THE FIRST STEP ACT AND *UNITED STATES V. JONES*

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Congress passed the First Step Act to remedy the harsh, disproportionate sentences in crack cocaine offenses.[1] It became effective in December of 2018. The United States Sentencing Commission reports that in the first year of the Act, district courts reduced sentences for 2,387 federal prisoners by an average of 26 percent.[2] The First Step Act continues to hold promise. Courts, however, have not yet entirely determined which prisoners are eligible. In *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), the court addressed what was the central issue, but in a way distinct from and, to a degree, inconsistent with the

[1] The Act includes many prospective changes: (1) for purposes of the enhancement provision found in 21 U.S.C. § 851, it requires a more substantial predicate—a conviction for a "serious drug felony," rather than a "felony drug offense" and adds violent felonies; (2) makes it easier for a defendant to qualify for the safety valve; (3) eliminates the "stacking" of the mandatory minimum sentences required by 18 U.S.C. § 924(c) unless the offenses are truly consecutive; (4) expands the availability of compassionate release; and. (5) creates earned good time credit. This article addresses only the Act's retroactive application of the Fair Sentencing Act.

[2] *See*, United States Sentencing Commission, *The First Step Act of 2018: One Year of Implementation.* Available at: https://www.ussc.gov/research/research-reports/first-step-act-2018-one-year-implementation.

opinions from the other six courts of appeal that have reviewed the statute.

A. The Initial Argument

The Fair Sentencing Act of 2010 increased the threshold quantities for crack cocaine offenses. Before its enactment, the United States Code provided for a sentence of five to 40 years for offenses involving at least five grams of crack and ten years to life for offenses involving 50 grams or more.[3] Section two of the Fair Sentencing Act increased the threshold to 28 grams and 280 grams respectively.[4] Congress made the Act effective as of August 3, 2010, but did not make it retroactive to those sentenced

[3] It provided for harsher sentences for those with prior felony drug convictions. For those convicted of offenses involving 50 grams or more, the minimum mandatory became 20 years if the Government filed an information alleging a prior felony drug conviction and a minimum mandatory of life if the Government alleged at least two felony drug convictions. For those convicted of offenses involving five grams or more, but less than 50, the mandatory minimum was 10 years if the government alleged one or more felony drug convictions.

[4] There are three subsections of 21 U.S.C. § 841 that provide penalties for the manufacture, distribution, or dispensing of a controlled substance or possession with intent to do any of those things. The subsections applicable to crack cocaine offenses are 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), and 841(b)(1)(C).

earlier. *See, e.g., United States v. Berry*, 701 F.3d 374, 377 (11th Cir. 2012). The First Step Act remedied that shortcoming, extending the benefit of the Fair Sentencing Act to those sentenced before its enactment.

Specifically, the First Step Act provides "[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) (internal citation omitted).[5] Section 404(a) of the Act defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties of which were modified by section 2 or 3 of the Fair Sentencing Act of 2010."

Initially courts debated whether what came to be known as the "penalty phrase"—"the statutory penalties of which were modified by

[5] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Section 3 of the Fair Sentencing Act eliminated a mandatory minimum penalty for possession offenses and does not play a role in the ongoing First Step Act litigation.

section 2 or 3 of the Fair Sentencing Act"—modified "violation of a federal criminal statute" or just "federal criminal statute."[6]

A few courts concluded it was the former and held courts were to rely on the defendant's actual conduct, i.e. the quantity of drugs for which the defendant was held responsible at sentencing. It meant those held responsible for a quantity that remained in the same subsection of the drug statute (21 U.S.C. § 841), before and after the Fair Sentencing Act, were ineligible. If, for example, the court had held the defendant responsible for 300 grams, he fell in § 841(b)(1)(A) both before and after the Fair Sentencing Act. Likewise, if a court held a defendant responsible for 45 grams, he still fell in § 841(b)(1)(B) after the Fair Sentencing Act. Neither would be eligible for a reduced sentence. The thinking was that in those instances the defendant was ineligible because his penalty remained the same. As most who were still serving sentences had been held responsible for 280 grams or more, the reasoning excluded many if not most prisoners.

[6] Compare *United States v. Rose*, 379 F.Supp.3d 223, 228 (S.D. N.Y. 2019), and *United States v. Blocker*, 378 F.Supp.3d 1125, 1129 (N.D. Fla. 2019).

The alternative, *i.e.* that the penalty clause modified only "Federal criminal statute," had the opposite outcome—nearly all who were sentenced for crack offenses before August 3, 2010, were eligible. The defendant convicted of violating § 841(b)(1)(A), was eligible because the change brought about by the Fair Sentencing Act was a modification of that subsection of the statute. It no longer provided for a penalty of 10 years to life for distributing 50 grams or more, but, instead, for distributing 280 grams or more. The same was also true for § 841(b)(1)(B). The sentence of five years to 40 years no longer applied to those distributing between five and 50 grams, but to those distributing between 28 and 280 grams.

Of the seven circuit courts that have issued published opinions, six have decided the penalty phrase modifies only "Federal criminal statute," making most prisoners in those jurisdictions eligible for a reduced sentence.[7] The Eleventh Circuit entered the arena in June. In *Jones*, contrary to the other courts of appeal, it held that the penalty phrase

[7] *See United States v. Boulding,* 960 F.3d 774 (6th Cir. 2020); *United States v. Smith,* 954 F.3d 446 (1st Cir. 2020); *United States v. Jackson*, 945 F.3d 315 (5th Cir. 2019); *United States v. McDonald*, 944 F.3d 769 (8th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175 (4th Cir. 2019); *United States v. Shaw*, 957 F.3d 734 (7th Cir. 2020).

modified "violation of a Federal criminal statute," but much like the other courts still found most prisoners to be eligible. The different analysis and an added requirement, however, excludes some who the other courts would find eligible.

B. United States v. Jones

The *Jones* court didn't think its grammatical difference with the other courts made much difference, as it led "to the same end result as the interpretation by our sister circuits." 962 F.3d at 1300. It found that "violation of a Federal criminal statute" should be read to mean an "offense" not the actual conduct of the defendant, and that "offense" is shorthand for the drug statute. So, like the other courts, it held what mattered is whether the Fair Sentencing Act had modified the statute. But while, like the other courts the Eleventh Circuit extended "eligibility" to most defendants, it added an analysis which treats differently those sentenced before the June 26, 2000, decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The other circuit courts haven't placed the same emphasis on what the Eleventh Circuit calls the "as if" provision—the clause that allows a court 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." Those courts interpret it to mean that, if a defendant is eligible, a court may exercise its discretion and sentence the defendant as it would for what would have been the reduced offense. If a defendant was convicted before the Fair Sentencing Act of a § 841(b)(1)(A) offense, *i.e.* of the offense of distributing at least 50 grams or more of crack, the court upon resentencing him under the First Step Act, may sentence him as if he had been convicted of a § 841(b)(1)(B) offense, an offense involving less than 280 grams of crack.

The Eleventh Circuit, however, treats the "as if" clause as a restriction on the authority of the district court to reduce a sentence. According to the Court, it gives rise to two limitations:

> 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.

Jones at 1303. Expressed differently, the court held the "as if" provision (1) prohibits a district court from imposing a sentence below the

mandatory minimum sentence available to the defendant under the Fair Sentencing Act and (2) that the mandatory minimum is established by the offense of conviction in post-*Apprendi* cases and by the quantity determined by the court in pre-*Apprendi* cases.

Before *Apprendi,* courts treated drug quantity as a sentencing factor, not an element of the offense.[8] Under *Jones*, if it is a pre-*Apprendi* case, where drug quantity was only a sentencing factor, it still is, and the judge's original finding as to quantity limits the authority of a district court to reduce a sentence under the First Step Act.

Accordingly, if a defendant was sentenced in 1999 for distributing 300 grams of crack, a court could not reduce the sentence to anything less than the mandatory minimum 10 years required for a § 841(b)(1)(A) offense. If, in 1999, the Government had filed an information pursuant to 21 U.S.C. § 851 alleging two prior drug felony convictions resulting in the

[8] *Apprendi* held that under the Fifth Amendment's guarantee of due process and the Sixth Amendment's right to a jury trial any fact that increased "the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. 476. Subsequently, in *Alleyne v. United States*, 570 U.S. 99, 103 (2013), the Court held the same was true for facts that establish a mandatory minimum offense.

imposition of the statutorily required life sentence, a court cannot reduce the sentence under the First Step Act. The mandatory life sentence is "the lowest statutory penalty that also would be available to him under the Fair Sentencing Act."

Had the same defendant been sentenced in 2003, after *Apprendi*, the "previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing" would have been 50 grams.[9] In imposing a sentence under the First Step Act, "the lowest statutory penalty" that also would be available under the Fair Sentencing Act" would be the ten year mandatory minimum provided for those convicted of a § 841(b)(1)(B) offense who had a prior felony drug conviction.

Jones may not be the final word. As of this writing, Warren Jackson, whose appeal was consolidated with the three other defendants in *Jones*, has a pending petition for rehearing *en banc*. Then, too, given the conflict

[9] Neither a jury nor a judge would have made a finding of anything else because the quantity of at least 50 grams was the element that made it a § 841(b)(1)(A) offense. And while the judge would have found for purposes of the Sentencing Guidelines, under the lesser standard of proof by the greater weight of the evidence, the quantity was 300 grams, there was no need to determine whether there was proof beyond a reasonable doubt the defendant distributed 300 grams.

between the Eleventh Circuit and the other six courts of appeal, *Jones* would seem ripe for Supreme Court review. Meanwhile, an unpublished decision may provide relief to some.

In *United States v. Robinson*, 826 F.App'x 760, 763 (11th Cir. 2020), the court acknowledged the *Jones* holding in pre-*Apprendi* cases, but added there must be an indication in the record that the court relied on its quantity finding, not just for Guideline purposes, but also to determine the statutory penalties. While *Robinson* may not be helpful where there was no dispute about the quantity, it may salvage a defendant's claim in cases like *Robinson* where there had been a trial or where there was a guilty plea, but a dispute over drug quantity. It would, after all, be the rare case where a court announced what quantity it relied upon to establish the statutory penalties apart from the guideline determination.

C. The Unresolved Issue

With or without *Jones* there remains, at least in the Eleventh Circuit, one unresolved First Step Act issue. The defendant convicted of an offense involving less than five grams would be facing the same penalty both before and after the Fair Sentencing Act, probation up to 20 years.

There is language in *Jones* showing the court would conclude those convicted of the offense are ineligible for relief.[10] In an unpublished decision, the court expressly stated it. *United States v. Cunningham*, 824 F.App'x. 835, 837 (11th Cir 2020). At least for now, though, the language in *Jones* is *dicta*.[11]

Four circuit courts have addressed the issue, with one, *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020), finding the defendant ineligible and three finding the defendant eligible.[12] In *United States v. Woodson*, 962

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[10] At one point, the court states that the First Step Act "refers to the crack-cocaine offenses for which sections 841 (b)(1)(A)(iii) and (B)(iii) [because] they are the only provisions the Fair Sentencing Act modified." *Jones*, 962 F.3d at 1300. Later the opinion states "[T]he Fair Sentencing Act did not modify the statutory penalties for offenses involving only a detectable amount of crack cocaine." *Id.* at 1302.

[11] None of the four consolidated cases the court addressed in *Jones* involved a charge of less than five grams of crack. Accordingly, the language unfavorable to those convicted of that offense is not binding precedent. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case.)

[12] Sparing the details, it is worth noting that the reasoning in *Birt* relies on its conclusion that the phrase "Federal criminal statute" as it is used in § 404(a) of the First Step Act refers to the individual subsections of § 841: (b)(1)(A), (b)(1)(B), and (b)(1)(C). *Jones* disagrees, concluding "violation of a Federal criminal statute" refers to § 841 as a whole.

F.3d 812 (4th Cir. 2020); *United States v. Smith,* 954 F.3d 446 (1st Cir. 2020); and *United States v. Hogsett*, __ F.3d __, 2020 WL 7134464 (7th Cir. Dec. 7, 2020), the courts found the defendants eligible. Those decisions recognize the penalties for the subsections remained the same after the Fair Sentencing Act. A violation of (b)(1)(A) is still 10 to life, a violation of (b)(1)(B) is still 5 to 40 years, and (b)(1)(C) still had no minimum and a maximum of 20 years. The question, however, is not whether the penalties changed, but whether the statute was "modified." As the three courts concluded, all three subsections have been. After the Fair Sentencing Act, § (b)(1)(A) established the penalty for offenses involving 280 grams or more, instead of 50 or more; § (b)(1)(B) the penalties for offenses involving between 28 grams up to 280 instead of five to 50, and § (b)(1)(C) the penalties up to 28 grams instead of up to five.

Up until earlier this month, there was a second unresolved issue. It involved those who had been convicted of single count that alleged a quantity of crack and powder cocaine that fell in the same subsection of § 841, say 50 grams or more of crack and five kilograms or more of powder

cocaine.[13] However, in *United States v. Taylor*, __ F.3d __, 2020 WL 7239632, *3 (11th Cir. Dec. 9, 2020), the court favorably resolved the issue, finding "a 'covered offense' covers a multidrug conspiracy offense that includes *both* a crack-cocaine element *and* another drug-quantity element." (Emphasis in original).

D. More to Be Done

The Fair Sentencing Act went into effect in 2010. Many of those convicted of crack cocaine sentences have served their sentence. Those still in custody are there because they received sentences of more than 10 years.[14] As time passes, the benefit of the First Step Act diminishes, as many with even the longer sentences are completing them. Those that now stand to benefit the most are those serving the longest sentences, 20 years, 30 years, or life. Those serving statutorily required life sentences for pre-*Apprendi* cases have the most difficult path. For most prisoners, the faster the resolution the greater the benefit. For those convicted of a § 841(b)(1)(C) offense persistence is more important. Some

[13]Also, five or more grams of crack and 500 grams or more of powder cocaine, both of which were the subject of § 841(b)(1)(B).

[14] Some may be there because, subsequent to their release, the court sentenced them for a violation of supervised release. They are eligible for relief, but, it may be harder to convince the court.

of the pre-*Apprendi* prisoners will need patience as their chances for relief rest with the fate of *Jones*.