

Crack Cocaine Offenses and the First Step Act of 2018: Overview and Implications of *Terry v. United States*

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On June 14, 2021, the Supreme Court issued an opinion in *Terry v. United States*, unanimously holding that a person convicted of possession with intent to distribute crack cocaine prior to enactment of the [First Step Act of 2018](#) is eligible for a retroactive sentence reduction under the First Step Act only if the crack offense triggered a mandatory minimum sentence. This Legal Sidebar outlines relevant background related to sentencing for criminal offenses involving crack and powder cocaine, then discusses the Supreme Court’s decision in *Terry*. The Sidebar concludes with considerations for Congress related to powder and crack cocaine sentencing.

Background on Federal Cocaine Sentencing

The [Controlled Substances Act](#) (CSA) imposes a comprehensive system of federal regulation on certain drugs and other substances deemed to pose a significant risk of abuse and dependence, including some prescription drugs and many recreational drugs. The CSA divides controlled substances into five lists, known as [schedules](#). A lower schedule number carries more stringent regulations, and it is unlawful to manufacture, possess, or distribute a controlled substance except as authorized under the CSA.

Congress enacted the CSA in 1970. Among other things, the 1970 legislation [placed cocaine in Schedule II](#) under the CSA and imposed [criminal penalties](#) for the unlawful manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense any “narcotic drug,” including cocaine. The CSA as enacted did not distinguish between powder and [crack cocaine](#). However, in response to concerns about a “crack epidemic” that arose in the mid-1980s, Congress later [amended the CSA](#) in 1986, imposing mandatory minimum sentences for certain offenses involving cocaine. While the minimum sentences applied to both powder and crack cocaine, the amount of each substance required to trigger the mandatory minimum varied by a ratio of 100-to-1. For example, offenses involving 5 kilograms of cocaine powder or 50 grams of cocaine base (i.e., crack) carried a mandatory 10-year sentence, and offenses involving 500 grams of cocaine powder or 5 grams of cocaine base carried a mandatory 5-year sentence. Offenses involving smaller amounts or an unspecified amount of cocaine (whether powder or crack) were also subject to criminal penalties but did not carry a mandatory minimum prison term.

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After the 1986 legislation was enacted, some commentators and stakeholders, including the U.S. Sentencing Commission (USSC), raised concerns that the disparity between the thresholds for powder and crack cocaine was too great, and that crack offenders were disproportionately Black, creating a “[perception of unfairness](#).” In response, Congress enacted the [Fair Sentencing Act of 2010](#), which, among other things, raised the amounts of crack required to trigger mandatory minimum sentences, reducing the disparity between the thresholds for powder and crack cocaine to a ratio of approximately 18-to-1. The Fair Sentencing Act applied to future cases and cases that were pending on the date of enactment, but did not apply to cases in which a sentence had already been imposed.

Following enactment of the Fair Sentencing Act, the USSC [updated](#) the drug quantity tables in the U.S. Sentencing Guidelines (Guidelines) to reflect changes made by the legislation. The Guidelines are a complex system of rules for arriving at a suggested sentencing range for each federal offender and offense. While the Guidelines are advisory and cannot mandate a certain sentence, a federal court must consider them in determining what sentence to impose within statutory parameters. The USSC made the changes to the Guidelines [retroactive](#), meaning that offenders sentenced prior to enactment of the Fair Sentencing Act of 2010 could [seek](#) a reduction in their sentence based on changes to the Guidelines drug quantity tables that brought recommended sentence ranges under the Guidelines in line with the crack-to-powder ratio reflected in the Fair Sentencing Act. That said, the USSC did not, and could not, change the *statutory* penalties in effect at the time an offender was sentenced. In other words, because Congress did not make the Fair Sentencing Act retroactive, offenders sentenced prior to passage of that statute [remained](#) subject to the mandatory minimums then in effect and could not have their sentences reduced below those minimums, even if recommended under the Guidelines. Additionally, under the Guidelines, some offenders who were [sentenced](#) as “career offenders” (meaning they were convicted of a felony “controlled substance offense” or “crime of violence” when over the age of 18 and after two prior convictions of the same) could seek neither a statutory nor a Guidelines sentence reduction, [as](#) the amendments to the drug quantity tables did not affect the separate career offender guideline.

Congress addressed the non-retroactivity of the Fair Sentencing Act through the [First Step Act](#) in 2018. The First Step Act made the Fair Sentencing Act’s changes to crack sentences retroactive and permitted those convicted and sentenced prior to passage of the Fair Sentencing Act to seek [resentencing](#). The Act applied to any “covered offense,” [defined](#) in part as “a violation of a Federal criminal statute, the statutory penalties for which were modified by” the Fair Sentencing Act provision that altered the crack-to-powder ratio for purposes of the relevant CSA offenses. Federal courts divided on the question of which statutory penalties were “modified by” the Fair Sentencing Act such that an offense subject to such penalties would constitute a “covered offense.” As noted above, the CSA [establishes](#) three relevant tiers of penalties for the unlawful manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense crack. Offenses involving the highest amount of crack are subject to a 10-year mandatory minimum sentence of imprisonment. Offenses involving a lower amount of crack are subject to a 5-year mandatory minimum. And offenses involving the lowest or an unspecified amount of crack are punishable by imprisonment but are not subject to a mandatory minimum. The Fair Sentencing Act [changed](#) the amounts of crack that trigger mandatory minimum sentences under the highest tier and the middle tier from 50 grams to 280 and from 5 grams to 28, respectively. The Act did not expressly amend the lowest tier—which carries no mandatory minimum and does not specify an amount of crack for purposes of punishment (and does not expressly distinguish between crack and other forms of cocaine).

Thus, one question courts have grappled with since the First Step Act’s passage in 2018 is whether offenders convicted under the lowest tier prior to changes made by the Fair Sentencing Act can now seek retroactive resentencing; put another way, was the lowest tier “modified by” the Fair Sentencing Act? The question [produced](#) a split among the U.S. Courts of Appeals. Some courts held that the Fair Sentencing Act [did](#) modify the lowest tier because, by increasing the amount of crack needed to impose the mandatory minimum in the middle tier, offenders who previously would have fallen in the middle tier now fell in the lowest tier. By adopting this view, some [courts](#) determined that by changing the middle tier

from 5 to 28 grams of crack, the Fair Sentencing Act in effect raised the upper limit for sentencing in the lowest tier as well. Other courts held, to the [contrary](#), that the lowest tier was not modified by the Fair Sentencing Act because that Act changed only the amounts of crack relevant to imposing mandatory minimums under the middle and highest tiers. The Supreme Court stepped in to resolve the split, [granting](#) certiorari in *Terry v. United States* on January 8, 2021.

The Supreme Court Decision in *Terry*

The petitioner in *Terry v. United States* pled guilty in 2008 to possession with intent to distribute a small, unspecified amount of crack cocaine. The petitioner's offense fell within the lowest statutory penalty tier under the CSA, meaning he was not subject to either the 5- or 10-year mandatory minimums described above. The sentencing court determined that the petitioner was a career offender under the Sentencing Guidelines and sentenced him to 188 months' imprisonment. Following enactment of the Fair Sentencing Act and the attendant retroactive amendments to the Guidelines, the petitioner sought resentencing pursuant to the new Guidelines but was unsuccessful because the Guidelines changes did not apply to career offenders. The petitioner then sought resentencing after passage of the First Step Act, arguing that his sentence qualified as a "sentence for a covered offense" within the meaning of that Act. Both the [district court](#) and the U.S. Court of Appeals for the Eleventh Circuit disagreed, with the Eleventh Circuit [holding](#) "that offenders are eligible for a sentence reduction only if they were convicted of a crack offense that triggered a mandatory minimum."

In a June 14, 2021, decision, the Supreme Court affirmed, [concluding](#) unanimously that the Fair Sentencing Act did not modify the statutory penalties for the petitioner's offense under the lowest penalty tier. Focusing on the text of the relevant provisions, the Court [recognized](#) that "[b]efore 2010, the statutory penalties for that offense were 0-to-20 years, up to a \$1 million fine, or both, and a period of supervised release," and "these statutory penalties remain exactly the same" after 2010. The Court thus [viewed](#) as "straightforward" the result that no statutory penalties under the lowest penalty tier were "modified" by the Fair Sentencing Act within the meaning of the First Step Act, meaning that offenses in the lowest tier sentenced prior to 2010 are not "covered offense[s]" eligible for First Step Act resentencing. Justice Sotomayor wrote [separately](#) to argue that, in light of the Court's decision, some offenders sentenced under the lowest tier before 2010 "have been left behind" despite the reduction of the crack-to-powder disparity. Justice Sotomayor noted that, if the petitioner in *Terry* had been convicted of possessing with intent to distribute larger amounts of crack, he would have been eligible to seek resentencing under the First Step Act in light of the Fair Sentencing Act's modification of the middle and highest penalty tiers. Justice Sotomayor further noted that, even if convicted under the lowest tier, the petitioner would have been eligible for a sentence reduction under the Guidelines if his [range](#) "had been calculated like that of a non-career offender." But because the petitioner was [both](#) convicted under the lowest penalty tier and sentenced as a career offender under the Guidelines, Justice Sotomayor stated that "he has never had a chance to ask for a sentence that reflects today's understanding of the lesser severity of his crime." Justice Sotomayor thus [concluded](#) that although the text of the First Step Act "will not bear" a reading that applies the Fair Sentencing Act retroactively to offenders like the petitioner in *Terry*, "Congress has numerous tools to right [that] injustice."

Considerations for Congress

Following the Supreme Court's decision in *Terry*, Congress might examine whether to expand resentencing opportunities for crack offenses committed before the enactment of the Fair Sentencing Act of 2010. It appears that at least some Members of Congress who supported the First Step Act intended the legislation to reach broadly and encompass all crack offenders. For instance, four Senators who were lead sponsors and drafters of the 2018 legislation filed an [amicus brief](#) in *Terry*, arguing that the First Step Act "authorizes relief to everyone who had been sentenced for crack-cocaine offenses before the Fair

Sentencing Act became effective, including individuals with low-level crack offenses” that did not carry mandatory minimum sentences. Additionally, some commentators have argued that it would be [incongruous](#) or [arbitrary](#) to allow resentencing for individuals convicted of offenses involving large amounts of crack while leaving in place sentences involving smaller amounts of the substance.

More generally, Congress might also examine whether to alter or eliminate the disparity in sentencing thresholds between crack and powder cocaine. Congress originally imposed lower quantity thresholds for crack offenses based on [concerns](#) that crack was cheaper, more potent, more addictive, and overall more dangerous than other forms of cocaine. However, some commentators argue that the current [eighteen-to-one ratio](#) is [not justified](#) on scientific or public safety grounds and [disproportionately affects Black offenders](#). If Congress elected to modify the threshold amounts that trigger mandatory minimum sentences under the CSA, it could also consider whether those changes should apply retroactively.

A proposal currently pending before Congress entitled the Eliminating a Quantifiably Unjust Application of the Law Act, or EQUAL Act ([S. 79](#), [H.R. 1693](#)), would seek to address both the retroactivity question presented in *Terry* and the sentencing disparity. With respect to the sentencing disparity between crack and powder cocaine, the EQUAL Act would repeal the CSA provisions that impose mandatory minimum sentences for offenses involving crack. Because crack also falls within the broader category of cocaine, certain crack offenses would remain subject to mandatory minimum sentences. However, the quantity of crack required to trigger a mandatory minimum sentence would no longer be lower than the quantity of other forms of cocaine. With respect to retroactivity, the EQUAL Act would authorize resentencing of any “defendant who, before the date of enactment of [the EQUAL] Act, was convicted or sentenced for a Federal offense involving cocaine base.” That language appears to include offenders who, like the petitioner in *Terry*, were convicted of crack offenses that did not carry a mandatory minimum sentence.

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