

12.5 kilograms of crack. Under the United States Sentencing Guidelines in effect at the time, the base offense level for this quantity of crack was 40. The Probation Office applied a one-level enhancement for distribution near a school, a two-level enhancement for gun possession, and a three-level enhancement for his managerial role in the drug conspiracy, resulting in an adjusted offense level of 46. Nixon was in a criminal history category VI, and his Guidelines sentence was life imprisonment. Nixon's statutory minimum sentence was ten years and his maximum term was life.

At the sentencing hearing on June 6, 1994, the court found that Nixon knew or could have reasonably foreseen the distribution of at least 1.5 kilograms but less than 5 kilograms of crack, resulting in a base offense level of 38. Nixon's total offense level was 44. With a total offense level of 44 and a criminal history category VI, Nixon's sentencing range under the then-mandatory Guidelines was life imprisonment. The court adhered to the Guidelines and sentenced Nixon to life in prison. Our Court of Appeals affirmed Nixon's conviction and sentence on May 30, 1995. See United States v. Rivers, 54 F.3d 770 (3d Cir. 1995). On September 17, 1996, we denied his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. See Doc. # 253.

On July 24, 2001, we granted the motion of Nixon to amend his judgment of conviction to reduce his total offense level from 44 to 43. See Doc. # 316. We agreed with Nixon that under United States v. Watterson, 219 F.3d 232 (3d Cir. 2000), decided by the Court of Appeals after Nixon was sentenced, it was improper to include a one-point increase to his offense level based on the finding that the distribution of illegal drugs occurred within 1,000 feet of a school since Nixon was not charged with and convicted of distribution of drugs near a school. Nevertheless, Nixon's Guidelines range remained life imprisonment and thus the court denied his motion for a sentence reduction.

In 2008, Nixon's offense level was further reduced by Amendment 706, which lowered the base offense levels for many crack-related offenses. With other applicable adjustments, Nixon's total offense level was reduced to 41 so that his Guidelines range was now 360 months to life imprisonment. This court granted Nixon's motion for relief under Amendment 706 and resentenced Nixon to 360 months' imprisonment. See Doc. # 403.

In 2012, Nixon moved for a reduction of sentence under 18 U.S.C. § 3582(c)(2) and Amendment 750, which again lowered the base offense levels for many crack-related offenses. This motion was denied. See Docs. ## 445 and 446. Given Nixon's criminal history category of VI, his Guidelines range remained

360 months to life imprisonment. Our Court of Appeals affirmed. See United States v. Nixon, 499 F. App'x 185, 187 (3d Cir. 2012).

In 2015, Nixon again moved for a sentence reduction, this time under Amendment 782 to the Guidelines which lowered the base offense levels for most drug offenses by two levels. This court denied Nixon's motion on the ground that it did not lower his applicable Guidelines range. See Doc. # 476. Using the lower end of the estimated quantity of 1.5 to 4.4 kilos, Nixon's amended base offense level under Section 2D1.1 of the Guidelines was 32 and his total offense level was 37. Nixon's Guideline range remained 360 months to life due to his criminal history category of VI.

II

Section 404 of the First Step Act makes retroactive Sections 2 and 3 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, 2372 (2010). See First Step Act, § 404. The Fair Sentencing Act of 2010 was enacted in response to widespread criticism of the relatively harsh treatment of crack cocaine offenses compared to offenses involving powder cocaine. See Dorsey v. United States, 567 U.S. 260, 268 (2012). Prior to passage of the Fair Sentencing Act, federal law provided for a five-year mandatory minimum sentence for a defendant convicted of distributing five grams or more of

cocaine base and a ten-year mandatory minimum sentence for a defendant convicted of distributing 50 grams or more of cocaine base. See 21 U.S.C. § 841(b)(1)(A) (2009). Section 2 of the Fair Sentencing Act increased the drug amounts triggering these mandatory minimums. Specifically, it increased the amount triggering the five-year mandatory minimum from five grams or more to 28 grams or more and the amount triggering the ten-year mandatory minimum from 50 grams or more to 280 grams or more. See Dorsey, 567 U.S. at 269.

The First Step Act permits a court that imposed a sentence for a "covered offense" to exercise its discretion to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentence Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act, § 404(b). A "covered offense" is "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). Nixon's offense took place long before that date.

The Government contends that Nixon is not entitled to relief under the First Step Act. According to the Government, there would be no change to Nixon's statutory penalty under the Fair Sentencing Act for his conviction for conspiracy to distribute crack in violation of §§ 841(a)(1) and 846 because

the Fair Sentencing Act simply increased the relevant threshold crack quantity under § 841(b)(1)(A) from 50 grams or more to 280 grams or more. At sentencing, Nixon was found responsible for a minimum of 1.5 kilograms of crack, an amount that far exceeds the increased 280 gram-threshold. Accordingly, Nixon remains subject to a mandatory minimum sentence of ten years and a maximum sentence of life under § 841(b)(1)(A).

In contrast, Nixon asserts that he is 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 penalties set forth in 21 U.S.C. § 841(b)(1)(A). According to Nixon, this court should consider only the statutory minimum quantity of crack for which he was charged and convicted to determine his eligibility for resentencing. Nixon was charged with and convicted of conspiring to distribute "more than 50 grams" of crack, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Under the First Step Act, a quantity of 50 grams or more but less than 280 grams would trigger only the five-year mandatory minimum sentence set forth in § 841(b)(1)(B).

After reviewing the parties' briefs, we conclude that Nixon is not entitled to resentencing under the First Step Act. As stated above, the First Step Act states, in relevant part,

that “[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.” First Step Act, § 404(b). The 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 of 2010 . . . that was committed before August 3, 2010.” Id. § 404(a).

The word “violation” refers to the factual conduct underlying the offense, not the fifty-gram minimum amount charged in the indictment. The court found Nixon to be responsible for conspiracy to distribute a minimum of 1.5 kilograms of crack, an amount far in excess of the now 280-gram minimum amount necessary to trigger a ten-year mandatory minimum sentence under § 841(b)(1)(A). Thus, he did not commit a “violation” for which the statutory penalties were modified.

In reaching this conclusion, we are persuaded by the reasoning of our colleague Judge Michael M. Baylson in United States v. Jackson, No. 03-642, 2019 U.S. Dist. LEXIS 109993 (E.D. Pa. June 26, 2019). Like the court in Jackson, we rely on the text of the statute as well as the dictionary definition of the term “violation,” which means “[t]he act of breaking or dishonoring the law.” See Black’s Law Dictionary (11th ed

2019). We interpret the "act of breaking" the law as the facts or conduct underlying defendant's arrest and conviction and not simply the words of the indictment or statute. See Jackson, 2019 U.S. Dist. LEXIS 109993, at *7-8.

This approach accomplishes the intent of the Fair Sentencing Act to lower the disparity between cocaine base and cocaine powder offenses. See id. at *9 (citing United States v. Blocker, 378 F. Supp. 3d 1125, 1131 (N.D. Fla. 2019)). If sentences were instead reduced based solely on the quantity charged in the indictment, which often simply tracked the language of the statute as written at that time, "an enormous disparity [would] be created in the opposite direction" in which "[m]any 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. (quoting Blocker, 378 F. Supp. 3d at 1131).

In so ruling, we recognize that many district courts outside of this district have reached the opposite conclusion and have held that the amount charged in the indictment controls for purposes of determining eligibility for resentencing under the First Step Act. See, e.g., United States v. Williams, No. 03-1334, 2019 WL 2865226, at *2-3 (S.D.N.Y. July 3, 2019); United States v. Valentine, No. 99-01, 2019 WL 2754489, at *5

(W.D. Mich. July 2, 2019); United States v. Herbert, No. 97-30024, 2019 WL 2718498, at *2 (W.D. Va. June 28, 2019); United States v. Johnson, No. 01-543, 2019 WL 2590951, at *2-3 (N.D. Ill. June 24, 2019). Nonetheless, we will follow the well-reasoned approach of Judge Baylson in Jackson in the absence of a ruling to the contrary on this issue from our Court of Appeals.

Nixon also asserts that interpreting the phrase "violation of a Federal criminal statute" to refer to the offense conduct rather than the statutory language as charged in the indictment violates his right to trial by jury under the Sixth Amendment to the United States Constitution. He reasons that under Apprendi v. New Jersey, "facts that expose a defendant to a punishment greater than that that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense" and "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 483 n.10, 490 (2000); see also Alleyne v. United States, 570 U.S. 99, 115-16 (2013). However, Apprendi and Alleyne do not apply here because the First Step Act authorizes a court only to "reduce" a sentence in its discretion. See First Step Act, § 404(c). Declining to reduce a sentence "is not tantamount to an increase" nor does it implicate a defendant's right to a jury trial under the Sixth Amendment. Jackson, 2019 U.S. Dist. LEXIS 109993, at *13

(internal citations omitted); see also Dillon v. United States, 560 U.S. 817, 828 (2010).

Because this court found at sentencing that Nixon was responsible for the distribution of at least 1.5 kilograms of crack, he remains subject to the same mandatory minimum penalty both before and after the First Step Act. Accordingly, the motion of Nixon for a reduction of sentence pursuant to the First Step Act will be denied.¹

1. The parties also dispute whether the First Step Act authorizes a plenary resentencing. Because we have determined that Nixon is ineligible for relief under the First Step Act, we need not consider his request for a resentencing hearing.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MICHAEL NIXON	:	NO. 93-386-4

ORDER

AND NOW, this 25th day of September, 2019, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion of defendant for resentencing pursuant to the First Step Act of 2018 (Docs. ## 516, 534) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.