

19-1701
Martin v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

(Argued: May 20, 2020 | Decided: September 3, 2020)

Docket No. 19-1701

UNITED STATES OF AMERICA,

Appellee,

v.

JERROD MARTIN,

Defendant-Appellant.[†]

Before:

SACK, WESLEY, and LIVINGSTON, *Circuit Judges.*

In November of 2005, Jerrod Martin pleaded guilty to conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) and to using a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i). He was sentenced to 150 months' imprisonment for conspiracy to distribute crack cocaine, and to a consecutive 60-months' imprisonment for use of a firearm in furtherance of a drug trafficking offense. While imprisoned for those offenses, Martin committed two additional offenses and was sentenced to two consecutive 12-month terms of imprisonment.

[†] The Clerk of the Court is directed to amend the official caption as set forth above.

In March of 2019, Martin moved for resentencing pursuant to the First Step Act, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). Although the district court initially granted Martin’s motion, it soon vacated its order and denied his motion as moot after learning that Martin had completed serving his 150-month term of imprisonment for conspiracy to traffic crack cocaine and remained imprisoned only because he continued to serve two consecutive sentences imposed for offenses committed while in prison that Martin did not mention in his original application for re-sentencing. Martin appeals, arguing that the First Step Act permits retroactive modification of a sentence that has already been served where that sentence’s reduction would have the effect of crediting over-served time to later-imposed consecutive sentences for, in this instance, crimes committed while Martin was in prison.

We disagree. Sentences are imposed separately for convictions on specific violations of criminal statutes and are aggregated only for administrative purposes. Because sentences within judgments of conviction are otherwise final orders, they are modifiable only in limited circumstances. The First Step Act permits such modification—a district court may “impose a reduced sentence” for a “covered offense.” However, where an inmate, like Martin, has already served the term of imprisonment imposed for a “covered offense,” we hold the statute no longer permits relief. Because the relief authorized by the First Step Act is no longer possible, Martin’s motion is moot.

We therefore **AFFIRM**. Judge Sack dissents in a separate opinion.

COLLEEN P. CASSIDY, Assistant Federal Defender, Federal Defenders of New York, Inc., New York, NY, *for Defendant-Appellant*.

ANDREY SPEKTOR, Assistant United States Attorney, (David C. James, Assistant United States Attorney, *on the brief*), *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

WESLEY, *Circuit Judge*:

Jerrod Martin pleaded guilty, pursuant to a plea agreement, to one count of conspiracy to distribute and possess with the intent to distribute crack cocaine in violation of 21 U.S.C. §§ 846, 841(b)(1)(A) and one count of using a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i). In July of 2007, he was sentenced to 150-months' imprisonment for conspiracy to distribute and possess with intent to distribute and to 60-months imprisonment, to be served consecutively, for using a firearm during a drug trafficking offense.

In March of 2019, Martin moved for resentencing pursuant to the First Step Act, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018).¹ Martin requested that his drug conspiracy sentence be reduced from 150 months to 60 months resulting in an aggregate sentence from the drug conspiracy and gun sentences of 120 months. The United States District Court for the Eastern District of New York (Cogan, J.) concluded that it could not reduce Martin's sentence below the time he had served and instead granted Martin's motion by reducing his sentence to time

¹ Martin had previously moved, *pro se*, to set aside his judgment under Federal Rule of Civil Procedure 60(b). The district court denied that motion in its first Decision and Order on Martin's application for relief under the First Step Act. Martin has not raised this issue since the district court's initial decision, and we need not address it.

served and directing his immediate release. Shortly thereafter, the Bureau of Prisons notified the district court that, because of good time credit, Martin had completed serving his original two terms of imprisonment in late 2018 but remained imprisoned because he continued to serve two consecutive 12-month sentences imposed for crimes committed while he was in prison—crimes (and corresponding sentences) not mentioned by Martin in his First Step Act application nor by the government in its response.² The district court then vacated its prior order and denied Martin’s motion for relief under the First Step Act as moot.

Martin moved for reconsideration, arguing that because the Bureau of Prisons aggregated his sentences and treated them as one, the district court should do so also. Thus, the court could still order his immediate release if his drug conspiracy sentence was reduced in conjunction with his mandatory gun sentence to a total of 188 months. That sentence would result in the remaining time Martin

² We note that Martin’s initial application for relief was made *pro se*, and we ascribe no motivation to him or his counsel’s failure to inform the district court of Martin’s additional sentences. Many prisoners, and the Federal Defenders, made motions under the First Step Act shortly after it became law. We note that both Martin and the Government failed to mention Martin’s additional sentences only to show the facts as they were presented to the district court and to explain the procedural rollercoaster contained in the record.

had already served being credited towards his two 12-month terms of imprisonment and Martin would be released in short order, thus accomplishing the intent of the district court's original order.³

The district court denied Martin's motion for reconsideration. The court reasoned that it lacked the ability to, in effect, modify Martin's aggregate term of imprisonment. It found that section 404 of the First Step Act did not permit a general resentencing, and only permitted the imposition of a reduced sentence for a "covered offense." The court therefore lacked the ability to reduce his drug conspiracy sentence in order to generate overserved time that could be credited to his 12-month terms of imprisonment.

Martin appeals; he argues that the district court erred in determining it could not grant the relief he requested because reducing the term of imprisonment for his crack cocaine offense would have a collateral effect on his "sentence"—it would result in crediting the time he over-served on the reduced sentence towards his later, consecutive sentences. He further argues that the First Step Act contains

³ Martin also argued that his motion was not moot because the district court could reduce his term of supervised release.

no limitation preventing the court from retroactively reducing his sentence to less than time served. We disagree in both respects.

Sentences are imposed for specific convictions within judgments of conviction. Judgments of conviction are final judgments that are only modifiable by courts in limited circumstances, including where “expressly authorized” by statute. The fact that multiple sentences may be aggregated for administrative purposes does not authorize a court to treat those sentences as an undivided whole, the authorization to modify one part of which confers authorization to modify the whole.

Section 404(b) of the First Step Act permits district courts 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.” *See* Pub. L. 115-391, 132 Stat. at 5222. The First Step Act only the authorizes the imposition of a reduced sentence for specific offenses, and where an inmate has already served his sentence for that specific offense, the Act does not authorize any relief. The plain language of the Act involves the “imposition” of a “reduced sentence”; we cannot read that language to permit the imposition of a new and reduced sentence where the original has been served. The fact that granting retroactive relief would affect

another sentence that was aggregated for administrative purposes does not operate to create a live case or controversy.

Therefore, an inmate like Martin—who has served the entirety of his sentence for a covered offense and remains imprisoned only by virtue of consecutive terms of imprisonment arising out of separate judgments of conviction—cannot obtain effectual relief through a favorable judicial decision authorized by the First Step Act. Martin points to no collateral consequences stemming from his sentence for drug trafficking. Nor does the practice of crediting time spent in prison to other sentences where a defendant's conviction or sentence has been vacated operate to create a live case or controversy because Martin neither challenges his conviction nor argues that his sentence was unlawful when it was imposed.

For these reasons we affirm the district court's decision dismissing Martin's motion as moot.

BACKGROUND

I. Martin's Sentences⁴

Jerrod Martin was a member of a drug trafficking organization operating in Brooklyn, New York. Martin and several of his co-conspirators were arrested in June of 2003 and indicted for a number of criminal acts including trafficking 50 grams or more of cocaine base (otherwise known as “crack” or “crack cocaine”), and committing a homicide in 2003.⁵ On November 1, 2005 Martin pleaded guilty pursuant to a plea agreement to one count of conspiracy to distribute and possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. § 846 (Count Seven), and one count of using a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c) (Count Ten). Martin stipulated that he would be sentenced based on having distributed 1.5 kilograms of crack cocaine during the time in which the trafficking organization operated. At Martin's plea allocution, he admitted that his organization had trafficked roughly 1.5 kilograms of crack during its tenure.

⁴ References to J.A. refer to the Joint Appendix, references to G.A. refer to the Government's Appendix, and references to PSR refer to Martin's Pre-Sentencing Investigation Report.

⁵ Martin has been in custody since his arrest on June 18, 2003.

In July of 2007, Judge Trager sentenced Martin to 150-months' imprisonment for Count Seven and a consecutive 60-months' imprisonment for Count Ten.⁶ Under the law at the time, Martin was subject to a 10-year mandatory minimum sentence for Count Seven, and a 5-year mandatory minimum sentence for Count Ten. *See* 21 U.S.C. § 841(b)(1)(A) (2006).

Martin was convicted of two additional crimes while serving those two terms of imprisonment. In June of 2010, Martin pleaded guilty to an information charging a misdemeanor drug offense and was sentenced to a consecutive 12-month term of imprisonment. Four years later, Martin was convicted after a jury

⁶ The PSR prepared for Martin calculated his guidelines range as 360-months to life imprisonment based on an offense level of 40 and a criminal history category of 3. That base offense level was predicated upon the homicide committed by other members of Martin's drug trafficking organization, and because Martin was a leader of the organization, the PSR indicated he was accountable for that murder. Martin's co-defendants objected to the PSR's Guidelines calculations and Judge Trager sentenced them accordingly, based only upon the drug-related count, not upon the murder count. Martin's counsel, however, did not object to the PSR's Guidelines calculations, and Judge Trager mentioned those calculations at his sentencing proceeding. Some of Martin's co-defendants were able to receive sentencing reductions based on subsequent changes to the Sentencing Guidelines that were applicable to their drug offenses. However, because Martin had been sentenced with reference to a murder charge, *see* U.S.S.G. § 2A1.1 (cross-referenced by U.S.S.G. § 2D1.1(d)(1), which applies to violations of 21 U.S.C. § 841(a)(1)), Martin was ineligible for the same sentencing reduction because Amendment 782 to the Sentencing Guidelines did not affect Martin's adjusted offense level. *See* U.S.S.G. app. C., amend. 782 (U.S. SENTENCING COMM'N 2014).

trial of the misdemeanor assault of a corrections officer and was sentenced to another consecutive 12-month term of imprisonment. *See United States v. Martin*, 704 F. App'x 34, 35 (2d Cir. 2017) (summary order).

II. Martin's Motion for Relief Under the First Step Act

In 2010, Congress enacted the Fair Sentencing Act, which reduced the mandatory minimum sentence for distribution of 50 grams or more of crack cocaine from 10 years to 5 years. *See* Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (amending 21 U.S.C. § 841(b)(1)). The Fair Sentencing Act also increased the threshold required to trigger a 10-year mandatory minimum sentence from 50 grams to 280 grams of crack cocaine. *See id.* § 2. However, the Fair Sentencing Act did not apply retroactively to defendants sentenced before the Act became effective. *See Dorsey v. United States*, 567 U.S. 260, 268–69 (2012). In 2018, Congress passed the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Section 404(b) of the First Step Act permits a district court, on a motion from the defendant, the Bureau of Prisons (“BOP”), or the Government, 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.” 132 Stat. at 5222.

On March 1, 2019, Martin moved for relief under the First Step Act in the United States District Court for the Eastern District of New York.⁷ When Martin made his motion, he had already spent over 188 months in prison.⁸ Martin sought a reduction of his sentence under Count Seven, the “covered offense,” to 60-months imprisonment, and requested that the court impose a total sentence of 120-months imprisonment, which would result in his immediate release. No mention was made of Martin’s convictions for the offenses he committed in prison. The

⁷ Martin has attempted to receive modification of his sentence on several occasions. Although the sentences imposed by Judge Trager in 2007 were within the range stipulated to in Martin’s plea agreement, he appealed his sentence in 2008. His counsel later filed an *Anders* brief, and on May 5, 2008, this Court summarily affirmed Martin’s sentence and granted his counsel permission to withdraw. *See United States v. Martin*, No. 07-3214 (2d Cir. May 5, 2008). In 2009, Martin moved to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2), arguing that he was entitled to a reduction in his base offense level from 40 to 32 based on the drug quantity to which he pleaded guilty. Martin also filed a *habeas* petition pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel based on failures to obtain a more favorable plea bargain, and to argue that a consecutive sentence was not required under Count Ten. *See Martin v. United States*, No. 09-cv-02337, Dkt. 1 (filed May 29, 2009). The district court (Cogan, J.) denied Martin’s motion for a sentencing reduction because his “guideline range was calculated pursuant to his responsibility for a drug-related homicide . . . and [the applicable Guidelines range for § 2A1.1 has] not been revised since [Martin] was sentenced.” *Martin v. United States*, No. 09-cv-02337, Dkt. 15 at 2 (E.D.N.Y. Feb. 16, 2011). The court also denied Martin’s § 2255 petition. *See id.* at 2–3. As noted above, Martin also moved *pro se* to set aside his judgment under F.R.C.P. 60(b) in November of 2018. The district court denied that motion in its first ruling on Martin’s First Step Act motion. *See United States v. Martin*, No. 03-cr-795 (BMC), 2019 WL 1558817, at *1–3 (E.D.N.Y. April 10, 2019).

⁸ Martin was imprisoned on June 18, 2003, and made his motion 15 years, 8 months, and 11 days later, on March 1, 2019.

Government opposed Martin's motion, arguing that the 1.5 kilograms of cocaine base trafficked by Martin's organization "supports application of the same statutory penalties even after passage of the Fair Sentencing Act." J.A. 98.

In April of 2019, the district court (Cogan, J.) rejected Martin's request for a reduced sentence of 60-months for Count Seven but reduced his sentence to time served and directed his immediate release. *See United States v. Martin*, No. 03-cr-795 (BMC), 2019 WL 1558817, at *3 (E.D.N.Y. April 10, 2019) (Vacated). Soon after that decision was issued, the BOP informed the district court that, because of good time credit, Martin had completed serving both terms of imprisonment imposed by Judge Trager in 2007 at some point between September and December of 2018. But Martin remained imprisoned because of the two 12-month terms of incarceration that had been imposed for crimes committed while he was in prison. After giving notice to the parties and hearing argument, the district court vacated its prior decision and denied Martin's motion as moot. *See United States v. Martin*, No. 03-cr-795 (BMC), 2019 WL 2296051, at *1-2 (E.D.N.Y. April 22, 2019) ("*Martin II*").

Martin moved for reconsideration. He argued that his sentences from his various convictions are aggregated by the Bureau of Prisons and he has but one

sentence, one period of incarceration. Thus, his motion was not moot because imposing a reduced sentence of 188-months' imprisonment would "result in the past 24 months being credited" to the later-imposed 12-month terms of imprisonment and in Martin's immediate release.⁹ J.A. 165–66. The district court denied Martin's motion. *See United States v. Martin*, No. 03-cr-795 (BMC), 2019 WL 2289850 (E.D.N.Y. May 29, 2019) ("*Martin III*").

The court rejected Martin's argument that he was serving "one sentence" and reasoned that the First Step Act did not empower it to retroactively impose a reduced term of imprisonment where the defendant was no longer serving that term of imprisonment. *See Martin III*, 2019 WL 2289850, at *3–4. Because the statute did not permit the district court to engage in "plenary resentencing," the court reasoned it had no power to alter any sentence other than one imposed for a "covered offense." *See id.* The district court also noted that, even if it were

⁹ Martin also argued that the district court could reduce Martin's term of supervised release, and therefore his motion was not moot. The district court denied Martin's motion in this respect. The court noted that Martin had previously requested only a modification of his term of imprisonment and thus could not create a live controversy by now expanding his request to a modification of the supervised release portion of his sentence. *See Martin III*, 2019 WL 2289850, at *2. Furthermore, the court stated that it would deny Martin's request for a modification of his term of supervised release in an exercise of its discretion. *See id.* at *6.

permitted to reduce Martin's term of imprisonment, it would exercise its discretion not to do so. *See Martin III*, 2019 WL 2289850, at *5–6.

Martin timely appealed, arguing that the district court's decision is incorrectly premised on the ground that the First Step Act does not allow a defendant to receive a reduction of an already-served sentence if he remains in custody serving consecutive sentences for unrelated offenses because all of the sentences are aggregated by the Bureau of Prisons and are to be treated as one sentence. Martin argues that the district court's holding is "contrary to the plain language of the [First Step] Act, inconsistent with the purpose of the Act," and contrary to other district court decisions. Pet'r's Br. at 2–3. Martin begins by arguing that nothing in the language of the First Step Act prohibits modification of sentences that were already served, so long as a sentence was imposed for a "covered offense." *See generally id.* at 13–20. Because the language of the act does not forbid the relief Martin requests, Martin argues his motion is not moot because "the imposition of a term of [time served] would give Mr. Martin credit against the consecutive misdemeanor sentences that he already incurred and is serving" *Id.* at 20.

The Government counters by arguing that Martin does not qualify for a reduction of his sentence because the quantity of crack cocaine for which he admitted responsibility “greatly exceeded 280 grams, the amount necessary to trigger the highest mandatory minimum sentence under the current version of the statute.” Resp’t’s Br. at 19. The Government also argues that, even if Martin were eligible for a reduction, the offenses for which he is currently imprisoned are not covered by the First Step Act, and that, in the alternative, the district court did not abuse its discretion in denying Martin’s motion for relief.

DISCUSSION

I. Martin Was Eligible for Relief Based on His Plea and Sentence.

Eligibility for relief under the First Step Act depends upon having been sentenced for a “covered offense.” *See* § 404(b), 132 Stat. at 5222. Section 404(a) of the First Step 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” 132 Stat. at 5222. The Government argues that Martin is ineligible for relief under the First Step Act because he admitted to conspiring to traffic 1.5 kilograms of crack cocaine during his plea allocution, and a minimum sentence imposed under the Fair Sentencing Act on the basis of 1.5 kilograms of

crack cocaine would not differ from the sentence that Judge Trager actually imposed upon him. *See* 21 U.S.C. § 841 (b)(1)(A)(iii). We disagree; Martin would have been eligible for relief under the First Step Act had he not already served his sentence.

We recently rejected the Government's argument in *United States v. Johnson*, 961 F.3d 181, 186–191 (2d Cir. 2020), where we determined that “it is the statute under which a defendant was convicted, not the defendant's actual conduct, that determines whether a defendant was sentenced for a ‘covered offense’ within the meaning of Section 404(a) [of the First Step Act].” *Id.* at 187; *see id.* at 190–91. Martin was indicted for, and pleaded guilty to, conspiring to traffic 50 grams or more of crack cocaine. “Section 2 of the Fair Sentencing Act modified the statutory penalties associated with a violation of those provisions by increasing Section 841(b)(1)(A)(iii)'s quantity threshold from 50 to 280 grams,” and thus modified the penalties for Martin's statutory offense. *Johnson*, 961 F.3d at 190. Martin was sentenced for a “covered offense” as defined by section 404(a) of the First Step Act.

II. Martin's Motion for Relief is Moot

Martin was sentenced for a “covered offense,” and thus would be eligible for relief under the First Step Act, if the Act permits the district court to impose a

reduced sentence for his drug conspiracy conviction. To determine whether the First Step Act permits modification of an already-served sentence, it seems logical to start with its plain language.¹⁰ See *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014). Section 404(b) of the First Step Act reads in full:

(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*.

132 Stat. at 5222 (emphases added).

Section 404(b) permits courts to “impose a reduced sentence as if” certain provisions of the Fair Sentencing Act of 2010 “were in effect at the time the covered offense was committed.” *Id.* The statute’s language tells us that a court may impose a sentence under the sentencing regime laid out under the Fair Sentencing Act—which will provide for lower penalties than those mandated when the defendant was originally sentenced. Martin was sentenced for a “covered offense” in 2007; had he been sentenced “as if the Fair Sentencing Act of 2010 were in effect

¹⁰ We review questions of statutory interpretation *de novo*. *United States v. Johnson*, 961 F.3d 181, 186 (2d Cir. 2020).

at the time [his] offense was committed,” he would have been subject to a less-severe mandatory minimum sentence. Thus, whether a successful motion made under section 404(b) can grant Martin effective relief depends upon what it means for a court to “impose a reduced sentence.” *See Lockhart*, 749 F.3d at 152 (“Where, as here, the plain meaning is not [determinative], we can draw upon a variety of interpretive tools, including . . . statutory structure[] and legislative history to discern meaning.”); *see also Tanvir v. Tanzin*, 894 F.3d 449, 463 (2d Cir. 2018) (“Congress is presumed to legislate with familiarity of the legal backdrop for its legislation.”), *cert. granted*, 140 S. Ct. 550 (2019).

A. The Nature of Sentences

The power of courts to sentence defendants convicted of violations of federal statutes is prescribed by statute. *See generally* 18 U.S.C. § 3551(a); 18 U.S.C. § 3581(a) (“A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.”); *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (“Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.” (citations omitted)). And “a judgment of conviction that includes a sentence constitutes a final judgment for all other purposes.” 18 U.S.C. § 3582(b).

Statutes like the First Step Act provide exceptions to the otherwise-general rule of finality. *See* 18 U.S.C. § 3582(b)(1), (c)(1)(B); *Dillon v. United States*, 560 U.S. 817, 824 (2010); *see also United States v. Holloway*, 956 F.3d 660, 665–66 (2d Cir. 2019) (determining that motions made under the First Step Act are properly analyzed under 18 U.S.C. § 3582(c)(1)(B), “which provides that a ‘court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute’” (quoting 18 U.S.C. § 3582(c)(1)(B))). But other than the limited exceptions provided by statutes, the Sentencing Commission, and the Federal Rules of Criminal Procedure, courts are not free to modify sentences at will.

Under the Federal Sentencing Guidelines, sentences within judgments of conviction are imposed for particular counts of conviction, despite that they may be imposed as part of one judgment of conviction or grouped to determine an adjusted offense level. *See, e.g.*, U.S.S.G. § 5G1.2(a) & cmt. 1. Sentences imposed in multiple-count cases are “imposed independently” for each count of conviction, despite that, in most instances, sentences imposed as part of the same judgment of conviction run concurrently to each other. *See, e.g.*, U.S.S.G. § 5G1.2(a). The Guidelines anticipate that the imposition of a reduced sentence for one offense might result in the reduction of a sentence for another offense that was imposed

as part of the same judgment of conviction. *See, e.g.*, U.S.S.G. §§ 1B1.1(a)(4), 3D1.1, 3D1.2, 3D1.3.¹¹ Furthermore, the Guidelines specify that, when an inmate commits an offense while serving an undischarged term of imprisonment, the later sentence should run consecutively to the undischarged term of imprisonment. *See* U.S.S.G. § 5G1.3(a).

“Notwithstanding the fact that a sentence to imprisonment can subsequently be modified” pursuant to specific provisions of the United States Code, corrected as provided for by Rule 35 of the Federal Rules of Criminal

¹¹ Section 1B1.1(a)(4) instructs sentencing courts to calculate the guideline range for each sentence where there are multiple counts of conviction, and then to apply Part D of Chapter Three to group offenses, if possible, and thereby adjust the combined offense level. *See* § 1B1.1(a)(4). Sections 3D1.1, 3D1.2, and 3D1.3 instruct courts how to group offenses and calculate combined offense levels for grouped offenses. In certain instances, a reduction in the guidelines offense-level for one offense may result in the reduction of the combined offense level. For example, where a defendant is convicted of two or more offenses that are groupable under § 3D1.2, the most serious offense forms the offense level applicable to a given group of offenses. If the guidelines range for that offense is later reduced, the defendant may be able to obtain a sentencing reduction that has the effect of reducing his sentence for other grouped offenses. Thus, where a judgment of conviction contains multiple convictions and sentences for multiple offenses, and where the defendant’s sentences are contingent upon the calculated offense level of other offenses (which is often the case in bank robbery convictions, for example, *see* § 3D1.5 cmt. 1), a reduction of one sentence may impact sentences that were imposed for other convictions within the same judgment of conviction. That is not this case. *Cf., e.g., United States v. Hudson*, --- F.3d ----, 2020 WL 4198333, at *3–4 (7th Cir. 2020) (finding the First Step Act permitted modification of grouped offenses other than covered offense for purposes of imposing a reduced sentence).

Procedure, or through the appellate process, “a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.” *See* 18 U.S.C. § 3582(b). Congress has limited courts’ authority to modify imposed sentences to limited circumstances. *See generally* 18 U.S.C. § 3582(c).

Specifically, section 3582(c) provides that “court[s] may not modify a term of imprisonment once it has been imposed except” on a motion by the director of the BOP or a defendant if extraordinary and compelling reasons warrant such a reduction or if the defendant is at least 70 years of age and has served 30 years in prison for the offenses for which he is currently imprisoned. *See id.* § 3582(c)(1)(A). Furthermore, a “court may [also] 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.” *Id.* § 3582(c)(1)(B). And, where a defendant was sentenced to a term of imprisonment based on a sentencing guidelines range that was subsequently lowered by the Sentencing Commission, a court may reduce the term of imprisonment “after considering the factors set forth in section 3553(a) . . . [and] if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* § 3582(c)(2). For example, section 1B1.10(b)(2)(C) of the Sentencing Guidelines provides that that “[i]n no event may

the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.” See U.S.S.G. § 1B1.10(b)(2)(C).

The cornerstone to Martin’s argument is that, while he may have been sentenced a number of times for a number of crimes, his “sentence” is an undivided whole—it is one sentence as determined by the Bureau of Prisons in calculating how long he will remain in federal custody. Thus, a reduction in one component can result in a credit elsewhere without the need to separate the sentence into its respective segments. Eligibility for a reduced sentence may be crime specific, but Martin argues that the benefit need not be. While Martin is right as to how the Bureau performs its custodial calculations, sentences are a function of a judicial process—they are imposed and served for specific offenses. Sentences are only aggregated—or combined—in specific circumstances.

The statute on which Martin builds his argument, 18 U.S.C. § 3584(c), provides that “[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated *for administrative purposes* as a single, aggregate term of imprisonment.” 18 U.S.C. § 3584(c) (emphasis added). Those administrative purposes are explained in, among other provisions, 18 U.S.C. § 3585, which authorizes the Bureau of Prisons to provide inmates with credit towards their

sentence for various reasons, including for time spent in detention prior to commencement of the sentence. *See generally United States v. Wilson*, 503 U.S. 329, 333–35 (1992) (“After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for *administering* the sentence.” (emphasis added)).

Aggregation for administrative purposes does not imply that every sentence imposed may be modified based on an authorization to modify one component part. In fact, courts that have modified sentences outside the context of the First Step Act have routinely rejected that administrative aggregation permits the modification of sentences that have already been served. *See, e.g., United States v. Llewlyn*, 879 F.3d 1291, 1295 (11th Cir. 2018) (finding moot a motion made under § 3582(c)(2) to reduce a sentence that had already been served where inmate remained imprisoned due to later consecutive sentences imposed for offenses committed while serving original sentence); *United States v. Vaughn*, 806 F.3d 640, 643–44 (1st Cir. 2015) (same); *United States v. Parker*, 472 F. App’x 415, 417 (7th Cir. 2012) (same). For example, the Eleventh Circuit affirmed the denial of an inmate’s motion for a sentencing reduction under § 3582(c)(2) as moot where the inmate sought to reduce an expired sentence despite remaining in prison for later

imposed sentences. *See Llewlyn*, 879 F.3d at 1293. In *Llewlyn*, the inmate argued that “his two consecutive federal sentences are aggregated and he is actually serving a single sentence,” thus the policy statement contained in § 1B1.10(b)(2)(C) did not prevent the requested reduction. *Id.* at 1295. The Eleventh Circuit rejected that argument and refused to extend the concept of administrative aggregation found in § 3584(c) to resentencing proceedings. *See id.* The Eleventh Circuit’s reasoning is helpful when considering Martin’s case. The Eleventh Circuit reasoned that courts’ “judicial decisions under § 3582 do not constitute an ‘administrative purpose,’” and that to so find would “essentially rewrite the statute to extend aggregation to *all* purposes.” *Id.* at 1295 (quoting *Vaughn*, 806 F.3d at 644).

Section 3584(c) provides no textual support for the position that sentences may be aggregated for the purpose of resentencing, nor has any court interpreted the statute in such a fashion. The authorization to modify sentences in section 3582 permits courts to modify “term[s] of imprisonment,” and section 3584(c) tracks that language, providing that “*terms* of imprisonment shall be treated *for administrative purposes* as a single, aggregate *term* of imprisonment.” *See* § 3584(c) (emphasis added). Thus, where an inmate is imprisoned upon multiple sentences

that are aggregated for administrative purposes, courts require specific modification authorization—either due to a change in the guidelines ranges for a sentence on a particular count of conviction, or because a statute authorizes the reduction of a sentence—for *each* term of imprisonment contained in an otherwise final judgment of conviction.

B. The First Step Act Does Not Permit Retroactive Modification of Sentences Already Served

Motions made under the First Step Act are properly considered under 18 U.S.C. § 3582(c)(1)(B). *Holloway*, 956 F.3d at 665–66. Section 3582(c)(1)(B) permits modification of a sentence to the extent “expressly permitted by statute.” We have previously interpreted section 3582(c)(1)(B) to require “that a statute contain an express grant of remedial power, and that this power be broad enough to permit the resentencing in question.” *United States v. Triestman*, 178 F.3d 624, 629 (2d Cir. 1999).

The language of the First Step Act is circumscribed, it permits courts only 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.” *See* § 404(b), 132 Stat. at 5222 (emphasis added). The plain language of the Act permits the limited modification of a specific sentence, it does not give district courts *carte blanche* to

modify terms of imprisonment other than those imposed for “covered offenses.” Furthermore, the stated purpose of the First Step Act suggests that section 404 was intended only to extend the Fair Sentencing Act retroactively in an effort to remedy sentencing disparities between defendants sentenced for the same conduct prior to and after the enactment of the Fair Sentencing Act.¹²

“Covered offenses” under the First Step Act are those for which the statutory penalties were modified by sections 2 or 3 of the Fair Sentencing Act. § 404(a), 132 Stat. at 5222; *see* §§ 2–3, 124 Stat. at 2372. The explicit reference to sections 2 or 3 of the Fair Sentencing Act demonstrates that the First Step Act permits a sentencing reduction *only* to the extent that sections 2 or 3 of the Fair Sentencing Act would apply. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) (“As a rule, a definition which declares what a term means excludes any meaning

¹² *See, e.g.*, 164 Cong. Rec. S7764 (Sen. Booker) (“The problem was the change [in the disparity between powder and crack cocaine sentencing addressed in the Fair Sentencing Act] wasn’t retroactively applied. . . . We never made this change retroactive. . . . Making this fix in the bill alone will mean that thousands of Americans who have more than served their time will become eligible for release”); *id.* at S7774 (Sen. Feinstein) (“Congress addressed [the disparity between crack and powder cocaine sentencing] in 2010, when the Fair Sentencing Act became law. . . . Unfortunately, this new law did not apply retroactively, and so there are still people serving sentences under the 100-1 standard. The bill before us fixes that and finally makes the Fair Sentencing Act retroactive so that people sentenced under the old standard can ask to be resentenced under the new one.”).

that is not stated.” (alterations, citations, and internal quotation marks omitted)). The First Step Act therefore provides no text authorizing a court to alter sentences other than those imposed for violations of a “covered offense.” *See, e.g., Dillon*, 560 U.S. at 825 (interpreting the language “may reduce the term of imprisonment” in § 3582(c)(2) not to “authorize a sentencing or resentencing proceeding,” but instead providing for a “modif[ication of] a term of imprisonment.” (alteration in original)).¹³ Thus, section 404(b)’s text, along with its narrow scope, shows that Congress “intended to authorize only a limited adjustment to an otherwise final sentence” *See id.* at 826.

The First Step Act permits a sentencing modification only to the extent the Fair Sentencing Act would have changed the defendant’s “covered offense” sentence. For Martin to obtain relief, the Act must “expressly permit” modification of a sentence that has already been served. It does not.

The text of the statute permits only the “impos[ition] of a reduced sentence,” from which we cannot also imply an authorization to reduce a term of

¹³ Although motions made under the First Step Act are properly considered under § 3582(c)(1)(B), *see Holloway*, 956 F.3d at 660, that does not suggest that the First Step Act should be interpreted differently from analogous language in § 3582(c)(2).

imprisonment that has already been served. The act of imposing something means “to levy or exact,” *see Impose*, BLACK’S LAW DICTIONARY (11th ed. 2019), to “establish or apply by authority,” or “bring about as if by force,” *see Impose*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/impose> (last visited August 4, 2020). It makes little sense to bring about, exact, establish, or apply a *reduced* term of imprisonment where the term of imprisonment to be reduced has been completed.

The act of imposing connotes the affirmative placement of a burden or a restriction; it makes little sense to place a “reduced” burden or restriction where no burden or restriction exists. The same cannot be said where a defendant continues to serve his term of imprisonment—there, the imposition of a “reduced” sentence merely modifies a punishment that has yet to be completed.

Furthermore, administrative aggregation of sentences for the purpose of calculating time served, and the fact that the reduction Martin requests would affect that calculation, cannot create an authorization for retroactive relief that is neither expressly stated within nor implied by the statute. It bears repeating that sentences are imposed for specific offenses; a statutory authorization to apply, establish, exact, or bring about a reduced sentence for one offense does not permit

modification of aggregated sentences where the modifiable sentence is no longer being served. To do so would erroneously treat the sentences as an undivided, aggregated whole. The “imposition” of a sentence is not an administrative purpose under section 3584(c), and to construe it as such would warp the structure of that chapter of the United States Code.

Although Martin argues this Court should not “imply a limitation where none has been written by Congress,” he misapprehends the relevant question: whether the statute “expressly” permits the requested relief. It does not. “Of course, Congress may depart from [our traditional legal concepts]; it may use words in ways that are unconventional, or adopt innovative procedures.” *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 760 F.3d 151, 166 (2d Cir. 2014). But absent any suggestion that Congress intended to upend the structure of resentencing proceedings, or to use the terms appearing in section 404(b) in a novel fashion, we cannot read into the statute the authorization to grant the relief Martin requests.

To the extent we presume that Congress legislates with familiarity of the legal backdrop for its legislation, *see, e.g., Tanvir*, 894 F.3d at 463; *see also Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (“We normally assume that, when Congress enacts

statutes, it is aware of relevant judicial precedent.”), it makes sense to look to an analogous resentencing proceeding for guidance: 18 U.S.C. § 3582(c)(2), which permits modification of a term of imprisonment based on a retroactive change to the Sentencing Guidelines. Comparing the long history of caselaw fleshing out the details and mechanics of section 3582(c)(2) with the relatively light amount of caselaw dealing with section 3582(c)(1)(B), and the fact that many courts consider only a few statutes to fall under the express authorization of section 3582(c)(1)(B), *see, e.g., United States v. Wirsing*, 943 F.3d 175, 184 (4th Cir. 2019) (“In pre-First Step Act cases, courts found § 3582(c)(1)(B) to encompass only a few statutes.”), we find it unlikely that Congress sought to substantially depart, without saying so, from otherwise settled presumptions regarding the resentencing context. Thus, it is helpful to look at the parallels between section 3582(c)(2) and the First Step Act to resolve background questions regarding the mechanics of the First Step Act like the question presented by Martin’s motion. Examining the cases interpreting section 3582(c)(2) and presuming that Congress legislated section 404(b) with a recognition of that resentencing regime supports that Congress did not seek to implicitly grant courts authority to modify sentences that have already been served.

For example, if the First Step Act permitted retroactive modification of sentences that had already been served, it would permit a defendant to obtain substantially more relief than if he had moved for a sentencing reduction pursuant to a change in the relevant Sentencing Guidelines. Courts considering motions made under § 3582(c)(2) are bound to follow the Guidelines' policy statements, including § 1B1.10(b)(2)(C)'s prohibition on reducing terms of imprisonment to less-than time served. *Cf., e.g., Llewlyn*, 879 F.3d at 1296, 1298. While motions made under the First Step Act are not subject to those policy statements, we find it difficult to believe that Congress intended to create two disparate resentencing regimes that would have the effect of treating similarly situated inmates differently, and that Congress did so without any express statement conveying such an intent.¹⁴ Presuming Congress's familiarity with these background

¹⁴ For example, as noted above and by the district court, several of Martin's codefendants obtained sentencing reductions based on Amendment 782 to the Sentencing Guidelines, which altered the offense level calculations for certain drug offenses under U.S.S.G. § 2D1.1. As also noted above, Martin was ineligible for the same reduction because his applicable offense level was calculated based on a murder committed by his drug trafficking organization. His Guidelines calculation was unaffected by Amendment 782. Thus, the First Step Act does diverge from § 3582(c)(2): Martin would have been eligible for relief under the Act, but was not similarly eligible under a change in the Guidelines. This divergence is because the Act requires only that Martin have been sentenced for a

principles of law, and with cases like *Llewlyn* applying those principles, it would seem a stretch to infer that Congress intended to substantially depart from those settled mechanics without expressing that intent.

To the extent the First Step Act is silent with respect to whether it permits the modification of already-served sentences, and given the strong rejection of such relief under § 3582(c)(2), “it is more likely that Congress was adopting, rather than departing from, established assumptions about how our legal or administrative system works. We will not lightly assume a less conventional meaning absent a clear indication that such a meaning was intended.” *Nat. Res. Def. Council, Inc.*, 760 F.3d at 166. This is especially true where § 3582(c)(1)(B) only permits modification of an “*imposed* term of imprisonment” to the extent “expressly permitted by statute.” *See* 18 U.S.C. § 3582(c)(1)(B) (emphasis added). Congress *could* give a court the power to modify *any* imposed term of imprisonment—including one already served—and to thus grant Martin’s requested relief. Here, however, it has only expressly permitted courts to “*impose*

“covered offense.” Despite the divergence—which is clear from section 404(a)—we find no authorization to reduce an already served sentence from the text of section 404(b).

a reduced sentence,” § 404(b), 132 Stat. 5222 (emphasis added), which more closely mirrors § 3582(c)(2)’s grant of authority to “reduce the term of imprisonment,” 18 U.S.C. § 3582(c)(2).

The First Step Act does not authorize district courts to reduce sentences for covered offenses where those sentences have been fully served.

C. The Relief Authorized by the First Step Act is No Longer Possible for Martin

“[A] case is moot when the issues presented are no longer ‘live’ or the part[y] lack[s] a legally cognizable interest in the outcome.” *See United States v. Suleiman*, 208 F.3d 32, 36 (2d Cir. 2000). For a party to have a cognizable interest in the outcome of a proceeding, a litigant must have suffered an actual injury traceable to the opposing party, and the alleged injury must be likely to be redressed by a favorable judicial decision. *See Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990).

While it is true that a criminal case does not “necessarily become moot when [an] [inmate] finishes serving the sentence,” it will only remain a live case or controversy if there exists “some concrete and continuing injury or collateral consequence resulting from the conviction.” *United States v. Mercurris*, 192 F.3d 290, 293 (2d Cir. 1999) (internal quotation marks omitted) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). Where an inmate challenges his criminal conviction,

the Supreme Court “has been willing to presume the existence of collateral consequences sufficient to satisfy the case or controversy requirement,” or has at least been willing “to count collateral consequences that are remote and unlikely to occur.” *See id.* (emphasis omitted) (quoting *United States v. Probbler*, 170 F.3d 345, 348 (2d Cir. 1999)). However, challenges to sentences do not create a presumption of collateral consequences. *See id.* at 293–94. And a challenge to the length of a completed sentence does not present a live controversy solely by virtue of its collateral effect or consequence on future sentencing. *See Suleiman*, 208 F.3d at 36–37 (discussing Second Circuit precedents following *Spencer*, 523 U.S. at 7, and noting that the contrary holding in *United States v. Rivera*, 164 F.3d 130, 132 (2d Cir. 1999), was no longer good law). For example, “speculation that an individual will receive an enhanced sentence in a future sentencing proceeding in connection with a crime he has not yet committed” is insufficient to demonstrate the presumption of collateral consequences. *Mercurris*, 192 F.3d at 294. Where courts decline to presume the existence of collateral consequences, the inmate seeking to challenge an already-completed sentence “bears the burden of demonstrating some ‘concrete and continuing injury’ sufficient to create an Article III case or controversy.” *Id.* (quoting *Spencer*, 523 U.S. at 7).

Martin has not argued that we ought to presume he suffers collateral consequences as a result of the sentencing disparity between powder and crack cocaine caused by having been sentenced prior to the enactment of the Fair Sentencing Act. Instead, he has consistently argued that his continuing imprisonment is the injury for which he seeks redress.¹⁵ For Martin's injury to be redressable, a court must have the power through a favorable judicial decision to reduce Martin's term of imprisonment. But, as we determined above, the First Step Act does not grant a court the authority to modify Martin's term of imprisonment because he has already completed serving the term imposed for Count Seven—the only “covered offense” for which Martin was convicted. Martin's injury is therefore not redressable by a favorable decision under the First Step Act.

¹⁵ To the extent Martin seeks reduction of his term of supervised release, we agree that his motion is not moot in that respect. However, such relief is distinct from modification of his term of imprisonment, which has already been served. Martin raised this issue for the first time in his motion for reconsideration. And we cannot say that the district court abused its discretion by denying Martin's request for modification of his term of supervised release. See *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52–53 (2d Cir. 2012). Furthermore, there is only a remote possibility that the district court would grant such relief on remand based upon the decisions below. See, e.g., *United States v. Key*, 602 F.3d 492, 494 (2d Cir. 2010); *United States v. Blackburn*, 461 F.3d 259, 262–64 (2d Cir. 2006). We therefore decline either to reverse the district court or to remand Martin's request for modification of his term of supervised release.

While it may be tempting to think that the later commencement of Martin's consecutive sentences constitutes a collateral consequence of his term of imprisonment for Count Seven, the fact that Martin remains in prison after serving his sentence is "contingent upon [Martin's having] violat[ed] the law, [being] caught and convicted." *See Spencer*, 523 U.S. at 15 (rejecting argument that a parole revocation could be used to increase sentencing in future proceeding, thus created collateral consequences); *see also Mercurris*, 192 F.3d at 294 (applying *Spencer's* rejection of similar reasoning to find moot a challenge to the application of a sentencing enhancement). Likewise, the fact that Martin remains incarcerated due to later convictions for non-covered offenses is only due to his later criminal conduct, and is therefore not "collateral" to his original sentence. Martin's later sentences were only affected by his sentence under Count Seven in the sense that he began serving those sentences later in time. Martin's motion is therefore moot; a district court cannot grant the relief he seeks under the First Step Act.

Nevertheless, Martin argues that effectual relief is possible because the imposition of a reduced term of imprisonment under Count Seven would have the effect of "crediting" time towards Martin's subsequent sentences. We disagree that crediting such time would be appropriate here.

The practice of crediting time served occurs in several contexts. *See generally United States v. Jackson*, 952 F.3d 492, 497–98 (4th Cir. 2020). Most frequently, “[18 U.S.C.] § 3585(b) reduces a defendant’s ‘imprisonment’ by the amount of time spent in ‘official detention’ before his sentence [is imposed]. . . .” *Reno v. Koray*, 515 U.S. 50, 56, 59 (1995); *see* 18 U.S.C. § 3585(b). Similarly, defendants are credited for time spent in prison when their term of imprisonment is partially vacated. *See generally United States v. Johnson*, 529 U.S. 53, 54–55 (2000). In that context, the Supreme Court has found that a defendant’s term of supervised release is unaffected by excess time spent in prison after a partially vacated conviction. *See id.* at 54.

Perhaps most relevant to Martin’s case is when a defendant serving multiple terms of imprisonment has one of his convictions or sentences vacated, and the defendant is then retried and convicted for the same offense. There, the time served under the vacated conviction must be credited towards the later-imposed sentence or another consecutive sentence to avoid a violation of the Double Jeopardy Clause. *See generally North Carolina v. Pearce*, 395 U.S. 712, 718–19 (1969) (“[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully

‘credited’ in imposing sentence upon a new conviction for the same offense”) *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798–803 (1989); *see also*, e.g., *United States v. Markus*, 603 F.2d 409, 412–14 (2d Cir. 1979) (crediting time served under vacated conviction to consecutive sentence and finding no violation of Double Jeopardy after re-imposition of original sentence to be served consecutively upon reconviction). The Double Jeopardy concern, and the resulting credit that is applied to other sentences, results from the possibility that the defendant is reconvicted and resented for the same offense. *See Pearce*, 395 U.S. at 719 (“If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.”); *Miller v. Cox*, 443 F.2d 1019, 1020–21 (4th Cir. 1971) (“[W]here a prisoner serving consecutive sentences on several convictions succeeds in having one of the sentences invalidated after it has been fully or partially served . . . there is no question of multiple punishment for the same offense . . . [still] the state must credit the sentences remaining to be served on the valid convictions with the time served under the voided conviction.”). Even if such a defendant is not retried for the same crime, “common sense and

fundamental fairness require” that time spent in prison on a now-voided conviction be credited towards the defendant’s remaining valid convictions and sentences. *See Miller*, 443 F.3d at 1021.

Martin argues that effectual relief is possible because the imposition of a reduced sentence under Count Seven would have the effect of having caused him to over-serve his sentence for Count Seven; thus, the additional time he spent in prison may be credited towards the two 12-month terms of imprisonment he continues to serve, and granting his motion would result in his immediate release. To explain, were the district court to have imposed a reduced sentence of 60-months’ imprisonment for Count Seven, Martin would have overserved his sentence by 68 months. Martin contends that those 68 months could then be applied towards his two 12-month misdemeanor sentences, thereby causing Martin’s immediate release. Martin claims this credit would constitute effectual relief made possible by a favorable judicial decision under the First Step Act.¹⁶

¹⁶ We construe Martin’s argument charitably. The argument appearing in his briefing is less nuanced, and relies on the erroneous presumption that the district court was empowered to alter Martin’s aggregated sentence for both Counts Seven and Ten. The district court committed the same error in its vacated decision. We note these errors only in an effort to emphasize the precise limits of the First Step Act—which permits modifications of a sentence imposed for a “covered offense,” and not the aggregate term

Martin's case is therefore unlike the situations described by *Pearce* and *Miller*, where courts credit time served for one sentence towards another sentence when the underlying conviction or sentence is vacated. In those circumstances, the defendants spent time in prison for reasons that could no longer justify their imprisonment. Because time cannot be paid back to a defendant who is wrongfully imprisoned, courts credit that time towards a defendant's consecutive sentences. Martin does not seek vacatur of his sentence for Count Seven—he seeks the imposition of a reduced sentence. There is no contention that Martin was unlawfully imprisoned for Count Seven, nor is there any contention the sentence imposed by Judge Trager in 2007 was in error at the time it was imposed. In short, Martin served the sentence that was lawfully imposed upon him. The fact that a change in the law that was later made retroactive created a disparity between Martin and similar defendants sentenced several years later does not render the time he served for Count Seven creditable to offenses he committed while in prison.

of imprisonment contained in a judgment of conviction including a sentence for a covered offense.

Congress created the disparity between powder and crack cocaine sentencing in 1986 with the Anti-Drug Abuse Act of 1986, and took until 2010 before attempting to remedy that disparity through the Fair Sentencing Act. Congress then took another 8 years before applying the Fair Sentencing Act retroactively to defendants like Martin. The vast majority of defendants who have been disparately sentenced since 1986 will not be entitled to relief under section 404(b) because many of them were released from prison long ago. Martin was imprisoned in 2003, and only remains imprisoned due to his later criminal conduct—none of which is affected by the disparity between powder and crack cocaine sentencing. That Martin remains imprisoned due to later criminal conduct does not create an entitlement to Congressional grace denied to another inmate imprisoned in 2003 who chose not to commit further crimes in prison.

“[T]he fact that our interpretation [of the First Step Act] leaves some [sentencing] disparities in place is hardly an objection” to our conclusion that the statute does not permit the relief Martin requests. *See Johnson*, 961 F.3d at 191. If Congress intended to permit the retroactive modification of a sentence that has already been served, it could have done so. The First Step Act is silent with respect to such relief; a favorable judicial decision under the Act that would have the effect

of reducing Martin's term of imprisonment is no longer possible; his motion is moot.

CONCLUSION

The order and judgment of the district court are **AFFIRMED**. The mandate shall issue on Wednesday, September 9, 2020.