No. 20-6075

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ALEJANDRO SALINAS GARCIA,

Appellant.

On Appeal from the United States District Court
For the Western District of North Carolina (5:09-CR-00025-KDB-DCK)

REPLY BRIEF

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ARGUMENT

I. Mr. Garcia is entitled to relief under the First Step Act because he was convicted of a "covered offense" and did not already receive the benefit of the Fair Sentencing Act.

The District Court erred when it summarily denied Mr. Garcia's motion for resentencing pursuant to the First Step Act of 2018. Pub. L. No. 115-391, 132 Stat. 5194 (2018). A defendant convicted of a covered offense under the First Step Act may receive a resentencing consistent with the Fair Sentencing Act so long as his sentence was not previously imposed or reduced under the Fair Sentencing Act. First Step Act § 404(a)–(c); *United States v. Wirsing*, 943 F.3d 175, 185–86 (4th Cir. 2019); *see* Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010). *See generally Dorsey v. United States*, 567 U.S. 260 (2012).

Mr. Garcia was sentenced for a covered offense because the penalty for his cocaine base charge was lowered by the Fair Sentencing Act. *See United States v. Gravatt*, 953 F.3d 258, 263 (4th Cir. 2020). The Government agrees. (*See* Appellee's Br. 14.) Moreover, Mr. Garcia has never received the Fair Sentencing Act's benefits. Mr. Garcia's revised final presentencing report was filed in September 2011. (J.S.A. at 2.) At that time, this Court's decision in *United States v. Bullard* held that defendants like Mr. Garcia, who committed their offenses before the Fair Sentencing Act's promulgation, could not receive its benefits. *See Bullard*, 645 F.3d 237, 249 (4th Cir.

2011). It was not until mere months before Mr. Garcia was sentenced that the Supreme Court indicated that defendants like Mr. Garcia could benefit from the Act. *Dorsey*, 567 U.S. at 281. And it was another year still until this Court formally recognized that *Bullard*'s holding on the retroactivity of the Fair Sentencing Act could no longer stand in light of *Dorsey*. *See United States v. Allen*, 716 F.3d 98, 107 (4th Cir. 2013). As a result, the PSR was never updated post-*Dorsey*. Thus, when the Sentencing Court adopted the PSR "for all purposes" at sentencing, it never considered on the record the Fair Sentencing Act or how it applied to Mr. Garcia. (J.A. at 128–29.)

Yet here, the District Court denied Mr. Garcia's motion simply by virtue of his sentencing date, without delving into the record to see if he actually received the benefit of the Fair Sentencing Act. The date of sentencing alone is not determinative of whether Mr. Garcia received the benefit—especially when the record shows Mr. Garcia has *not* received the benefit of the Fair Sentencing Act. Accordingly, Mr. Garcia is eligible for relief under the First Step Act. *See* § 404(c). This Court should remand so that Mr. Garcia's motion can be considered on its merits.

A. Under *United States v. Gravatt*, the powder cocaine aspect to the charged drug conspiracy is irrelevant to whether Mr. Garcia is entitled to a resentencing under the First Step Act.

The Government admits two key points in its brief. First, it admits that Mr. Garcia was convicted of a covered offense under the First Step Act because the penalty for his cocaine base charge was lowered by the Fair Sentencing Act. (*See* Appellee's Br. 14.) However, the Government then goes on to argue that because Mr. Garcia's offense also included a quantity of powder cocaine, the "Fair Sentencing Act made *no difference*" to his sentencing range, and therefore suggests that the Sentencing Court was not required to consider the Fair Sentencing Act when handing down Mr. Garcia's sentence. (*Id.* 13–14 (emphasis in original).) The Government makes this argument while citing a portion of *Gravatt* that rejects this exact argument. (*Id.* (citing *Gravatt*, 953 F.3d at 263–64).)

Whether the Fair Sentencing Act would have made a difference to one's penalty range at sentencing is irrelevant for First Step Act purposes. This Court held in *Gravatt* that "covered offense[s]" include "multi-object conspirac[ies]" so long as the statutory penalty for the cocaine base portion of the charge was reduced by the Fair Sentencing Act, even if another drug charged in the conspiracy independently supports the sentence. *Gravatt*, 953 F.3d at 262–64. As this Court explained in *Gravatt*, "nothing in the text of the Act" supported reading into the First Step Act a requirement that no other drug "independently support" the sentence, and to hold

otherwise would "impose an additional limitation to the Act's applicability" not included in its language. *Id.* at 262, 264.

Like *Gravatt*, Mr. Garcia's drug conspiracy charge involved 5 kilograms of powder cocaine, an offense for which the statutory penalty range was not modified by the Fair Sentencing Act. (J.A. at 20.) And also like *Gravatt*, Mr. Garcia's charge involved 50 grams of cocaine base, an amount for which the statutory penalties were lowered by the Fair Sentencing Act—it is therefore a "covered offense" under the First Step Act regardless of whether any other drug independently supported the sentence. (*Id.*); Fair Sentencing Act § 2; First Step Act § 404(a). As this Court noted, "the relevant change for purposes of a 'covered offense' under the First Step Act is a change to the statutory penalties for a defendant's statute of conviction, not a change to a defendant's particular sentencing range as a result of the Fair Sentencing Act's modifications." *United States v. Woodson*, 962 F.3d 812, 816–17 (4th Cir. 2020) (citing *Wirsing*, 943 F.3d at 185–86). Because Mr. Garcia committed a "covered offense" and has yet to receive the benefits of the Fair Sentencing Act, he is eligible for First Step Act relief. *Gravatt*, 953 F.3d at 264; First Step Act § 404(a), (c).

Mr. Garcia is not arguing that at resentencing he would be guaranteed a reduced sentence. But the Government's argument that Mr. Garcia cannot benefit from the First Step Act because there is no guarantee of a lower sentence misses the point

of *Gravatt* and other Fourth Circuit precedent. *See also Wirsing*, 943 F.3d at 186 ("All defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under that Act."); *Woodson*, 962 F.3d at 817 ("[E]ven defendants whose offenses remain within the same subsection [of § 841] after Section 2's amendments are eligible for relief . . . ."). District courts have "discretion under Sections 404(b) and (c)" to impose a new sentence after a "substantive review," and it is not for an appellate court to prejudge a defendant's sentence. *Cf. Gravatt*, 953 F.3d at 264. As in *Gravatt*, the "district court should have reviewed [Mr. Garcia's] motion on the merits," and this Court should reverse so that the district court can conduct a substantive review of Mr. Garcia's sentence. *Id.* at 264.[1]

[1] The Government describes at length facts regarding Mr. Garcia's conviction. (*See* Appellee's Br. 2–4.) These facts—and the Government does not assert otherwise—are irrelevant to Mr. Garcia's eligibility for relief under the First Step Act. *Cf.* Gravatt, 953 F.3d at 264. However, it's worth noting the Government did not oppose Mr. Garcia's initial sentence reduction just a few years ago, (*see* J.A. at 16), and contests neither the extraordinary circumstances surrounding Mr. Garcia's sentencing, nor that Mr. Garcia has been a model prisoner during his incarceration.

B. The record shows Mr. Garcia did not receive the benefit of the Fair Sentencing Act because it mentions neither the Fair Sentencing Act nor its more lenient penalties that applied to Mr. Garcia's cocaine base charge.

The Government makes a second critical admission in its brief: the sentencing date is not dispositive of eligibility for relief under the First Step Act. (*See* Appellee's Br. 14–15.) But it then focuses on the date of sentencing to argue why Mr. Garcia is ineligible for the First Step Act, pointing out more than once that he was sentenced in 2012, after the Supreme Court handed down *Dorsey*, which held that the Fair Sentencing Act applied to all eligible defendants sentenced after its passage. (*See id.* 11, 16.)

The date of Mr. Garcia's sentencing in 2012 does not tell the full story. Before *Dorsey*, in *Bullard*, this Court determined that the Fair Sentencing Act did not apply to crimes committed before the Act's effective date even when the defendant was sentenced after its effective date. *Bullard*, 645 F.3d at 249. It was not until June 2012 that the Supreme Court effectively overruled this aspect of *Bullard* and held that the Fair Sentencing Act applied to anyone sentenced after its effective date, regardless of when the crime was committed. *See Dorsey*, 567 U.S. at 281. And this Court did not explicitly recognize that *Dorsey* limited *Bullard* until 2013. *See Allen*, 716 F.3d at 107 ("[O]ur holding in Bullard—that the Fair Sentencing Act does not have retroactive effect—is limited to the extent that the Fair Sentencing Act does apply to all sentences handed down after its enactment.").

This sequence of events proves why the sentencing date alone cannot answer the question of whether a defendant received the benefit of the Fair Sentencing Act, because the legal landscape in this Circuit was muddied for the first few years after the Fair Sentencing Act became law. It is for that very reason that defendants in this Circuit have been held to be eligible for First Step Act relief despite being sentenced after the Fair Sentencing Act went into effect. *See, e.g.*, *United States v. Grey*, No. DKC 08-0462, 2020 WL 1890537 (D. Md. Apr. 16, 2020) (First Step Act resentencing available to defendant despite being sentenced in 2011); *United States v. Ferguson*, No. 5:10-CR-13, 2019 WL 3557888 (W.D. Va. Aug. 5, 2019) (same); *United States v. Welch*, No. 7:10-CR-0054-008, 2019 WL 2092580 (W.D. Va. May 13, 2019) (same).

Yet still, parroting the reasoning of the District Court, the Government maintains that Mr. Garcia was sentenced in accordance with the Fair Sentencing Act because he was sentenced in December 2012, "well after the effective date of the Fair Sentencing Act." (J.A. at 316; *see also* Appellee Br. 11.) In making this argument, the Government tellingly fails to mention that *Bullard* was the law of the land until *Dorsey* was decided just months before Mr. Garcia's sentencing. Nor does the Government mention that this Court did not expressly recognize the fact that *Bullard*'s holding about the retroactivity of the Fair Sentencing Act was no longer good law

until 2013—*after* Mr. Garcia's sentencing. Indeed, the defendants in *Grey*, *Ferguson*, and *Welch* were all "sentenced well after the effective date of the Fair Sentencing Act," yet they were entitled to resentencing under the First Step Act. The District Court's singular focus on Mr. Garcia's sentencing date, without referring to the record to ensure that Mr. Garcia did in fact receive the benefit of the Fair Sentencing Act, was erroneous.

Had the District Court examined the record, it would have been clear that Mr. Garcia did not receive the benefit of the Fair Sentencing Act—neither the Fair Sentencing Act nor *Dorsey* feature anywhere in the trial record. Most critically, when Probation prepared the PSR, *Dorsey* had not been decided and *Bullard* was still good law, meaning that at the time that the PSR was prepared, binding Circuit precedent held that Mr. Garcia was not eligible for the reduced penalties in the Fair Sentencing Act. And the Government did not update the PSR after *Dorsey* to reflect this change in the law. On appeal, the Government tacitly admits that the Fair Sentencing Act is noticeably devoid from the record and that it did not alert the Sentencing Court to how *Dorsey* substantially changed the law in the Circuit. (Appellee's Br. 13–14.) Thus, while the law changed after *Dorsey*—and indeed lowered the statutory penalty range based on the amount of cocaine base in Mr. Garcia's conspiracy charge—Mr. Garcia's PSR did not change with it. As a result, when the Sentencing Court adopted the PSR "for all purposes of sentencing," it did not take into account

that the Fair Sentencing Act now applied to Mr. Garcia. (J.A. at 128–29.) Despite being sentenced after the Fair Sentencing Act's effective date, the record shows Mr. Garcia never received its benefits.

The Government cannot contest that the record is silent as to the application of the Fair Sentencing Act, and therefore essentially argues this Court must assume the Sentencing Court considered the Fair Sentencing Act based on Mr. Garcia's sentencing date. Specifically, the Government says that "nothing in the record suggest that he did not receive" the benefits of the Fair Sentencing Act. (Appellee's Br. 14.) But that's not accurate. Mr. Garcia's judgment reflects that he was convicted of violating 21 U.S.C. §§ 846 and 841(b)(1)(A). (*See* J.A. at 76.) Before the Fair Sentencing Act, all of the drug quantities charged in the indictment would in fact have fallen within § 841(b)(1)(A). (*See id.* at 20 (indictment charging drug conspiracy including 5 kilograms of powder cocaine, 50 grams of cocaine base, and 1000 kilograms of marijuana).) Had the Sentencing Court applied the Fair Sentencing Act, then the judgment *should* reflect that Mr. Garcia was convicted of violating 21 U.S.C. §§ 846, 841(b)(1)(A), *and* 841(b)(1)(B), as the amount of cocaine base charged in the conspiracy was no longer sufficient to trigger § 841(b)(1)(A) after the Fair Sentencing Act. (*See* Appellant's Br. 15 (explaining that the Fair Sentencing Act raised the threshold amount of cocaine base to trigger § 841(b)(1)(A) from 50

grams to 280 grams).) Therefore, the judgment confirms the Sentencing Court did not account for the Fair Sentencing Act.

The Government tries to excuse this by again focusing on the powder cocaine and saying that the only relevant statutory range applicable to Mr. Garcia's sentencing was still ten years to life imprisonment under § 841(b)(1)(A). (*Id.* 11–13). But the Fair Sentencing Act did not change the threshold amounts for powder cocaine, so that is not proof that the Sentencing Court considered the Fair Sentencing Act. Moreover, this ignores the change in law that made § 841(b)(1)(B)'s more lenient penalties applicable to Mr. Garcia's cocaine base charge and ignores that at no point in the record is this change in law brought to the Court's attention or reflected in any way. Contrary to the Government's argument, the Sentencing Court's failure to consider this change in the law may very well have prejudiced Mr. Garcia, because as this Court explained, "a district court may find this shift relevant to determining the appropriate sentence for a particular offender." *Woodson*, 962 F.3d at 817. And even if the Sentencing Court only relied on § 841(b)(1)(A) for sentencing, this does not explain why the record does not accurately reflect that Mr. Garcia was also eligible for sentencing under § 841(b)(1)(B) had the Sentencing Court considered the Fair Sentencing Act. Simply put, there is nothing in this record that should lead this Court

to presume the Sentencing Court applied the Fair Sentencing Act in the face of complete silence as to that point, when the law surrounding the Fair Sentencing Act was in flux in this Circuit and the judgment reflects the opposite.

In fact, the Government's argument in some ways *supports* Mr. Garcia's claim that the Sentencing Court did not consider the Fair Sentencing Act, and thus why Mr. Garcia has yet to receive its benefits. Because the Government and Sentencing Court were focused on the amount of the powder cocaine at the time of sentencing, neither focused on the cocaine base or the fact that the Fair Sentencing Act modified the applicable statutory penalty range. Therefore, as the Government contends, because the Sentencing Court was not focused on the cocaine base, and instead was focused on the powder cocaine quantity when sentencing Mr. Garcia, (see Appellee's Br. 14), it follows that Mr. Garcia's sentence was *not* imposed with the Fair Sentencing Act in mind.

The Government's position is just a variant of the one this Court rejected in *Gravatt*, because it is asking this Court to hold that the record's lack of any mention of § 841(b)(a)(B) or the Fair Sentencing Act or *Dorsey* should be construed to mean that Mr. Garcia benefited from the Fair Sentencing Act since the amount of powder cocaine still triggered § 841(b)(1)(A) and thus independently supported his sentence. But this Court made clear in *Gravatt* that a court of appeals should not make that assumption for a district court, and should instead remand for the "district court, in

its discretion, to consider whether [Mr. Garcia] is entitled to relief." *Gravatt*, 953 F.3d at 264. Such a remand is especially appropriate here, where the Government is speculating about the Sentencing Court's decision-making (none of the Government's appellate arguments other than the focus on the sentencing date appear in the District Court's order), and the District Court judge who ruled on Mr. Garcia's First Step Act motion was not the sentencing judge and therefore has no insight as to what that judge may or may not have taken into account during sentencing. (*See* Appellant's Br. 3 n.2.) Under these circumstances, the silence in the record should not work to the Government's benefit. *Cf. United States v. Carter*, 564 F.3d 325, 329–30 (4th Cir. 2009) (explaining that a sentencing court's explanation of its sentence, which deviated from the Sentencing Guidelines, must be sufficient to allow for

"meaningful appellate review" so that the appellate court does "not guess at the district court's rationale").[2]

CONCLUSION

For these reasons, this Court should reverse the district court's denial of Mr. Garcia's motion to reduce his sentence and remand this case for further proceedings.

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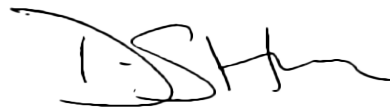
[2] Given the importance of elucidating the nuances of the record, and the rapid development of the law in this area, as represented in Mr. Garcia's Opening Brief, Mr. Garcia respectfully suggests that oral argument would be helpful. (Appellant's Br. 23.) However, if the Court believes, as the Government argues, that oral argument will not assist the Court in any material way, it should summarily reverse the District Court's denial of Mr. Garcia's motion in accordance with the line of cases following *Gravatt*. *See United States v. Byers*, 801 F. App'x 134 (4th Cir. 2020) (per curiam) (holding defendant was eligible for relief under First Step Act when convicted of an offense involving five kilograms of more of powder cocaine and fifty grams or more of cocaine base); *United States v. McKenzie*, 805 F. App'x 223 (4th Cir. 2020) (per curiam) (same); *United States v. Winter*, 803 F. App'x 715 (4th Cir. 2020) (per curiam) (same); *United States v. Landrum*, 809 F. App'x 154 (4th Cir. 2020) (per curiam) (same); *United States v. James*, 806 F. App'x 214 (4th Cir. 2020) (per curiam) (same); *United States v. Holmes*, 806 F. App'x 206 (4th Cir. 2020) (per curiam).

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 6,500 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 3,146 words.



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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2021, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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