

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
Respondent,	:	NO. 03-0642
	:	
v.	:	
	:	
ANTHONY JACKSON	:	CIVIL ACTION
	:	
Petitioner.	:	NO. 09-5255

MEMORANDUM RE: MOTION FOR RESENTENCING

Baylson, J.

June 26, 2019

I. Introduction and Background

On August 5, 2004, Defendant, Anthony Jackson, was charged in a four-count Superseding Indictment with drug and firearm offenses. (ECF 68.) On November 3, 2004, Defendant was convicted after a jury trial of two counts: possession with intent to distribute more than 5 grams of cocaine base (“crack”) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (Count One) and possession with intent to distribute more than 5 grams of crack within 1000 feet of a school zone in violation of 21 U.S.C. § 860(a) (Count Two). (See ECF 104.) Defendant was acquitted of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count Three) and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count Four). (Id.)

The Superseding Indictment alleged in Counts One and Two that Defendant “knowingly and intentionally possessed with the intent to distribute in excess of five (5) grams, that is approximately forty-eight (48) grams, of a mixture or substance containing a detectable amount of cocaine base (“crack”).” (ECF 68.) The evidence presented at trial, as well as the Presentence

Investigation Report (“PSR”) established that Defendant’s crime involved 48.35 grams of crack,¹ which carried a base level of 32 pursuant to the United States Sentencing Guideline (“U.S.S.G.”) § 2D1.1. (PSR ¶¶ 15, 18.) Because the Probation Office determined that Defendant had two prior convictions for robbery and simple assault, he was a career offender with a base offense level of 34 under U.S.S.G § 4B1.1. (*Id.* ¶ 26.) As a result, Defendant was placed in criminal history category VI, which carried a guideline range of 262 to 327 months. (*Id.* ¶¶ 36, 54.) Defendant’s statutory mandatory minimum sentence was 5 years with an 8-year term of supervised release, and his statutory maximum sentence was 80 years pursuant to 21 U.S.C. §§ 841(b)(1)(B) and 860. (*Id.* ¶ 53.) Defendant received a sentence of 300 months plus 8 years of supervised release and a fine.

The Third Circuit affirmed Defendant’s judgment of sentence as to 21 U.S.C. § 841(b)(1)(B) and remanded for sentencing pursuant to 21 U.S.C. § 860. *United States v. Jackson*, 443 F.3d 293 (3d Cir. 2006). This Court imposed the same sentence on remand, which was affirmed by the Third Circuit. *United States v. Jackson*, 301 F. App’x 153 (3d Cir. 2008).

On April 5, 2019, Defendant filed a Motion for Resentencing under § 404 of the First Step Act of 2018, which made retroactive portions of the Fair Sentencing Act of 2010 that lowered statutory penalties for certain violations involving crack (ECF 165). S. 3747, 115th Cong. § 404(a) (2018); Pub. L. No. 111-220, 142 Stat. 2372 (2010). The Government filed a Response in opposition on May 20, 2019 (ECF 170), Defendant filed a Reply in support of the Motion on June 6, 2019 (ECF 171), and the Government filed a Sur-Reply on June 12, 2019 (ECF 172). After reviewing the briefs, the Court held a hearing on the Motion on June 13, 2019 (ECF 173, 174, 177). Following the hearing, Defendant filed a Letter in support of the Motion (ECF 175), and the Government submitted a Letter in response (ECF 176).

¹ The Court notes that there was no objection to the PSR’s reference to this amount of crack.

For the reasons discussed below, Defendant's Motion is DENIED.

II. Relevant Law

The First Step Act of 2018 made certain provisions of the Fair Sentencing Act of 2010 retroactive. By enacting the First Step Act, Congress intended to reduce sentences for individuals who were convicted of drug crimes and often sentenced to lengthy periods of incarceration because of mandatory minimums that have since been reduced by the Fair Sentencing Act. See United States v. Pierre, 372 F. Supp. 3d 17, 19–20 (D.R.I. 2019) (discussing the history and objectives of the Fair Sentencing Act and the First Step Act).

Section 404(b) of the First Step Act states, in relevant part: “A court that imposed a sentence for a covered offense may, on motion of the defendant, . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” S. 3747, 115th Cong. § 404(b). Section 404(a) 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 of 2010 . . . , that was committed before August 3, 2010.” Id. § 404(a). Sentence reductions under the First Step Act are discretionary, as Section 404(c) states that “[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Id. § 404(c); see also United States v. Higgins, No. 3:08-CR-150-TAV-HBG, 2019 WL 2527562, at *2 (E.D. Tenn. June 19, 2019) (“Although a defendant may be eligible for a reduction under the First Step Act, the Court nevertheless retains discretion to determine whether and to what extent a sentence modification should be granted.”).

As relevant here, section 2 of the Fair Sentencing Act increased the amount of crack necessary to trigger the 5-year mandatory minimum sentence imposed by 21 U.S.C. § 841(b)(1)(B) from 5 to 28 grams.

III. Discussion

A. Parties' Contentions

Defendant's Motion correctly contends that because he was sentenced for offenses involving crack prior to August 3, 2010, he is among the individuals who may be eligible to receive a lower sentence under the First Step Act. (See ECF 165 at 4; ECF 171 at 3–5.) Defendant argues that the plain language of § 404 makes him eligible for resentencing because section 2 of the Fair Sentencing Act “modified” the “statutory penalties” for his “violation of a Federal criminal statute” by changing the amount of crack required to trigger the minimum and maximum in 21 U.S.C. § 841(b)(1)(B) from 5 to 28 grams. (See ECF 165 at 9–10.) As a result, Defendant contends that § 404 requires the Court to consider only the statutory minimum quantity of crack for which Defendant was charged and convicted, 5 grams, to determine his eligibility for resentencing. (See id.) Reading § 404 to permit the Court to determine eligibility based on the quantity involved in the crime of conviction, Defendant contends, would violate Defendant's constitutional rights. (Id.; ECF 171 at 5–7.) Accordingly, Defendant contends that after the passage of the Fair Sentencing Act and the First Step Act, Defendant is now subject to a 0-year statutory minimum, a 40-year mandatory maximum, and a mandatory supervised release term of 6 years. See 21 U.S.C. §§ 841(b)(1)(C), 860; (ECF 165 at 4; ECF 171 at 8.)

The Government objects and asserts that the word “violation” in the First Step Act requires the Court to look at the facts underlying the conviction to determine whether, under the Fair Sentencing Act, Jackson would receive a lower sentence than he originally received. (See ECF 170 at 6; ECF 172 at 3–4.) The Government contends that Defendant's “violation” is not a “covered offense” under the First Step Act because the Superseding Indictment charged Defendant with 48 grams, and the PSR and evidence at trial established that Defendant was responsible for

48.35 grams, which would trigger the same mandatory minimum penalties both before and after the Fair Sentencing Act. See 21 U.S.C. §§ 841(b)(1)(B), 860; (ECF 170 at 7; ECF 172 at 6.)

B. Analysis

In this case, the answer to the question of whether Defendant’s “violation” is a “covered offense” is no. The Court concludes that the word “violation” in § 404(a) of the First Step Act refers to the conduct underlying the offense, not the 5-gram minimum amount necessary to trigger a mandatory sentence, as charged in the Superseding Indictment. This Court’s consideration of Defendant’s conduct to determine his eligibility for resentencing under the First Step Act does not violate Defendant’s constitutional rights.

i. Meaning of “Violation”

To interpret the meaning of “violation,” this Court first looks to the text of the statute. See In re Price, 370 F.3d 362, 369 (3d Cir. 2004) (“We are to begin with the text of a provision and, if it’s clear, end there.”). When the First Step Act is given its most natural reading, the dependent clause of § 404(a), “the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act,” modifies the word “violation,” not the phrase “Federal criminal statute.”²

The dictionary definition of “violation” further supports the Court’s interpretation of § 404(a). See Restrepo v. Att’y Gen. of U.S., 617 F.3d 787, 796 n.9 (3d Cir. 2010) (noting that it is “accepted” to “afford[] terms their common definition when they are left undefined by Congress”). The definition of “violation” is “[t]he act of breaking or dishonoring the law[.]” Violation, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added). The definition refers to an act. The

² The Court recognizes that other district courts have taken contrary views. See, e.g., United States v. Rose, No. 03-CR-1501 (VEC), --- F. Supp. 3d ---, 2019 WL 2314479, at *3 (S.D.N.Y. May 24, 2019) (concluding, by applying “ordinary English grammar and rules of usage[,]” that “the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act” modifies “Federal criminal statute”) (citation and internal quotation marks omitted).

facts underlying an individual's arrest are a "violation" of criminal law, and an indictment and conviction follow.

By using the term "violation" in § 404(a), the Court believes that Congress intended to refer to conduct. If, instead of "violation," Congress had used the word "indictment" or "conviction," then Defendant's argument that he is entitled to a sentence reduction would have much greater logic in terms of statutory construction. See United States v. Blocker, No. 4:07-cr-36-RH, --- F. Supp. 3d ----, 2019 WL 2051957, at *4–5 (M.D. Fla. April 25, 2019) (noting that "the [First Step Act] defines 'covered offense' by reference to the violation,' not by reference to the 'indictment'"); see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.'") (citation omitted); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985) (noting that in a civil RICO statute, "the term 'violation' does not imply a criminal conviction").³

No circuit court has yet addressed the meaning of the word "violation" in the First Step Act. However, district courts have determined whether "violation" refers to the offense conduct or the charge in an indictment by considering Congressional intent. See Blocker, 2019 WL 2051957, at *3 (distinguishing between the "offense-controls theory," where eligibility for resentencing is based on actual conduct, and the "indictment-controls theory," where eligibility is

³ To the extent the Government suggests that the meaning of "violation" in § 404(a) is ambiguous, the Court disagrees. (See ECF 172 at 3) (noting that the clause "'the statutory penalties for which were modified[]' may just as readily relate to the entire phrase, 'a violation of a Federal criminal statute,' as to only the final four words"). As a result, the Court's interpretation of "violation" in the First Step Act is not subject to the rule of lenity, which requires courts to construe ambiguities in criminal statutes in favor of defendants. But see Rose, 2019 WL 2314479, at *4 ("Construing § 404(a) [of the First Step Act] in favor of broader eligibility would also be consistent with the rule of lenity, which is of particular concern here because of the potential unfairness of using offense conduct to exclude defendants from eligibility."); Pierre, 372 F. Supp. 3d at 22 ("[W]here a criminal statute is ambiguous, as it is here [with the First Step Act], the rule of lenity informs the Court's decision.").

based on the charge in the indictment).

For example, in Blocker, Judge Hinkle concluded that “the authority to reduce a sentence ‘as if’ the Fair Sentencing Act [were] in effect requires a court to apply the offense-controls theory, not the indictment-controls theory.” Id. at *5. Judge Hinkle explained that the offense-controls theory accomplishes the intent of the Fair Sentencing Act “to lower the sentencing disparity between crack and powder, changing the 100-to-1 drug-amount ratio to approximately 18-to-1.” Id. at *6. If sentences were instead lowered on an indictment-controls theory, Judge Hinkle stated, “an enormous disparity [would] be created in the opposite direction. Many defendants who committed crack offenses prior to adoption of the Fair Sentencing Act [would] be subject to lower penalty ranges than defendants who committed offenses involving the same amount of powder.” Id.

The Court recognizes that Blocker may be an “outlier,” as many district courts have recently concluded that the amount charged in an indictment governs eligibility. United States v. Martinez, No. 04-cr-48-20 (JSR), 2019 WL 2433660, at *2–3 (S.D.N.Y. June 11, 2019) (concluding that “the phrase ‘violation of a Federal criminal statute’ refers to the amount charged in the indictment upon which [the defendant] was convicted,” following “nearly every court to address this issue”), appeal filed, No. 19-1736, (2d Cir. June 12, 2019); see, e.g., United States v. Booker, No. 07 CR 843-7, 2019 WL 2544247, at *2 (N.D. Ill. June 20, 2019) (stating that “nearly every court to address the issue agrees [that] eligibility for relief under the First Step Act is determined by the amount charged in the indictment, not the amount admitted in the plea agreement or found at sentencing[.]” and citing only Blocker in opposition); United States v. Jones, No. 2:05-CR-29-FL-1, 2019 WL 2480113, at *3 (E.D.N.C. June 11, 2019) (“The phrases ‘Federal criminal statute’ and ‘statutory penalties’ refer to the offense of conviction and the relevant

quantity of cocaine base identified by the charging instrument, not the drug quantity found at sentencing”); United States v. Davis, No. 07-CR-245S(1), 2019 WL 1054554, at *2 (W.D.N.Y. Mar. 6, 2019) (“[I]t is the statute of conviction, not actual conduct, that controls eligibility under the First Step Act[.]”); see also United States v. Whitmore, 573 F. App’x 24, 26 (2d Cir. 2014) (summary order) (holding that “the offense charged in the indictment, upon which [the defendant] was convicted, does not involve a sufficient quantity of cocaine base to trigger the . . . mandatory minimum under the post-[Fair Sentencing Act] penalty provision of § 841.”).

Notwithstanding, as there is no precedential judicial authority undermining Blocker, the Court finds Judge Hinkle’s rationale to be particularly persuasive and joins the district courts that have followed the “offense-controls” approach. See United States v. Banuelos, No. 02-cr-084 WJ, 2019 WL 2191788, at *2 (D.N.M. May 21, 2019) (“[I]f PSR findings were disregarded . . . , ‘every crack defendant sentenced before the Fair Sentencing Act . . . would be eligible for a reduction,’ creating ‘an enormous disparity between crack and powder cocaine offenders.’” (quoting Blocker, 2019 WL 2051957, at *5)), appeal filed, No. 19-2086 (10th Cir. May 31, 2019); see also United States v. Bolden, No. 04-cr-80111-BLOOM, 2019 WL 2515005, at *2 (S.D. Fla. June 18, 2019) (considering the amount of cocaine base charged in the indictment and stated in the presentence investigation report when denying a motion for resentencing under the First Step Act).

Following Judge Hinkle’s analysis, a finding that Defendant is entitled to a sentence reduction would increase the disparity between an individual convicted of possession with intent to distribute more than 28 grams of crack after the Fair Sentencing Act and Defendant, who would be getting a lesser sentence. The First Step Act cannot be read to produce “unwarranted windfalls” to defendants who committed “violation[s]” before the Fair Sentencing Act was enacted. See United States v. Boulding, No. 1:08-cr-65-01, --- F.3d ----, 2019 WL 2135494, at *6 (W.D. Mich.

May 16, 2019), appeal filed, No. 19-1590 (6th Cir. May 28, 2019); but see Jones, 2019 WL 2480113, at *4 (rejecting the government’s argument that reducing the defendant’s sentence would have produced unfair sentencing discrepancies because “it relie[d] on speculation that the defendant would have pleaded guilty or would have been found guilty at trial if the government had charged the increased drug quantity”).

ii. Constitutional Issues

Defendant contends that interpreting “violation of a Federal criminal statute” to refer to the offense conduct unconstitutionally “premises the availability of a sentence reduction on uncharged conduct.” See United States v. Martin, No. 03-CR-795 (ERK), 2019 WL 2571148, at *2 (E.D.N.Y. June 20, 2019). Such an interpretation, Defendant argues, is precluded by Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013), which stand for the proposition that any fact that increases the mandatory minimum penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. See Apprendi, 530 U.S. at 466; Alleyne, 570 U.S. at 103; (ECF 165 at 9–10.) The Government, on the other hand, contends that Apprendi and Alleyne are inapplicable because the First Step Act authorizes this Court to “reduce” Defendant’s sentence, not to increase it. (See ECF 170 at 10.)⁴

The Court finds the Government’s argument persuasive. As other district judges have

⁴ The Government argues that Dillon v. United States, 560 U.S. 817 (2010), applies and compels this Court to conclude that Defendant is not entitled to plenary resentencing under the First Step Act. (ECF 170 at 10–11.) The Court does not reach any conclusions on this issue. The Court notes, however, that at least one judge in this Circuit has concluded that Dillon is inapplicable to First Step Act motions. See United States v. Crews, No. 06-418, 2019 WL 2248650, at *5 n.3 (W.D. Pa. May 24, 2019) (“The analysis in Dillon . . . [is not] helpful in analyzing the sentence reduction authority Congress has granted the courts through § 404[]’ . . . because defendant is not requesting a reduced sentence based on an amendment to the sentencing guidelines” (alteration in original) (quoting United States v. Rivas, No. 04-CR-256-PP, 2019 WL 1746392, at *7 (E.D. Wis. Apr. 18, 2019))).

explained when considering First Step Act motions, Apprendi and Alleyne “prohibit judicial findings that increase the statutory penalty for a crime. Alleyne in particular was issued to protect the Sixth Amendment right to a jury trial.” Banuelos, 2019 WL 2191788, at *3. Apprendi and Alleyne do not apply to this Court’s consideration of Defendant’s Motion because “[d]eclining to reduce a sentence is not tantamount to an increase, nor does this proceeding implicate Defendant’s right to a jury trial.” Id.; see also United States v. Washington, No. 095-cr-06047, 2019 WL 2410078, at *2 (S.D. Fla. June 7, 2019) (“Nothing within the First Step Act permits a court to consider extraneous constitutional issues such as Defendant’s challenge under Alleyne and Apprendi.”); but see Martin, 2019 WL 2571148, at *2 (concluding that interpreting “violation of a Federal criminal statute” to refer to underlying conduct “present[ed] several difficulties,” including that such an interpretation was contrary to Alleyne because it “premise[d] the availability of a sentence reduction on uncharged conduct not considered by the grand jury[.]”); United States v. Latten, No. 1:02-CR-00011-012, 2019 WL 2550327, at *2 (W.D. Va. June 20, 2019) (“I join many other district judges in finding that I cannot rely on the drug weight found in the PSR in light of Apprendi and Alleyne.”); United States v. Stanbeck, --- F. Supp. 3d ----, No. 5:02-CR-30020-1, 2019 WL 1976445, at *3 (W.D. Va. May 2, 2019) (“Under Alleyne, this court is not free to ignore [the jury’s] finding and impose a penalty based on the 1.5 kilograms of cocaine base referenced in the PSR.”)⁵

⁵ This Court has reviewed the Supreme Court’s recent opinion in United States v. Haymond, No. 17-1672, 588 U.S. ___, 2019 WL 2605552 (June 26, 2019) (plurality opinion), which applied Apprendi and Alleyne to invalidate a federal statute governing revocation of supervised release. A plurality of the Supreme Court held that the statute, which required a district judge to impose an increased minimum sentence based on facts found by the judge by a preponderance of the evidence, violated the right to trial by jury guaranteed by the Fifth and Sixth Amendments. Id. at *10–11. This Court concludes that Haymond does not affect the Court’s analysis of Defendant’s Motion.

iii. Whether the Fair Sentencing Act “Modified” the “Statutory Penalties” for Defendant’s “Violation”: Unique Circumstances of This Case

This case presents a unique factual situation. Even if the “indictment-controls theory” were correct, and the Court could only consider the statutory minimum charged in the Superseding Indictment, Defendant would still not be eligible for a sentencing reduction. Although the Government only had to prove that Defendant possessed with intent to distribute more than 5 grams of crack to support Defendant’s conviction, the Superseding Indictment also specified that the amount was “approximately forty-eight (48) grams.” (ECF 68.) As a result, under both the “indictment-controls theory” and the “offense-controls theory,” the Court may determine Defendant’s eligibility for relief by considering that Defendant was responsible for 48.35 grams, as adduced at trial and stated in the PSR, because the Superseding Indictment also alleged that Defendant possessed 48 grams.

When taking that amount into account, the Court concludes that Defendant’s sentence would not have been “modified” if section 2 of the Fair Sentencing Act had been in effect at the time of Defendant’s sentencing. The 48.35 grams of crack that Defendant possessed and that formed the basis of his “violation” would trigger the same 5-year mandatory minimum and term of supervised release both before and after the Fair Sentencing Act. See 21 U.S.C. §§ 841(b)(1)(B), 860.

Thus, if Defendant were convicted of the same “violation” of possession with intent to distribute more than 28 grams of crack after the Fair Sentencing Act became effective, the Court would have been required to impose the exact same mandatory minimums.⁶ As “the statutory

⁶ Defendant argues that his prior convictions no longer support a career offender enhancement. (See ECF 171 at 12–13.) However, at least one district court in this Circuit has rejected a similar argument when considering a First Step Act motion. See Crews, 2019 WL 2248650, at *7 n.7 (“[The defendant] also argues that under current law he is not considered a career offender. . . .

penalties” for Defendant’s “violation” were not “modified by section 2 or 3 of the Fair Sentencing Act,” Defendant is not eligible for resentencing, and the Court must deny the Motion.

Though Defendant cites other district courts that have granted relief to similarly situated individuals under the First Step Act, the Court cannot conclude that Congress intended an outcome that would give drug offenders a break just because they committed a “violation” before the Fair Sentencing Act was enacted. That outcome would result in sentencing disparities between individuals responsible for the same amount of crack, contravening the many efforts over many years to reduce sentencing disparities, starting with the prime rationale of the Sentencing Guidelines.

IV. Conclusion

For the foregoing reasons, Defendant’s Motion for Resentencing is denied.

An appropriate Order follows.

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The First Step Act does not permit the court to consider other statutory or sentencing guideline amendments enacted since the date the defendant committed his . . . offense. At the time [the defendant] committed the instant offense, the sentencing guidelines provided that he was a career offender, . . . and the First Step Act did not alter that legal conclusion.”). Therefore, the Court does not consider whether, under current law, Defendant would be a career offender.

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Petitioner.	:	NO. 09-5255

ORDER RE: MOTION FOR RESENTENCING

AND NOW, this 26th day of June, 2019, upon consideration of Defendant's Motion for Resentencing under the First Step Act (ECF 165), the Responses and Replies thereto, and oral argument, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.