

Defendant,

_____/

ORDER DENYING MOTION TO REDUCE SENTENCE UNDER SECTION 404 OF THE FIRST STEP ACT

This matter is before the Court on defendant Ervin Thornton's motion for sentence reduction under Section 404 of the First Step Act. (ECF No. 602). The Government has filed a response, and Thornton has filed a reply as well as a notice of supplemental authority and a notice of supplemental exhibit. (ECF Nos. 611, 612, 614, 615). The Court does not believe that oral argument is necessary to resolve this motion. E.D. Mich. LR 7.1(f)(1). For the reasons that follow, the Court will deny the motion.

I. Background

The Sixth Circuit Court of Appeals has summarized the relevant factual background of Thornton's crimes as follows:

> Lee Strickland often sold cocaine to Jewell Allen. Allen in turn sold Strickland's cocaine to defendant Thornton and Tederick Jones. Thornton cooked crack and sold it. Thornton stored and sold drugs in his mother's house and from his car wash, "Just Keep It Clean." Throughout 1996-1997. Thornton provided defendant Brown cash totaling $35,000-$40,000 to buy cocaine for him and paid Brown with drugs.
>
> After Strickland was indicted in federal court, Allen became concerned that Strickland would provide information about his involvement in drug trafficking. Allen offered Thornton and Jones $5,000 each to murder Strickland.
>
> In 1995, Thornton and Jones, armed with handguns, ambushed Strickland, Fanny Strickland, and Eric Williams as they were getting into Strickland's car. The Stricklands were killed and Williams survived.
>
> After the murders, Allen paid Thornton and Jones $5,000 each. Thornton's murder weapon was seized from his vehicle at his mother's house. In January 1997, agents executed a search warrant at Thornton's car wash where they seized drugs, $19,800 in cash, scales, and a phone list which included Brown's name. In May 1997, officers executed search warrants and found drugs, a handgun with ammunition, and title to the vehicle that contained the Strickland murder weapon, all linked to Thornton.

United States v. Thornton, No. 99-1275, 2000 WL 1597928, at *1 (6th Cir. Oct. 17, 2000).

Thornton was convicted by a jury of various controlled substance, firearms, and homicide charges and sentenced by the Honorable Paul V. Gadola to life imprisonment. (ECF No. 292). On direct appeal, the Sixth Circuit affirmed. *Thornton*, 2000 WL 1597928.

Thornton was generally unsuccessful on multiple post-conviction motions. Then in March 2021, following a hearing, this Court granted Thornton's motion for

compassionate release and reduced his sentence to a total of 360 months' imprisonment. (ECF No. 575). The Court also denied as moot Thornton's original motion for a sentence reduction pursuant to Section 404 of the First Step Act. (*Id.*). The United States appealed, and the Sixth Circuit reversed. (ECF No. 589). Thornton now returns to this Court with the instant motion for sentence reduction under the First Step Act. (ECF No. 602).

II. Legal Standard

Thornton presently seeks a reduced sentence pursuant to Section 404 of the First Step Act of 2018. The Act states as follows:

> (a) DEFINITION OF COVERED OFFENSE. – In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED. – A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS. – No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this

> section shall be construed to require a court to reduce any sentence pursuant to this section.

First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194 (2018). As indicated in the text of the First Step Act, eligibility turns on whether the defendant was sentenced for a "covered offense." A "covered offense" is federal crime, committed before August 3, 2010, "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act of 2018, § 404(a).

The Fair Sentencing Act of 2010 "aimed to lessen the sentencing disparity between cocaine offenses and those involving crack cocaine" by increasing the threshold quantities of crack cocaine needed to trigger mandatory statutory penalties. *United States v. Boulding*, 960 F.3d 774, 777 (6th Cir. 2020). As is relevant here, "it increased the threshold quantity of crack cocaine in 21 U.S.C. § 841(b)(1)(A) from 50 grams or more to 280 grams or more. Similarly, it increased the threshold quantity of crack cocaine in 21 U.S.C. § 841(b)(1)(B) from 5 grams or more to 28 grams or more." *Id.* Specifically, it amended the amounts of crack cocaine (alternatively referred to as "cocaine base," *id.* at 776) in sections 21 U.S.C. § 841(b)(1)(A)(iii) and 21 U.S.C. § 841(b)(1)(B)(iii). Fair Sentencing Act of 2010, Pub L. No. 111-220, §§ 2(a)(1), (2), 124 Stat. 2372 (2010). Accordingly, a crack cocaine conviction may count as a "covered offense," but a powder cocaine conviction will not.

The Court is tasked with determining first whether Thornton is eligible for a reduced sentence under Section 404 of the First Step Act, and then, if he is, whether he should receive one.

III. Analysis

Thornton is not eligible for a sentence reduction under Section 404 of the First Step Act because he was not convicted of a crack cocaine offense.

Thornton urges that Counts 1 and 8 are "covered offenses" under the First Step Act. (ECF No. 602, PageID.1362). The Government disagrees. (ECF No. 611, PageID.1624). Both sides acknowledge that, as the Sixth Circuit has said, "eligibility for resentencing under the First Step Act turns on the statute of conviction alone." *Boulding*, 960 F.3d at 781; (ECF No. 602, PageID.1369); (ECF No. 611, PageID.1626-27).

The charging document and judgment in this case indicate that in Counts 1 and 8 Thornton was convicted of "cocaine" offenses.[1] The parties dispute whether "cocaine" is a broad umbrella term covering both crack and powder cocaine, or whether it refers more specifically to powder cocaine. Again: crack cocaine convictions could be "covered offenses" under Section 404 of the First Step Act, but powder cocaine convictions are ineligible.

[1] Similarly, the instructions read to the jury refer to "cocaine." (ECF No. 611-2, PageID.1644, 1647, 1649)

The second superseding indictment charges Thornton in Count 1 with conspiracy to distribute controlled substances; specifically, it alleges that he conspired "to distribute cocaine, a Schedule II controlled substance, and marijuana, a Schedule I controlled substance; all in violation of Title 21, United States Code, Section 846 and 841(a)(1)." (ECF No. 602-2, PageID.1392-93). Likewise Count 8 charges him with "possess[ion] with intent to distribute cocaine, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1)." (*Id.*, PageID.1399). Judge Gadola's judgment describes Count 1 as "Conspiracy to Distribute Controlled Substances" and Count 8 as "Possession With Intent to Distribute Cocaine." (ECF No. 292, PageID.1197). Neither document identifies the specific subsection of 21 U.S.C. § 841 pursuant to which Thornton was convicted and sentenced. That is, the documents neither indicate that he was sentenced and convicted pursuant to 21 U.S.C. § 841(b)(1)(A)(ii) (relating to powder cocaine) nor that he was sentenced and convicted pursuant to 21 U.S.C. § 841(b)(1)(A)(iii) (relating to cocaine base, or crack cocaine).[2]

The statutory text, however, resolves the issue: within the statute, "cocaine" is not treated as an umbrella term, but rather is distinguished from "cocaine base."

[2] Similarly, they neither indicate that he was sentenced and convicted pursuant to 21 U.S.C. § 841(b)(1)(B)(ii)(II) (relating to powder cocaine) nor that he was sentenced and convicted pursuant to 841(b)(1)(B)(iii) (relating to cocaine base, or crack cocaine).

Violations involving "cocaine, its salts, optical and geometric isomers, and salts of isomers" are discussed in 21 U.S.C. § 841(b)(1)(A)(ii)(II). Violations involving "a mixture or substance described in clause (ii) which contains cocaine base" are discussed in 21 U.S.C. § 841(b)(1)(A)(iii).[3] Thornton was charged with "cocaine" violations, not "cocaine base" violations, and he is thus ineligible for relief under Section 404 of the First Step Act.

Thornton argues that because he was indicted and sentenced before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the prosecutor did not have to charge, and the jury did not have to find, the facts that increased his statutory maximum sentence. (ECF No. 602, PageID.1371). Thus, he urges, the prosecution did not have to specify the form of cocaine in the charging document. (*Id.*). However, as indicated above: the statute itself differentiates between "cocaine" and "cocaine base." He was indicted for "cocaine" offenses. Although colloquially "cocaine" may be used to refer to "powder cocaine" or as a generic identifier for multiple substances including "crack cocaine," within the statute "cocaine" is specifically differentiated

[3] The same distinction occurs in subsection (b)(1)(B): 21 U.S.C. § 841(b)(1)(B)(ii)(II) addresses "cocaine" while 21 U.S.C. § 841(b)(1)(B)(iii) addresses a mixture or substance containing "cocaine base."

from "cocaine base."[4] That is to say: the prosecution *did* specify the form of cocaine in the charging document, and it was "cocaine," not "cocaine base."

Thornton also points to cases supporting the proposition that "drug type and quantity were assessed [before *Apprendi*] as sentencing factors (not elements of the crime) by probation during the presentence investigation and the sentencing judge." (ECF No. 602, PageID.1371). The problem with the argument, however, is that at sentencing the judge is not determining whether to convict the defendant, but rather how to sentence the defendant for crimes for which he has already been convicted. And the cases demonstrate that in crafting sentences before *Apprendi* and its progeny, judges could rely on things, including drug type and quantity, that went beyond the crimes for which the defendant had been convicted. In *Edwards v. United States*, 523 U.S. 511 (1998), the Supreme Court held that "regardless" of whether the jury believed the defendant's conspiracy involved powder, crack or both, "[t]he Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable – and then to impose a sentence that varies depending upon amount and kind." *Id.* at 513-14, *see also id.* at 514 (noting that in determining a Guidelines sentence a judge may consider drug charges for which the

[4] And notably: the statute does not include the term "powder cocaine." It is therefore unsurprising that the second superseding indictment and judgment do not reference "powder cocaine." Instead, the documents use the statutory term: "cocaine."

offender has been acquitted and that the judge may impose a higher Guidelines sentence based on the judge's finding that the offender also engaged in an uncharged cocaine conspiracy). Again: the Sixth Circuit has made clear that "eligibility for resentencing under the First Step Act turns on the statute of conviction alone." *Boulding*, 960 F.3d 781. What a judge considered in sentencing a defendant before *Apprendi* does not clarify the defendant's "statute of conviction."

Thornton's contention that probation, the prosecution, and the Court treated Thornton's case as a crack cocaine case is similarly unpersuasive. (ECF No. 602, PageID.1373). Thornton points to the numerous points in the Presentence Report ("PSR") and sentencing transcript addressing crack cocaine. (*Id.*, PageID.1373-74).[5]

[5] The PSR concluded that Thornton "sold both crack and powder cocaine and marijuana." (PSR ¶ 14). In calculating the drug quantities used to determine his base offense level, the PSR was silent as to the amount of powder cocaine attributable to Thornton but stated that Thornton "should be held accountable for the distribution of over 1.5 kilograms of crack cocaine." (PSR ¶ 19). Thornton objected to this calculation in the PSR, urging that testimony at trial suggested he was responsible for the distribution of only 1/3 of 2 kilograms of crack cocaine, not 1.5 kilograms. (PSR Addendum, Controverted Item No. 5).

At sentencing, Judge Gadola entertained argument on the objection. (ECF No. 602-4, PageID.1421-1432, 1438-43). The Government flatly rejected the defendant's objection: "[t]his isn't even a close question, Your Honor, with all due respect to counsel. We're talking about one and a half kilos of crack cocaine or more." (*Id.*, PageID.1422). The Government proceeded to read from various sections of the trial transcript relating to Thornton's involvement with crack cocaine. (*Id.*, PageID.1422-27). Defense counsel urged that "[t]he transcript is horribly conflicted" and pointed out numerous references to powder cocaine. (*Id.*, PageID.1427-29). The Court, however, concluded that "there was testimony of vast amounts of powder cocaine, but there is certainly also a reference to over 1.5 kilos

But Judge Gadola's finding that Thornton was responsible for 1.5 kilograms of crack cocaine was in relation to his base offense level under the guidelines, not his statutory penalty. *See* (PSR ¶¶ 19, 36); (ECF No. 602-4, PageID.1421, 1427). And again: before *Apprendi* and its progeny a sentencing court would have considered multiple factors, including uncharged offenses and even offenses for which a defendant was acquitted, in fashioning a sentence. The second superseding indictment charged him with "cocaine" offenses. At sentencing, consistent with *Edwards*, Judge Gadola considered Thornton's involvement with both crack and powder cocaine. That Judge Gadola did so does not mean that Thornton was convicted of crack cocaine offenses.

> Thus, the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each-regardless of whether the judge believed that petitioners' crack-related conduct was part of the "offense of conviction," or the judge believed that it was "part of the same course of conduct or common scheme or plan."

Edwards, 523 U.S. 514-15.

Thornton also urges that because he was sentenced to life on Count 1, he would have had to be held accountable for at least five kilograms of powder cocaine, but the PSR makes no mention of a powder cocaine quantity. (ECF No. 602,

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of crack cocaine." (*Id.*, PageID.1429). Judge Gadola overruled Thornton's objection. (*Id.*, PageID.1431).

PageID.1370). He thus concludes that his "life sentence on Count 1 was based on the 1.5 kilograms of crack." (*Id.* at 1371). As the Government notes, however, at sentencing Judge Gadola stated that "there was testimony that he was accountable for all sorts of powder cocaine," and defense counsel agreed. (ECF No. 602-4, PageID.1430). But more importantly, Thornton's statutory exposure was not in dispute at sentencing; rather the finding on crack cocaine was related to his calculation under the Sentencing Guidelines. As in *Edwards*, probation and Judge Gadola were considering drugs attributable to Thornton for purposes of the sentencing guidelines, not his statutory penalties. No discussion was required on his involvement with powder cocaine.

Finally, Thornton urges that the rule of lenity should be applied to find that he was convicted of a covered offense. (ECF No. 612, PageID.1670). But the rule of lenity applies only where there is ambiguity. *United States v. Moore*, 567 F.3d 187, 191 (6th Cir. 2009). Here, Thornton was unambiguously charged with and convicted of "cocaine" offenses, not "cocaine base" offenses.[6] The statute does not treat the former as an umbrella term, but rather distinguishes it from the latter by putting them in different subsections. The Sixth Circuit has cautioned courts against "hinging

[6] And unlike several of the cases cited in the briefing, this is not a situation in which the defendant was charged with a conspiracy involving both "cocaine and cocaine base." There is no reference to "cocaine base" or "crack cocaine" at all in the second superseding indictment or the judgment.

eligibility on a fact-intensive historical inquiry," as Thornton asks the Court to do here. *Boulding*, 960 F.3d at 782. Whether a defendant is eligible "for resentencing under the First Step Act turns on the statue of conviction alone," and not the defendant's individual conduct. *Id.* at 781.

Because Thornton was not convicted of a "covered offense," he is ineligible for resentencing under Section 404 of the First Step Act. Accordingly,

IT IS ORDERED that defendant's motion to reduce sentence under Section 404 of the First Step Act (ECF No. 602) is DENIED.

SO ORDERED.

s/Bernard A. Friedman
Hon. Bernard A. Friedman
Senior United States District Judge

Dated: May 15, 2023
Detroit, Michigan