

GERARD E. LYNCH, *Circuit Judge*, concurring in the judgment:

The Court's opinion today reaches a sensible resolution of a statutory puzzle that is perhaps more complicated than the opinion suggests. I am not fully persuaded that the language of the First Step Act compels the result we reach today. Nevertheless, I concur in the judgment, because I have become convinced that the majority's conclusion, supported by the consensus of our sister circuits and now by the Justice Department as well, reflects both sound policy and the likely intent of the Congress that adopted the First Step Act and is not precluded by the language of that statute. Given the difficulty of applying the deceptively simple language of the First Step Act to the convoluted structure of the penalty provisions of the Controlled Substances Act, I conclude that we do better to adopt a broad reading of eligibility for relief under a statute that Congress intended to relieve a long-standing injustice.

As a matter of pure textual analysis, it has been my view that the government's prior submission had the better of the analysis, particularly after the Supreme Court's decision in *Terry v. United States*, 141 S.Ct. 1858 (2021). That analysis is relatively straightforward.

The First Step Act makes a defendant eligible to seek a discretionary modification of his sentence for a “covered offense,” First Step Act § 404(b), 132 Stat. 5222, defined as a “violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010,” *id.* § 404(a). The Supreme Court in *Terry* clarified that the “which” in the latter clause modifies “violation,” rather than “statute.” The question of Jordan’s eligibility for sentencing relief thus turns on whether the “statutory penalties” for his “violation” were modified by the relevant sections of the Fair Sentencing Act, which moderate the infamously disproportionate penalties previously imposed for offenses involving cocaine base (in the vernacular, “crack”).

What was the “violation” charged in the count at issue here? As the majority opinion acknowledges, it was a “dual object” conspiracy: Jordan was charged with violating 21 U.S.C. § 846 by conspiring to distribute specified quantities of both powder cocaine and crack – quantities of each drug that were independently sufficient to trigger “statutory penalties” of ten years (enhanced to twenty for Jordan by virtue of a prior narcotics conviction) to life.

Jordan was not convicted of “violating” (or more accurately, conspiring to violate) either § 841(b)(1)(A)(ii) (relating to powder cocaine, the penalties for

which were not affected by the Fair Sentencing Act), or § 841(b)(1)(A)(iii) (relating to crack, the penalties for which *were* reduced by that Act); he was convicted of *conspiring* to violate *both*. The majority contends that because Jordan was convicted of an offense that invoked § 841(b)(1)(A)(iii), which sets the penalties for distributing crack cocaine, the terms of the First Step Act apply.

But Jordan was convicted under the relevant count of a *single* crime – a conspiracy to violate both statutes by distributing both types of drug. Before the Fair Sentencing Act, what was the statutory penalty range for such a dual purpose conspiracy, where the jury specifically found that each object of the conspiracy had been proven beyond a reasonable doubt? It was a single penalty, dictated by the highest penalty made available by any of the controlled substances the distribution of which was an object of the conspiracy. The majority opinion acknowledges as much: The ten-year mandatory minimum term and the maximum possible sentence of life imprisonment, as set by the powder cocaine object, would govern the sentence, regardless of whether the jury found that the defendant conspired to distribute an amount of crack that would also trigger that maximum, or a lesser amount that would trigger only a statutory penalty between five and forty years in prison, or a quantity of crack so small that there would be no mandatory

sentence at all. Both before and after the Fair Sentencing Act, the “statutory penalty” for Jordan’s violation of the narcotics conspiracy statute was at all times ten years to life in prison, without regard to the shifting penalties for violations of the same conspiracy law that involved only crack cocaine.

That analysis (actually, a slightly more complicated version of that analysis in light of this Circuit’s pre-*Terry* construction of the grammar of the First Step Act) persuaded me to adopt the result in *United States v. Lott*, 830 F. App’x 365 (2d Cir. 2020), and it still seems to me the cleaner reading of the language of the First Step Act.

For several reasons, however, I am now persuaded that even if the analysis set forth above more closely follows the literal meaning of the statute, it is not the better reading. First, it is wise to reconsider one’s views when those views are inconsistent with those of so many other judges who have considered the matter, and are no longer defended even by the prosecutors who previously sought the more rigid interpretation of the statute.

Second, Judge Bianco’s careful analysis in the opinion, which comports with the reading of all of our sister circuits that have addressed the question, persuades me that, at a minimum, the language of the First Step Act is sufficiently susceptible

of a more generous reading to be characterized as ambiguous, and in such situations the rule of lenity counsels adopting the interpretation that favors liberty. *United States v. Plaza Health Lab'ys, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (citing *Crandon v. United States*, 494 U.S. 152, 168 (1990)).

Third, the majority's interpretation likely reflects the intention of Congress. Of course, one could argue that if Congress in effect intended to make eligible for sentencing relief any defendant convicted of any offense involving crack cocaine, it could have said so simply and directly, rather than using the more technical language it adopted. But the Controlled Substances Act, with its convoluted nested penalty structure, makes cross-referencing difficult, and it is not apparent that Congress gave any specific consideration at all to the way in which its language would affect the somewhat arcane matter of dual-purpose narcotics conspiracies. In such circumstances, it is reasonable to adopt an interpretation that best furthers what we know to be Congress's dominant purpose in adopting both the Fair Sentencing Act and the First Step Act: to correct the excessive penalties adopted – perhaps understandably – at a time when the properties of a new form of drug not yet well understood appeared to create vastly greater harm than equivalent quantities of the same basic substance.

Finally, the risks involved in adopting the majority's interpretation are limited. Of course, Congress has the power to correct the courts' view of the statute if we misread its intention (and so far there has been no indication that anyone in Congress is unhappy with the interpretation that now has the support of every court of appeals to have construed the statute). Moreover, our ruling today affects only *eligibility* to apply for a sentence modification. If the sentencing court concludes that the sentence imposed on any particular defendant was and remains appropriate, notwithstanding our current understanding of the relative seriousness of crack as opposed to powder cocaine, the court may deny the motion in its discretion. The risks of erring in the other direction are more problematic: If we wrongly exclude defendants from eligibility who Congress intended to make eligible, we bar the district court from even considering whether its original sentence was over-influenced by now-discredited theories of the seriousness of crack.

For all of these reasons, I am now persuaded that the majority's more generous interpretation of the First Step Act is ultimately the better reading of the statute, and I concur in the judgment of the Court.