UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA — against — DESHAWN MILES, Defendant.	**07-cr-00890 (ARR)** **Opinion & Order**

ROSS, United States District Judge:

The defendant, Deshawn Miles, has filed a motion to reduce his sentence pursuant to the First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 ("First Step Act" or "Act"). The First Step Act made retroactive certain provisions of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 ("Fair Sentencing Act"). Since the passage of the First Step Act, many courts around the country have granted motions to reduce previously-imposed sentences under its retroactivity provisions. Miles's motion, however, presents an issue of first impression: whether relief under the First Step Act is available for an already-served sentence if the defendant remains in federal custody serving a consecutive sentence for an unrelated offense. Because I conclude that a sentence reduction in these circumstances is consistent with the policy behind the First Step Act and is not otherwise limited by any provision of the Act, I answer this question in the affirmative. Thus, I grant Miles's motion and reduce his sentence accordingly.

BACKGROUND

I. 2009 Sentence

On January 17, 2008, Deshawn Miles was charged by superseding indictment with conspiring to distribute heroin and cocaine base and distributing cocaine base and marijuana, in

violation of 21 U.S.C. §§ 841(a)(1), 846. *See* Superseding Indictment, 1–2, 4, 10, ECF No. 2.[1] He ultimately pled guilty to count five of the superseding indictment: distributing at least 50 grams of a substance containing cocaine base in violation of 21 U.S.C. § 841(a)(1). *See* Min. Entry, July 22, 2008, ECF No. 107. During his plea hearing, Miles told the court that he had sold at least 50 grams of crack cocaine. *See* Plea Tr. 16:16–17:5, ECF No. 268. At the time, a person convicted of distributing "50 grams or more of a mixture or substance . . . which contains cocaine base" faced a statutory mandatory minimum of "not less than 10 years" imprisonment and at least 5 years of supervised release. 21 U.S.C. § 841(b)(1)(A) (effective July 27, 2006, to Apr. 14, 2009).

Prior to sentencing, the Probation Department completed a pre-sentence investigation report ("PSR") that detailed Miles's conduct and history. The PSR stated that Miles was responsible for distributing "at least 62 grams of crack-cocaine between January 2006 and October 2007." PSR 8.[2] Using this quantity, the PSR identified Miles's base offense level as 30 and subtracted three levels for acceptance of responsibility. PSR 10–11. Based on an adjusted offense level of 27 and a criminal history category of III, the PSR calculated Miles's sentencing guidelines range at 87 to 108 months of imprisonment. PSR 22. However, the report noted that the statute mandated a term of imprisonment of at least ten years, despite the lower guidelines that applied to Miles's conduct. *Id.* Miles, represented by attorney Robert P. LaRusso, responded to the PSR on

[1] Unless otherwise specified, all citations to the record refer to docket number 07-cr-00890.

[2] In an addendum to the pre-sentence report filed on December 16, 2008, the Probation Department informed the court that, in addition to the "62.9 grams of crack cocaine" attributed to Miles in the PSR, Miles was also responsible for selling an additional "54.1 grams of the same drug on January 24, 2007." Addendum to PSR. This put the total quantity of cocaine base attributed to Miles at 117 grams. *Id.* The Addendum observed that this change did not impact the statutory mandatory minimum or Miles's guidelines calculations, as "the offense still involve[d] at least 50 grams but less than 500 grams of cocaine base." *Id.* Though the defendant's sentencing memorandum did not specifically address the PSR addendum, Miles did not object to the PSR's adjusted offense level or criminal-history calculations. During his plea hearing, Miles's attorney further asserted that he would not "contest the lab reports" that found that Miles was responsible for distributing 116 grams of crack cocaine. Plea Tr. 14:10–20.

January 21, 2009. *See* Def.'s Sentencing Mem., ECF No. 181. He asserted that "the PSR correctly calculated the defendant['s] criminal history . . . resulting in a recommended prison range of 87 to 108 months," but acknowledged that the court was obligated to impose a prison sentence of at least ten years due to the then-applicable statutory minimum. *Id.* at 1–2; *see also* Ross Sentencing Tr. 2:23–3:1, ECF No. 343 ("I know the presentence report has properly calculated the guideline range for Mr. Miles at 87 to 108 months"). The government responded on February 19, 2009 and did not object to the PSR's sentencing guidelines calculations. *See* Gov't Sentencing Mem., ECF No. 187.

On March 24, 2009, I sentenced Miles to 120 months of incarceration to be followed by a five-year term of supervised release. *See* Min. Entry, Mar. 24, 2009, ECF No. 193; *see also* Ross Sentencing Tr. 5:13–21. I observed that I was sentencing Miles to "the mandatory minimum" term of imprisonment, and I recommended that "he receive[] credit on this federal sentence from the date he was removed from state custody[,] which we believe to be January 27, of 2008." Ross Sentencing Tr. 5:13–15, 6:22–24. The court recently received confirmation from the Probation Department that Miles received good-time credit from the Bureau of Prisons for this sentence and that he officially completed his ten-year term of imprisonment on December 11, 2016.

II. 2012 Sentence

While he was serving the ten-year sentence I imposed on March 24, 2009, Miles was indicted and charged with Hobbs Act robbery conspiracy, attempted Hobbs Act robbery, and unlawful use of a firearm. *See* Sealed Indictment 1–2, No. 10-cr-00777, ECF No. 1. He pleaded guilty to count one of the indictment—Hobbs Act robbery conspiracy—on April 11, 2011. *See* Min. Entry, Apr. 11, 2011, No. 10-cr-00777, ECF No. 44. On December 1, 2011, Judge Gleeson sentenced Miles to a nine-year term of imprisonment to run consecutively to the ten-year sentence

I had previously imposed, followed by four years of supervised release.[3] *See* Min. Entry, Dec. 1, 2011, No. 10-cr-00777, ECF No. 64; J. Criminal Case 2–3, No. 10-cr-00777, ECF No. 66. After observing that Miles's projected release date for the ten-year sentence I had previously imposed was November 2016,[4] Judge Gleeson ruled that, "[r]ather than impose a sentence and make it partially concurrent," he would "impose a sentence that reflects the amount of time over and above the 120 months sentence that the defendant ought to and will serve for the offense and conviction before [him]." Gleeson Sentencing Tr. 100:3–11, No. 10-cr-00777, ECF No. 69. He imposed "a consecutive sentence nine years in length," or 108 months. *Id.* at 100:11–12.[5]

III. The Instant Motion

On January 3, 2019, Miles filed the instant motion as a habeas petition pursuant to 28 U.S.C. § 2255. Def.'s Pet., ECF No. 334. He asserts that section 404 of the First Step Act

[3] On appeal, the Second Circuit ruled that the statutory maximum term of supervised release was three years and remanded the case for the purpose of amending the judgment accordingly. *See* Mandate of USCA, Apr. 26, 2013, No. 10-cr-00777, ECF No. 91; *see also* Am. J. Criminal Case 3, No. 10-cr-00777, ECF No. 137. On June 22, 2016, the case was reassigned to Chief Judge Irizarry. *See* Order Reassigning Case, June 22, 2016, No. 10-cr-00777.

[4] As stated above, the Bureau of Prisons and the Probation Department recently informed the court that Miles's 120-month sentence expired on December 11, 2016, rather than in November 2016.

[5] Prior to sentencing Miles, Judge Gleeson held a *Fatico* hearing during which he heard evidence from the government that Miles had participated in a murder that "occurred a little more than six months after the robbery." *See Gleeson* Sentencing Tr. 6:5–6. The murder was not considered conduct that was relevant to the robbery and it was not used to increase Miles's sentencing guidelines; instead, the government presented evidence at the hearing so that Judge Gleeson could take the conduct into consideration as an element of Miles's history and characteristics, pursuant to section 1B1.4 of the sentencing guidelines and 18 U.S.C. § 3553(a). *See* Gleeson Sentencing Tr. 7:4–8:12, 60:1–6. After considering the evidence, Judge Gleeson concluded that the government had proven by a preponderance of the evidence that Miles shot and killed the decedent. *Id.* at 72:13–16. While Judge Gleeson chose to consider this evidence in imposing a sentence for the Hobbs Act robbery conspiracy, he also acknowledged that the "heart of the case" was the Hobbs Act conviction; thus, he concluded that while his findings with respect to the homicide could be considered during sentencing, they were not "a substitute for a charge and a trial and a conviction beyond a reasonable doubt of the defendant for that shooting." *Id.* at 96:17–25, 97:11–15. Judge Gleeson asserted that his "focus" was on the violen[t] crime [Miles] committed, exacerbated somewhat by this admission of a shooting." *Id.* at 99:24–25. Accordingly, he sentenced Miles to a slightly above-guidelines period of imprisonment of 108 months, or 9 years. *Id.* at 100:7–13; *see also id.* at 3:5–11 (observing that Miles's sentencing guideline range was 84 to 105 months).

authorizes the court to reduce his sentence below the ten-year mandatory minimum previously imposed. *See id.* at 5. The government's initial opposition letter was filed on February 28, 2019. *See* Gov't Opp'n, ECF No. 339. On March 27, 2019, I ordered the government to file a supplemental brief "that identifies the legal basis" for the government's arguments regarding defendant's ineligibility for relief. *See* Order, Mar. 27, 2019. The government's response was filed on April 1, 2019, *see* Gov't Supp. Br., ECF No. 342, and Miles subsequently filed a reply brief, dated April 11, 2019, which was received by the court on April 18, 2019, *see* Def.'s Reply, ECF No. 344.

APPLICABLE LAW

Miles's motion relies primarily on two statutes: the Fair Sentencing Act, which Congress passed and the President signed in 2010, and the First Step Act, which Congress passed and the President signed in 2018. I briefly describe the relevant provisions of each before addressing Miles's eligibility for a sentence reduction.

I. The Fair Sentencing Act

Congress enacted the Fair Sentencing Act in 2010 "to reform a penalty structure for crack cocaine offenses that was considered by many to be overly harsh and to have a disparate heavy impact on African-American defendants." *United States v. Simons*, No. 07-CR-00874, 2019 WL 1760840, at *3 (E.D.N.Y. Apr. 22, 2019); *see also* Fair Sentencing Act of 2010, PL 111-220, 124 Stat. 2372, 2372 (declaring that the Act is intended to "restore fairness to Federal cocaine sentencing"). In accordance with this goal, "[t]he Fair Sentencing Act lowered the statutory penalties for some offenses involving crack cocaine, reducing the sentencing disparity between crack and powder cocaine from 100:1 to 18:1." *Simons*, 2019 WL 1760840, at *3; *accord Dorsey v. United States*, 576 U.S. 260, 269 (2012). Section 2 of the Fair Sentencing Act increased the amount of cocaine base that triggers a ten-year statutory mandatory minimum period of

incarceration from 50 grams to 280 grams. § 2, 124 Stat. at 2372; *see also Dorsey*, 576 U.S. at 269. The Act also adjusted the minimum drug amount required to trigger a mandatory five-year period of incarceration from five grams to 28 grams. § 2; *see also Dorsey*, 576 U.S. at 269. Finally, the Act reduced the mandatory term of supervised release for certain quantities of drugs; defendants convicted of distributing between 28 grams and 280 grams of cocaine base are now subject to a mandatory term of supervised release of at least four years, as opposed to five years. *See* 21 U.S.C. § 841(b)(1)(B).

The new statutory mandatory minimum sentences did not apply retroactively, however. In 2012, the Supreme Court held in *Dorsey v. United States* that the Act's sentencing adjustments applied only to defendants who were sentenced after August 3, 2010, regardless of when the crimes were committed. 567 U.S. at 281–82. Therefore, because Miles was sentenced by me on March 24, 2009, he was not eligible for a reduction in his sentence under the new mandatory minimums established by the Fair Sentencing Act.

II. The First Step Act

In 2018, Congress enacted the First Step Act—"the result of a bipartisan legislative effort to moderately overhaul the criminal justice system." *Simons*, 2019 WL 1760840, at *4–5 (citing legislative history and observing that the impetus behind the passage of the Act was a growing concern about the increasing costs of incarceration and the resulting drain on public safety funding). Among other things, the Act made retroactive some of the sentencing amendments of the Fair Sentencing Act. *See United States v. Shelton*, No. 3:07-329 (CMC), 2019 WL 1598921, at *1 (D.S.C. Apr. 15, 2019); *United States v. Maxwell*, No. 2:09-033-DCR, 2019 WL 1320045, at *2 (E.D. Ky. Mar. 22, 2019), *appeal docketed*, No. 19-5312 (6th Cir. Apr. 2, 2019); *United States v. Sampson*, 360 F. Supp. 3d 168, 169 (W.D.N.Y. 2019). Section 404 of the First Step Act

allows—but does not require—courts that "imposed a sentence for a covered offense" to use the new statutory minimums from the Fair Sentencing Act to "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." § 404(b), 132 Stat. at 5222 (citation omitted). The retroactive provisions apply only to defendants who were sentenced for a "covered offense." *Id.* The Act defines a "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) (citation omitted). The court that imposed the sentence for the covered offense may impose a reduced sentence "on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court." *Id.* § 404(b).

Section 404 also includes two limitations that restrict the court's ability to apply the provisions of the Fair Sentencing Act in specific contexts. The limitations section provides that:

> 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 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.

Id. § 404(c). The last sentence in section 404(c) clearly demonstrates that "[r]elief under the First Step Act is discretionary." *Simons*, 2019 WL 1760840, at *5; *see also* Gov't Opp'n 2 n.1.

DISCUSSION

I. Defendant's motion is properly construed as a motion brought under 18 U.S.C. § 3582(c)(1)(B).

Though Miles styled his motion as a habeas petition brought pursuant to 28 U.S.C. § 2255, I agree with the government that Miles's motion is better analyzed under 18 U.S.C. § 3582(c)(1)(B). *See* Gov't Supp. Br. 1–2. Section 3582(c) provides several exceptions to the general

rule that a "court may not modify a term of imprisonment once it has been imposed." § 3582(b)–(c). Section 2255, on the other hand, allows a "prisoner in custody" to ask a court to "vacate, set aside or correct [his] sentence" on the grounds that "the sentence was imposed in violation of the Constitution or laws of the United States, . . . the court was without jurisdiction to impose such sentence, . . . the sentence was in excess of the maximum authorized by law, or [the sentence] is otherwise subject to collateral attack." § 2255(a). As the government argues—and as other courts have found—"Section 2255 is not the appropriate vehicle to move for resentencing under the First Step Act." Gov't Supp. Br. 2; *see also United States v. Drayton*, No. 10-20018-01-KHV, 2019 WL 464872, at *1–2 (D. Kan. Feb. 6, 2019) (concluding that a defendant's claim for resentencing under the First Step Act "does not satisfy the authorization standards under Section 2255" because the First Step Act does not constitute "newly discovered evidence" or "a new rule of constitutional law"). When I sentenced Miles to the statutorily-mandated minimum of ten years in prison in 2009, the sentence did not violate the Constitution or laws of the United States, and the First Step Act does not render the sentence otherwise invalid. In fact, as the government emphasizes, the First Step Act does not *require* resentencing—"it merely allows courts, in their discretion, to impose a reduced sentence." Gov't Supp. Br. 2.

Instead, 18 U.S.C. § 3582(c)(1)(B) is the appropriate mechanism for a defendant to bring a motion for resentencing under the First Step Act. That statutory subsection authorizes a court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." Because "the First Step Act . . . expressly provide[s] . . . authority to modify a term of imprisonment," section 3582(c)(1)(B) allows a court to make use of the First Step Act's retroactivity provisions to reduce a defendant's previously-imposed sentence. *United States v. Kamber*, No. 09-cr-40050-JPG, 2019 WL 399935,

at *2 (S.D. Ill. Jan. 31, 2019); *see also United States v. Davis*, No. 07-CR-245S (1), 2019 WL 1054554, at *2 (W.D.N.Y. Mar. 6, 2019) ("This Court has construed [defendant's] motion as one brought under 18 U.S.C. § 3582(c)(1)(B), which permits modification of an imposed term of imprisonment to the extent expressly permitted by statute."), *appeal docketed*, No. 19-874 (2d Cir. Apr. 5, 2019).

Moreover, § 3582(c)(1)(B) is a more fitting statutory vehicle for the application of the First Step Act to Miles's case than § 3582(c)(2). Section 3582(c)(2) authorizes a court to reduce a term of imprisonment where the sentencing range "has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)." Before utilizing this subsection to modify a sentence, the court must "consider[] the factors set forth in section 3553(a) to the extent that they are applicable" and the court must ensure that any sentence reduction "is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2). Here, however, Miles seeks a sentence reduction based on a federal statute—*not* amendments to the Sentencing Guidelines. Therefore, Miles's motion is properly analyzed under 18 U.S.C. § 3582(c)(1)(B). *See United States v. Ward*, No. 01-40050-01-DDC, 2019 WL 1620439, at *3 n.4 (D. Kan. Apr. 16, 2019); *see also Kamber*, 2019 WL 399935, at *2 (rejecting arguments that § 3582(c)(2) applied to defendant's motion and applying § 3582(c)(1)(B) instead).

II. Defendant is eligible for relief under section 404 of the First Step Act.

The First Step Act envisions a two-step process for the reduction of a sentence in accordance with the penalties established in the Fair Sentencing Act. First, "the court must . . . consider whether the defendant is eligible for a reduction in sentence. Second, if the defendant is eligible for reduction, the court must determine whether, and to what extent, a reduction is warranted." *United States v. Jackson*, No. 5:93CR300245-004, 2019 WL 1091381, at *1 (W.D.

Va. Mar. 8, 2019). I begin by explaining my conclusion that Miles is eligible for relief under the First Step Act before turning to the sentence reduction that is warranted in this case.

Section 404 allows a court to reduce a defendant's sentence if: (1) the defendant was previously sentenced for a covered offense by the court, and (2) none of the statutory limitations apply. *See* First Step Act, § 404; *see also United States v. Coleman*, No. 7:06-cr-00027, 2019 WL 1522880, at *2 (W.D. Va. Apr. 8, 2019) (concluding that the defendant "meets all the criteria to be eligible for a reduction under Section 404 of the First Step Act" because he was sentenced to a covered offense). Miles meets both of these requirements. As stated above, I previously sentenced him to the statutorily mandatory term of ten years in prison for distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1). Because the minimum penalties for violations of 21 U.S.C. § 841(a)(1) were modified by section 2 of the Fair Sentencing Act, Miles was sentenced to a "covered offense" as defined by the First Step Act. *See* First Step Act, § 404(a) (defining a "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" (citation omitted)). Specifically, Miles pleaded guilty to distributing at least 50 grams of crack cocaine between January 2006 and October 2007—well before the passage of the Fair Sentencing Act. Under the Fair Sentencing Act, the distribution of any quantity of crack cocaine between 28 and 280 grams now carries a statutory mandatory term of imprisonment of five years, as opposed to the previous ten-year mandatory minimum.[6] *See* 21 U.S.C. § 841(b)(1)(B)

[6] As stated above, *see supra* Background Part I and note 2, although the indictment charged Miles with distributing at least 50 grams of cocaine base, the PSR asserted that the government established that he had distributed at least 62 grams, and Miles did not object to the PSR's calculations or to the lab reports. Additionally, an addendum to the PSR asserted that Miles was actually responsible for distributing 117 grams of the drug. These distinctions do not affect Miles's eligibility for relief under the First Step Act, however, as he did not distribute "280 grams or more of a mixture or substance . . . which contains cocaine base"—the new quantity required to trigger a ten-year, as opposed to five-year, mandatory minimum. 21 U.S.C. § 841(b)(1)(A)(iii).

(effective December 21, 2018); *see also* Fair Sentencing Act, § 2. As such, the statutory penalties that applied at the time of Miles's 2009 sentencing have since been reduced by the Fair Sentencing Act, and Miles is thus eligible to seek a reduction in accordance with the First Step Act. *See, e.g.*, *Ward*, 2019 WL 1620439, at *4 (concluding that defendant qualifies for a sentence reduction under the First Step Act because "Section 2 of the Fair Sentencing Act reduced the penalty under" the statute of conviction).

None of the limitations enumerated in section 404(c) of the First Step Act render Miles ineligible for relief under the statute. Miles's sentence was imposed in 2009, well before the passage of the Fair Sentencing Act, so his sentence has not been "previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010." § 404(c).[7] Likewise, Miles has not made a previous motion under the First Step Act that was "denied after a complete review of the motion on the merits." *Id.* To the contrary, the instant motion is his first and only motion brought pursuant to the retroactivity provisions of the First Step Act.

While the government "does not concede that the defendant would be eligible for any relief under the Act," Gov't Opp'n 2, it does not dispute that Miles was sentenced to a "covered offense," and it does not argue that any of the statutorily enumerated limitations apply to his case. Instead, the government argues that Miles may not take advantage of the First Step Act's retroactivity provisions because Miles has already finished serving the ten-year period of incarceration to which

[7] On February 14, 2012, Miles wrote a letter to this court asking "whether he might be eligible for retroactive sentencing credit based on either the 2011 Amendments to the United States Sentencing Guidelines," section 2D1.1(c), or the Fair Sentencing Act of 2010. Order, June 20, 2012, ECF No. 265; *see* Letter, Feb. 14, 2012, ECF No. 264. I informed Miles that he could not benefit from either law, as the Fair Sentencing Act was not retroactive and Miles was sentenced to the statutory mandatory minimum, as opposed to a within-guidelines term of incarceration. Order, June 20, 2012.

I sentenced him in 2009, even though he remains incarcerated while serving a second, consecutive sentence on a different offense. *See* Gov't Supp. Br. 2–3.

The government's arguments are unsupported by the plain language of the First Step Act and § 3582(c)(1)(B). Section 3582(c)(1)(B) authorizes modification of a sentence when it is "expressly permitted by statute." In this case, and as other courts have held, the First Step Act expressly authorizes a sentence reduction if a defendant was previously convicted of a "covered offense." The text of the First Step Act contains no limitations that would prohibit a defendant like Miles from taking advantage of the retroactivity of the Fair Sentencing Act. Neither of the limitations enumerated in the Act apply to Miles, and I am not persuaded by the government's attempts to read a third limitation—that the defendant must *currently* be serving the sentence imposed for the "covered offense"—into the statute. *See United States v. Pugh*, No. 5:95 CR 145, 2019 WL 1331684, at *2 (N.D. Ohio Mar. 25, 2019) (concluding that the defendant was entitled to relief under the First Step Act because section 404(c) "places only two limitations on a court's authority to 'entertain a motion' under the act" and "[n]either of those circumstances exist[ed]" there); *cf. John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 405 (2d Cir. 2018) ("[T]he interpretive canon of *expressio unius est exclusio alterius* instructs that Congress's expression of one or several items in an enumerated list typically reflects an intent to 'exclude[] another left unmentioned.'" (quoting *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)).

I am also unconvinced by the analogies that the government seeks to draw between § 3582(c)(2) and § 3582(c)(1)(B). The government acknowledges that the Second Circuit has not addressed the question whether a defendant serving a consecutive sentence for a separate offense can move under § 3582(c)(1)(B) to seek modification of a sentence that he has already completed. *See* Gov't Supp. Br. 2. However, the government cites cases from other circuits that have held that

relief under section 3582(c)(2)—a related but distinct statutory subsection—is unavailable for an already-served sentence. *Id.* at 2–3 (citing cases) As described above, *see supra* Discussion Part I, § 3582(c)(2) authorizes a court to resentence a defendant in accordance with amendments to the sentencing guidelines "*if* such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2) (emphasis added). The relevant Sentencing Commission policy statement is memorialized in section 1B1.10 of the Sentencing Guidelines Manual, which cautions that "[i]n no event may the reduced term of imprisonment [imposed pursuant to 18 U.S.C. § 3582(c)(2)] be less than the term of imprisonment the defendant has already served." U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(C) (U.S. Sentencing Comm'n 2018).

All of the cases cited by the government relied heavily on this policy statement in holding that defendants may not seek a sentence reduction under § 3582(c)(2) for already-completed terms of imprisonment. *See United States v. Chapple*, 847 F.3d 227, 230 (5th Cir. 2017) (denying § 3582(c)(2) relief to defendant because he "had already served the sentence that was eligible for reduction" and thus his "motion was not consistent with § 1B1.10" (internal quotation marks omitted)); *United States v. Vaughn*, 806 F.3d 640, 643 (1st Cir. 2015) (holding that the defendant "is ineligible for relief" under an amendment to the Sentencing Guidelines "because he has already served the entirety of his otherwise eligible sentence" and the policy statement forbids reduction in these circumstances); *United States v. Llewlyn*, 879 F.3d 1291, 1294–95 (11th Cir.) (same), *cert. denied*, 138 S. Ct. 2585 (2018); *United States v. Parker*, 472 F. App'x 415, 417 (7th Cir. 2012) (same); *United States v. Gamble*, 572 F.3d 472, 475 (8th Cir. 2009) (same).[8] Put differently, these

[8] As the government notes, these cases also "reject analogies to Section 2255" in determining that a defendant may not seek relief under § 3582(c)(2) for an already-completed sentence. Gov. Supp. Br. 3 (citing cases). If defendant's motion was properly construed as a motion under § 2255, the Supreme Court's decision in *Garlotte v. Fordice* would allow him to challenge an already-completed sentence, as he would

cases all deny sentence modifications based on policy limitations that are specific to the Sentencing Guidelines, rather than a policy limitation that is *inherent* to § 3582 itself.

Here, there is no policy statement akin to the limitation enumerated in section 1B1.10 that would restrict Miles's entitlement to relief under § 3582(c)(1)(B) or the First Step Act. To the contrary, both the First Step Act and the Fair Sentencing Act are animated by an overarching policy in favor of "sending fewer people to prison, imposing shorter sentences for drug crimes, and reducing the sentencing disparity between crack and powder cocaine offenses." *Simons*, 2019 WL 1760840, at *1; *see also id.* at *4–5 (quoting legislative history of the First Step Act for the proposition that Congress was motivated by a desire to reduce the prison population and relieve the burden on public safety spending). Though Miles is no longer serving the sentence I imposed in 2009, a reduction in that sentence is consistent with these goals. Because Miles is currently serving a consecutive sentence that began immediately after he completed the 120-month sentence I imposed in 2009, a modification to the 2009 sentence would result in Judge Gleeson's sentence beginning earlier, thus reducing the amount of time left on Miles's total period of incarceration.

The government argues that Miles would not be entitled to relief if he "had not committed additional crimes for which he received an additional sentence." Gov't Supp. Br. 3. It is true that no relief would be available to Miles if he was not serving a subsequent consecutive sentence; if that were the case, he would have already been released from federal custody. However, because the start date of Judge Gleeson's sentence was explicitly tied to the end of the 120-month sentence

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remain "in custody" while serving a consecutive sentence for a different offense. *See* 515 U.S. 39, 41 (1995); *see also* Gov't Supp. Br. 2 ("For purposes of this response, the government does not contest that *Garlotte* would apply to a habeas corpus petition under these circumstances"). Because Miles's claim is properly analyzed under section 3582(c)(1)(B), he need not rely upon analogies to section 2255. Instead, he is eligible for a sentence reduction based on the plain language of the First Step Act, which imposes no limitations on relief when a defendant remains in custody on a consecutive sentence and seeks to challenge an already-served sentence.

I imposed, relief is possible in this case. There is nothing in the First Step Act or § 3582(c)(1)(B) that suggests that such relief is inconsistent with federal policy or otherwise prohibited by the Act.

I am similarly unconvinced by the government's argument that a reduction in Miles's 2009 sentence would be inconsistent with Judge Gleeson's 2011 sentence, *see id.* During Miles's sentencing hearing, Judge Gleeson observed that he was "impos[ing] a sentence that reflects the amount of time over and above the 120 months sentence that the defendant ought to and will serve for the offense and conviction before [him]." Gleeson Sentencing Tr. 100:8–11. He explicitly noted that he was choosing to impose a consecutive sentence "[r]ather than impose a sentence and make it partially concurrent." *Id.* at 100:7–8. Contrary to the government's argument, I cannot conclude from the sentencing transcript that "Judge Gleeson would have imposed a 14-year sentence, instead of a nine-year sentence" if Miles's earlier sentence had been five years instead of ten, Gov't Supp. Br. 3. The quoted language from Judge Gleeson's sentencing hearing establishes only that Judge Gleeson intended his sentence to run consecutively to my 2009 sentence. The sentencing transcript reveals that Judge Gleeson sentenced Miles to a period of incarceration that he deemed appropriate based on all relevant factors, including the nature of the charges and the evidence presented at the *Fatico* hearing. While a reduction in Miles's 2009 sentence will lead to his earlier release from federal custody, it does not alter the fact that Miles will have to serve 108 months in prison on the sentence imposed by Judge Gleeson.

Thus, because there are no limitations in the First Step Act that forbid the court from granting relief, I conclude that Miles is eligible for a sentence reduction under the First Step Act.[9]

[9] Many of the courts that have granted relief under the First Step Act have chosen to resentence defendants to time served, rather than reduce a sentence to a period *below* the amount of time that the defendant has already served. *See, e.g., United States v. Laguerre*, No. 5:02-cr-30098-3, 2019 WL 861417, at *3 (W.D. Va. Feb. 22, 2019) (resentencing a defendant to time served because "the need to protect the public and the need for deterrence dictates that a defendant not be allowed to 'bank time,' which could allow him to commit further crimes without the fear of imprisonment"). Some of these courts have relied upon the policy

III. Defendant is hereby resentenced to eighty-seven months' imprisonment followed by four years of supervised release.

After concluding that a defendant is eligible for a sentence reduction under section 404 of the First Step Act, a court must determine "whether, and to what extent, a reduction is warranted." *Jackson*, 2019 WL 1091381, at *1. The First Step Act does not entitle a defendant to a new sentencing hearing or to a complete "reconsideration of original sentencing determinations." *Shelton*, 2019 WL 1598921, at *2. Instead, the Act "simply permits a court to 'impose a reduced sentence' as if the Fair Sentencing Act's increased cocaine base requirements 'were in effect at the time the covered offense was committed.'" *Id.* (quoting First Step Act § 404); *see also United States v. Russo*, No. 8:03CR413, 2019 WL 1277507, at *1 (D. Neb. Mar. 20, 2019) ("[T]he Court cannot conclude that the First Step Act anticipates a full re-sentencing with application of laws and Guidelines that have changed since a defendant's original sentencing, other than the retroactive application of the reduced penalties for crack cocaine set out in the Fair Sentencing Act."); Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [for a resentencing if] [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).").

In this case, I exercise my discretion to sentence Miles to a reduced sentence of 87 months of incarceration, as opposed to the 120-month sentence I previously imposed. At the time of sentencing, Miles's guidelines range was 87 months to 108 months imprisonment—a range that

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statement contained in section 1B1.10 of the Sentencing Guidelines Manual in drawing this conclusion. *E.g., Id.* (concluding that the rationale for imposing a sentence of "time served" is guided by the same policy that "underlie[s] the express prohibition on a court's reduction of a sentence below time served when reducing based on a sentencing guideline amendment"). The concerns and motivations that guided these courts do not apply to the circumstances here, however. Though Miles has already completed the sentence I previously imposed, a reduction below the time he has already served will not allow him to "bank time" that can be credited against future sentences. Instead, it will simply result in Judge Gleeson's sentence beginning earlier. Miles will still be required to fully complete both sentences—my modified 2009 sentence and Judge Gleeson's 2011 sentence—before he can be released from federal custody.

was conceded by all parties. *See supra* Background Part I. However, the statutory minimum that applied at the time required that I sentence him to at least 120 months in prison. Based on the retroactive provisions of the Fair Sentencing Act, the statutory minimum that applies to Miles's crime today is five years. *See* 21 U.S.C. § 841(b)(1)(B). Though Miles's guidelines range remains unchanged,[10] this fact alone does not render him ineligible for relief under the First Step Act. *See Shelton*, 2019 WL 1598921, at *2 ("[N]othing in the First Step Act conditions eligibility for a reduced sentence on a lowered guideline range.").

Because the mandatory ten-year term of imprisonment no longer applies, I am now able to sentence Miles to a term of imprisonment within his guidelines range. If I had had this option in 2009, I would have sentenced him to a term of incarceration at the lowest end of his guidelines. Now, I exercise my discretion under the First Step Act to do so, and I reduce his sentence accordingly. As the government concedes, the First Step Act also authorizes me to reduce Miles's period of supervised release. *See* Gov't Supp. Br. 4. Because he is now entitled to a four-year—rather than five-year—period of supervised release, *see* § 841(b)(1)(B), I impose a reduced period of supervised release.

Accordingly, and for the reasons stated above, it is hereby ORDERED that:

1. Miles's sentence is reduced from 120 months to 87 months' imprisonment.
2. Miles's period of supervised release is reduced from five years to four years.

[10] Though the Sentencing Guidelines have been amended since Miles's sentencing and these amendments would likely result in a lower base offense level for the quantity of drugs Miles distributed, section 1 B1.10 of the Sentencing Guidelines Manual and 18 U.S.C. § 3582(c)(2) collectively forbid the use of guidelines amendments to reduce a term of imprisonment below the amount of time already served. *See supra* Discussion Part I; *see also Russo*, 2019 WL 1277507, at *1 (observing that the First Step Act does not entitle a defendant to "a full re-sentencing with application of laws and Guidelines that have changed since a defendant's original sentencing"). Some courts have nevertheless used the retroactivity provisions of the First Step Act to apply reduced sentencing guidelines to defendants who have moved for modifications under the First Step Act. *See, e.g.*, *Laguerre*, 2019 WL 861417, at *3. However, because Miles has officially completed the sentence I imposed in 2009 and the Sentencing Guidelines policy statements forbid the use of amendments to the guidelines to reduce a term of imprisonment below the time "already served," U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(C), I conclude that the better course of action here is to apply Miles's guidelines range as it was calculated in 2009.

3. The Clerk of Court is directed to enter an amended judgment and conviction reflecting the terms of this order.

Date: April 25, 2019
Brooklyn, New York

_____/s/_____
Allyne R. Ross
United States District Judge