

TERRY TECHNICAL CORRECTION ACT

NOVEMBER 29, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 5455]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5455) to amend the First Step Act of 2018 to permit defendants convicted of certain offenses to be eligible for reduced sentences, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Terry Technical Correction Act”.

SEC. 2. APPLICATION OF FAIR SENTENCING ACT OF 2010.

Section 404 of the First Step Act of 2018 (21 U.S.C. 841 note) is amended—

(1) in subsection (a)—

(A) by striking “‘covered offense’ means” and inserting the following:
“‘covered offense’—

- “(1) means”;
- (B) by striking the period at the end and inserting “, and”; and
- (C) by adding at the end the following:
- “(2) includes a violation, involving cocaine base, of—
- “(A) section 3113 of title 5, United States Code;
- “(B) section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C));
- “(C) section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a));
- “(D) section 406 of the Controlled Substances Act (21 U.S.C. 846);
- “(E) section 408 of the Controlled Substances Act (21 U.S.C. 848);
- “(F) subsection (b) or (c) of section 409 of the Controlled Substances Act (21 U.S.C. 849);
- “(G) subsection (a) or (b) of section 418 of the Controlled Substances Act (21 U.S.C. 859);
- “(H) subsection (a), (b), or (c) of section 419 of the Controlled Substances Act (21 U.S.C. 860);
- “(I) section 420 of the Controlled Substances Act (21 U.S.C. 861);
- “(J) section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3));
- “(K) section 1010A of the Controlled Substances Import and Export Act (21 U.S.C. 960a);
- “(L) section 90103 of the Violent Crime Control and Law Enforcement Act of 1994 (34 U.S.C. 12522);
- “(M) section 70503 or 70506 of title 46, United States Code; or
- “(N) any attempt, conspiracy or solicitation to commit an offense described in subparagraphs (A) through (M).”; and
- (2) in subsection (c), by inserting “A motion made under this section that was denied after a court determination that a violation described in subsection (a)(2) was not a covered offense shall not be considered a denial after a complete review of the motion on the merits within the meaning of this section.” after the period at the end of the second sentence.

Purpose and Summary

Introduced by Rep. Sheila Jackson Lee (D–TX) on September 30, 2021, H.R. 5455, the “Terry Technical Correction Act,” clarifies that the retroactivity provision of section 404 of the First Step Act is available to all offenders who were sentenced for a crack cocaine offense before the Fair Sentencing Act of 2010 became effective, including individuals convicted of offenses involving small quantities of crack.

Background and Need for the Legislation

In the mid-1980s, the United States experienced a surge in the use of crack cocaine. News of high-profile, cocaine-related deaths, including that of the recently drafted basketball star, Len Bias, filled headlines across the country.¹ Witnesses before Congress, and Members of Congress themselves, believed that crack was more addictive and dangerous than powder cocaine, cheaper and easier to obtain; and that these and other factors were fueling a crime wave.² In response to these concerns, Congress quickly passed the Anti-Drug Abuse Act of 1986 (ADAA), which established mandatory-minimum penalties for cocaine offenses.³ If the quantity of cocaine involved in an offense met or exceeded a minimum threshold, then federal judges were required to impose a minimum

¹ Gleber, Jonathan, *How Len Bias's death helped launch the US's unjust war on drugs*, THE GUARDIAN (June 29, 2021) <https://www.theguardian.com/sport/2021/jun/29/len-bias-death-basketball-war-on-drugs>.

² United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 5–6, 9–10, and n. 31 (May 2002); “Crack” Cocaine, Hearing before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 99th Cong., 2d Sess., 2, 5–6, 10, 94 (1986).

³ The Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, § 1002, 100 Stat. 3207 (1986).

sentence. Congress set the quantity thresholds much lower for crack offenses than powder offenses.

The ADAA included two base penalties that depended on drug quantity: a five-year mandatory minimum (triggered by five grams of crack or 500 grams of powder) and a ten-year mandatory minimum (triggered by 50 grams of crack or 5 kilograms of powder).⁴ The ADAA also created a third penalty for possession with intent to distribute a schedule I or II drug that did not treat crack and powder offenses differently, did not depend on drug quantity, and did not include a mandatory minimum penalty.⁵

The Fair Sentencing Act of 2010 reduced the 100-to-1 crack-powder cocaine sentencing disparity to 18-to-1. The Act increased the crack quantity thresholds from five grams to 28 grams for the five-year mandatory minimum and from 50 grams to 280 grams for the ten-year mandatory minimum.⁶ These changes did not apply to offenders who were sentenced before 2010 because the provisions of the Fair Sentencing Act were not made retroactive.

As a result of the Fair Sentencing Act, the U.S. Sentencing Commission altered the drug quantity table used to calculate Guideline ranges.⁷ The Commission decreased the recommended sentence for crack offenses to track the statutory change and made the change retroactive, giving previous offenders the opportunity for resentencing. However, judges were still constrained by the mandatory minimums in place prior to 2010, leaving many offenders serving sentences above what the Guidelines recommended.

In 2018, Congress passed the First Step Act of 2018, which made the Fair Sentencing Act changes retroactive and gave judges the authority to reduce the sentences of certain crack offenders.⁸ section 404 of the First Step Act allows crack cocaine offenders to request a sentence reduction in line with the Fair Sentencing Act. Specifically, the First Step Act allows defendants sentenced for a “covered offense” to seek a resentencing. A “covered offense” is defined as “a violation of a federal criminal statute, the statutory penalties for which were modified by . . . the Fair Sentencing Act.”⁹

In 2019, Taharick Terry petitioned for reduction of his 188-month sentence for possession with intent to distribute an unspecified amount of crack cocaine pursuant to the First Step Act. The district judge denied the motion. Mr. Terry appealed. The 11th Circuit Court of Appeals affirmed the denial, and certiorari to the Supreme Court was granted. In *Terry v. United States*, 141 S. Ct. 1858 (2021), the Court held that low-level crack offenders, whose conduct did not trigger a mandatory minimum penalty, do not qualify for resentencing under section 404 of the First Step Act. The effect of this holding is that those individuals convicted of the offenses involving the lowest quantities of crack cocaine are not eligible for retroactive relief, whereas other offenders are.

H.R. 5455 reaffirms Congress’s intent to provide retroactive sentencing relief to all individuals convicted of crack cocaine offenses before the Fair Sentencing Act of 2010 took effect. This bill re-

⁴ 100 Stat. 3207–2, 3207–3.

⁵ *Id.*, at 3207–4.

⁶ The Fair Sentencing Act of 2010, § 2(a), 124 Stat. 2372 (2010).

⁷ USSG 2D1.1(c)

⁸ First Step Act of 2018, Pub. L. No. 115–391, 132 Stat 5194 (2018).

⁹ § 404, 132 Stat 5194.

sponds to the Supreme Court’s ruling in *Terry* to ensure that the lowest-level offenders, who commit crimes that do not trigger mandatory minimums, qualify for the sentencing reductions provided for in the Fair Sentencing Act.

Hearings

For the purposes of clause 3(c)(6) of House rule XIII, the following hearings were used to develop H.R. 5455:

The hearing, “Controlled Substances: Federal Policies and Enforcement,” held on March 11, 2021, before the Subcommittee on Crime, Terrorism, and Homeland Security. The Subcommittee heard testimony from:

- Nicole M. Austin-Hillery, Executive Director, US Program, Human Rights Watch;
- Howard Henderson, Founding Director, Center for Justice Research, Texas Southern University; Nonresident Senior Fellow, Governance Studies, Brookings Institution;
- Derek Maltz, Former Special Agent in Charge, Special Operations Division, Drug Enforcement Administration; and
- Katharine Neill Harris, Alfred C. Glassell, III, Fellow in Drug Policy, Baker Institute for Public Policy, Rice University.

The hearing examined federal policies concerning controlled substances and the enforcement of our drug laws.

The Committee also held the following hearing: “Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform,” held on June 17, 2021, before the Subcommittee on Crime, Terrorism, and Homeland Security. The Subcommittee heard testimony from:

- Rachel E. Barkow, Vice Dean and Charles Seligson Professor of Law; Faculty Director, Center on the Administration of Criminal Law; NYU School of Law;
- William R. Underwood, Senior Fellow, The Sentencing Project;
- Kyana Givens, Assistant Federal Public Defender, Office of the Federal Public Defender for the Eastern District of North Carolina;
- Kassandra Frederique, Executive Director, Drug Policy Alliance;
- Marta Nelson, Director, Government Strategy, Advocacy and Partnerships Department, Vera Institute of Justice;
- Jillian E. Snider, Director, Criminal Justice & Civil Liberties, R Street Institute; and
- John Malcolm, Vice President, Institute for Constitutional Government; Director, Meese Center for Legal and Judicial Studies; and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow; The Heritage Foundation.

The hearing examined the rise of mass incarceration; explored the existing laws and policies fueling mass incarceration from pre-trial detention, the trial penalty to mandatory minimum penalties, and the Federal Bureau of Prisons (BOP) underutilization of its early release authorities; examined proposed sentencing reforms; and reviewed state-level reform efforts that might serve as a model for federal reform.

Committee Consideration

On September 21, 2022, the Committee met in open session and ordered the bill, H.R. 5455, favorably reported, as amended, by a voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House rule XIII, no rollcall votes occurred during the Committee's consideration of H.R. 5455.

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House rule X, are incorporated in the descriptive portions of this report.

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of the Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 5455 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 5455 would ensure that the retroactivity provision of section 404 of the First Step Act is available to all offenders who were sentenced for a crack cocaine offense prior to enactment of the Fair Sentencing Act of 2010, which reduced the 100-to-1 crack-powder cocaine sentencing disparity to 18-to-1, including those convicted of offenses involving small quantities of crack.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 5455 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 of the bill sets forth the short title of the bill as the “Terry Technical Correction Act.”

Sec. 2. Application of Fair Sentencing Act of 2010. Section 2 clarifies that the definition of a “covered offense” under section 404 of the First Step Act of 2018 includes violations of listed offenses involving cocaine base. The offenses are:

- (1) 5 U.S.C. 3113;
- (2) 21 U.S.C. 841(b)(1)(C);
- (3) 21 U.S.C. 844(a);
- (4) 21 U.S.C. 846;
- (5) 21 U.S.C. 848;
- (6) 21 U.S.C. 849;
- (7) 21 U.S.C. 859;
- (8) subsections (a), (b), and (c) of *21 U.S.C. 860*;
- (9) 21 U.S.C. 861;
- (10) 21 U.S.C. 960(b)(3);
- (11) 21 U.S.C. 960a;
- (12) 34 U.S.C. 12522;
- (13) 46 U.S.C. 70503 and 70506; and 14) any attempt, conspiracy, or solicitation to commit the above-listed offenses.

Section 2 also provides that a previous denial of a motion to reduce sentencing under section 404 is not a denial after a complete review of the motion on the merits that would foreclose a subsequent motion to reduce sentencing, if the previous denial was based on a determination that a violation of an offense listed in this section was not a covered offense.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

FIRST STEP ACT OF 2018

* * * * *

TITLE IV—SENTENCING REFORM

* * * * *

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term [“covered offense” means] “covered offense”—

(1) means 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 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010[.]; and

(2) includes a violation, involving cocaine base, of—

- (A) section 3113 of title 5, United States Code;
 (B) section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C));
 (C) section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a));
 (D) section 406 of the Controlled Substances Act (21 U.S.C. 846);
 (E) section 408 of the Controlled Substances Act (21 U.S.C. 848);
 (F) subsection (b) or (c) of section 409 of the Controlled Substances Act (21 U.S.C. 849);
 (G) subsection (a) or (b) of section 418 of the Controlled Substances Act (21 U.S.C. 859);
 (H) subsection (a), (b), or (c) of section 419 of the Controlled Substances Act (21 U.S.C. 860);
 (I) section 420 of the Controlled Substances Act (21 U.S.C. 861);
 (J) section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3));
 (K) section 1010A of the Controlled Substances Import and Export Act (21 U.S.C. 960a);
 (L) section 90103 of the Violent Crime Control and Law Enforcement Act of 1994 (34 U.S.C. 12522);
 (M) section 70503 or 70506 of title 46, United States Code; or
 (N) any attempt, conspiracy or solicitation to commit an offense described in subparagraphs (A) through (M).

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—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 (Public Law 111-220; 124 Stat. 2372) 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. *A motion made under this section that was denied after a court determination that a violation described in subsection (a)(2) was not a covered offense shall not be considered a denial after a complete review of the motion on the merits within the meaning of this section.*

* * * * *