

SECOND CIRCUIT REVIEW

Expert Analysis

Sentencing Under the First Step Act

The U.S. Court of Appeals for the Second Circuit last month issued its first published opinion examining the scope of relief offered to certain persons convicted of crack cocaine offenses under the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018). See *United States v. Holloway*, —F.3d—, No. 19-1035-cr, 2020 WL 1966840, at *4 (2d Cir. April 24, 2020). In an opinion written by Circuit Judge William Nardini, and joined by Circuit Judges Barrington Parker and Debra Livingston, the Second Circuit held that the First Step Act is a statutory source of sentencing relief independent from the U.S. Sentencing Guidelines or any other policy statement that may otherwise preclude a reduction in sentence.



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

The court joined the Third, Fourth and Sixth Circuit Courts of Appeal in holding that the First Step Act does not disqualify applicants from sentencing relief even when they fail to show a reduced advisory guideline range. See, e.g., *United States v. Wirsing*, 943 F.3d 175, 183 (4th Cir. 2019); *United States v. Beamus*, 943 F.3d 789, 792 (6th Cir. 2019); *United States v. Gibbs*, 787 F. App'x 71, 72 n.1 (3d Cir. 2019). In this opinion, one of the first written by recently confirmed Judge Nardini, the court declined to follow the reasoning of several district court decisions that limited applicants' eligibility for First Step Act sentencing relief.

The Fair Sentencing Act and the First Step Act

In August 2010, Congress enacted the Fair Sentencing Act, a law that attempted to reduce the disparity in sentencing for offenses involving crack and powder cocaine by raising the quantity of crack required to trigger certain mandatory minimum sentences. See *Dorsey v. United States*, 567 U.S. 260, 264 (2012). However, Congress only made the Fair Sentencing Act *prospective*, leaving any defendant sentenced prior to the law's August 2010 enactment ineligible for relief. *Id.* at 281.

Moreover, because the Fair Sentencing Act did not provide the courts with any explicit authorization to reduce a sentence, applicants could only rely on the U.S. Sentencing Commission's amendments to the sentencing guidelines to petition the court for relief. See *Wirsing*, 943 F.3d at 184. Specifically, applicants could

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss. OLEG M. SHIK, a litigation associate at the firm, assisted in the preparation of this column.

only seek relief under the Fair Sentencing Act pursuant to 18 U.S.C. §3582(c)(2), which allows district courts to reduce a sentence when a defendant's initial sentencing guideline range is lowered by the Sentencing Commission. *Id.*; U.S.S.G. §1B1.10(a)(2)(B) (prohibiting courts from reducing a sentence under §3582(c)(2) if changes to the sentencing guidelines do "not have the effect of lowering the defendant's applicable guideline range.").

In December 2018, Congress enacted the First Step Act, which expressly permits federal courts—subject to two exceptions not at issue on this appeal—to *retroactively* reduce the sentence of any defendant convicted of a "covered offense," defined as a "violation of a Federal criminal statute, the penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 that was committed before August 3, 2010." *Holloway*, 2020 WL 1966840, at *2.

The District Court's Ruling

In 2008, Jason Holloway pleaded guilty to possession with intent to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(A).

Id. at *1. Holloway further acknowledged that two prior convictions made him a career offender pursuant to U.S.S.G. §4B1.1. *Id.* In June 2010, the district court sentenced Holloway to 168 months incarceration, followed by 10 years of supervised release, the lowest end of the advisory guidelines and after including credit for cooperation with the government pursuant to U.S.S.G. §5K1.1. *Id.*

The decision represents a welcome development for defendants convicted of crack cocaine offenses who, prior to the First Step Act's enactment, were deprived of any avenues for relief because they were either sentenced prior to August 2010 or were classified as career criminals.

After the Fair Sentencing Act raised the quantity of crack cocaine triggering Holloway's initial sentencing range from 50 to 280 grams, Holloway repeatedly moved the district court for a reduction in sentence under §3582(c)(2). *Id.* at *2 n.1. The court denied his motions because Holloway's career offender status under the sentencing guidelines increased his guideline range to the point where none of the post-

Fair Sentencing Act guideline amendments had any "effect of lowering the defendant's applicable guideline range." *Id.* (citing §1B1.10(a)(2)(B)). Because Holloway's career offender status prevented any change to his guideline range, the court had no jurisdiction under §3582(c)(2) to lower Holloway's sentence under the Fair Sentencing Act. *Id.*

In February 2019, Holloway again moved for a reduction in sentence under the First Step Act, which the district court denied in a one-page order, finding that Holloway's career offender status again prevented any reduction of his guideline range, and thus deprived the court of jurisdiction under §3582(c)(2) to lower Holloway's sentence. See *id.* at *3. Several district courts have similarly ruled that First Step Act applicants must show a lower guideline range to be eligible for reductions in sentence. See, e.g., *United States v. Dunnigan*, 1:15-CR-00202 EAW, 2019 WL 4254028, at *2 (W.D.N.Y. Sept. 9, 2019); *United States v. Bolden*, Case No. 04-cr-80111-BLOOM, 2019 WL 2515005, at *3 (S.D. Fla. June 18, 2019); *United States v. Lewis*, No. CR 08-0057 JB, 2019 WL 2192508, at *19 (D.N.M. May 21, 2019) (stating that "First Step Act motions for sentence

reduction are [] §3582(c)(2) proceedings.”). Holloway timely appealed the denial of his First Step Act motion and, during the course of the appeal, the Bureau of Prisons released him from prison. *Id.*

The Second Circuit Opinion

The Second Circuit reversed the district court’s denial of relief. See *id.* at *5. First, the court held that Holloway’s release from prison did not render the appeal moot because the court could still “grant Holloway some form of ‘effectual relief’” by reducing his term of supervised release. See *id.* at *3 (internal citation omitted). Second, the court held that First Step Act motions for sentencing relief are “not properly evaluated under” §3582(c)(2) or any other guideline promulgated by the Sentencing Commission, but rather should be considered under §3582(c)(1)(B), which expressly permits district courts to directly “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.” *Id.* at *4.

The court reasoned that because motions for relief under the First Step Act are “based on the Act’s own explicit statutory authorization, rather than

on any action of the Sentencing Commission,” relief-seeking applicants are not bound by either §1B1.10(a)(2)(B)’s requirement to show a lower guideline range or “any other [Sentencing Commission] policy statement.” See *id.* Instead, a defendant’s eligibility under the First Step Act “turns only on the statutory criteria” of whether that defendant committed a covered offense whose statutory penalties were modified by §§2 or 3 of the Fair Sentencing Act. See *id.* at *3-4.

Because §2 of the Fair Sentencing Act lowered Holloway’s statutory sentencing range for possession with intent to distribute 50 or more grams of crack cocaine (from a minimum of 20 years to life in prison and 10 years of supervised release to a minimum of 10 years to life in prison and eight years of supervised release), the court found Holloway eligible for First Step Act relief regardless of his career offender status under the sentencing guidelines. *Id.* at *3. The court stressed, however, that mere *eligibility* for First Step Act relief does not *entitle* Holloway to any such relief, and that any potential reduction in sentence is “left to the district court’s sound discretion.” *Id.* at *5. The court remanded the case

to the district court to consider reducing Holloway’s supervised release term consistent with the court’s decision. *Id.*

Conclusion

Because the First Step Act provides courts with an explicit and independent source of authority to reduce sentences for eligible individuals, applicants need not show that the First Step Act lowers their sentencing ranges under the Sentencing Guidelines. The only inquiry relevant to a court’s determination of eligibility is whether the applicant committed a covered offense whose statutory penalties were modified by §§2 or 3 of the Fair Sentencing Act.

Although the court declined to delineate when an applicant may be entitled to—rather than merely eligible for—sentencing relief, the decision nonetheless represents a welcome development for defendants convicted of crack cocaine offenses who, prior to the First Step Act’s enactment, were deprived of any avenues for relief because they were either sentenced prior to August 2010 or were classified as career criminals.