



September 2, 2021

The Honorable Chuck Schumer
Senate Majority Leader
322 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Senate Minority Leader
317 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
1236 Longworth House Office Building
Washington, DC 20515

The Honorable Kevin McCarthy
2468 Rayburn House Office Building
Washington, DC 20515

Dear Leader Schumer, Leader McConnell, Speaker Pelosi, and Leader McCarthy,

As our jurisdictions' Attorneys General, we are responsible for protecting the health, safety, and well-being of our residents. Although our jurisdictions vary in size, geography, and political composition, we are united in our commitment to an effective criminal justice system that safeguards the communities of our states. To that end, a bipartisan coalition of Attorneys General supported the passage of the First Step Act of 2018—landmark legislation that brought common sense improvements to myriad aspects of the criminal justice system. Central to these reforms was retroactive relief for individuals sentenced under the discredited 100-to-1 crack-to-powder cocaine ratio that Congress abolished in 2010. Following the Supreme Court's recent opinion in *Terry v. United States*, however, the lowest level crack cocaine offenders remain categorically ineligible for resentencing. We write today to urge Congress to amend the First Step Act, and to clarify that its retroactive relief applies to *all* individuals sentenced under the prior regime.

Congress enacted the historic First Step Act of 2018 to modernize the criminal justice system, implementing comprehensive reform in areas such as corrections, criminal charging, community re-entry, and beyond. The product of a unique bipartisan consensus, the Act passed with overwhelming support from organizations across the ideological spectrum, including the Heritage Foundation, the American Civil Liberties Union, Freedomworks, the National Urban League, the American Conservative Union, the Public Defender Association, Americans for Prosperity, and the Center for American Progress, among many others. Over three dozen Attorneys General supported the Act as a critical tool for strengthening our criminal justice system and better serving the people of our states.

One of the First Step Act's key pillars was sentencing reform. This reform included Section 404, which provides retroactive relief for individuals sentenced under the discarded 100-to-1 crack cocaine-to-powder-cocaine ratio that Congress repudiated through the Fair Sentencing Act of 2010. That earlier legislation abolished the 100-to-1 ratio going forward, reflecting the overwhelming consensus that treating crack cocaine and powder cocaine radically differently exacerbated racial inequality in the criminal justice system and resulted in unjustly severe sentences for low-level crack cocaine users.

But the Fair Sentencing Act applied only to sentences imposed after the Act's passage. As Senator Cory Booker explained, it left thousands of "people sitting in jail . . . for selling an amount of drugs equal to the size of a candy bar" based solely on their sentencing date,¹ underscoring the need, in Senator Mike Lee's words, to apply the law "equally to all those convicted of cocaine and crack offenses regardless of when they were convicted."² Congress therefore included Section 404 in the First Step Act, which allowed individuals sentenced under the discarded 100-to-1 ratio to seek discretionary resentencing.

Unfortunately, that critical work remains incomplete. In *Terry v. United States*, the Supreme Court concluded that while Section 404 clearly authorized certain mid- or high-level crack cocaine offenders to seek resentencing, it did not extend relief to the lowest-level offenders sentenced under the prior regime. Specifically, the Court relied on Section 404's definition of a covered offense as any "violation of a Federal criminal statute, the statutory penalties for which were modified by" the Fair Sentencing Act. The Court reasoned that because the Fair Sentencing Act did not formally change the elements or penalties for the lowest level crack offenses—it merely changed the quantities needed to trigger mid- and high-level charges—the Act failed to modify the "statutory penalties" for the lowest category of offenders. As a result, these individuals are now the only ones sentenced under the earlier crack cocaine quantities that remain categorically ineligible for the First Step Act's historic relief.

We urge Congress to close this gap. There is no reason why these individuals—and these individuals alone—should continue to serve sentences informed by the now-discredited crack-to-powder ratio. Discretionary relief is unambiguously available to serious dealers and kingpins sentenced under the prior regime; extending Section 404's scope would simply allow individual users and other low-level crack cocaine offenders to have the same opportunity for a second chance. We therefore urge Congress to clarify that Section 404 of the First Step Act extends to *all* individuals convicted of crack cocaine offenses and sentenced under the 100-to-1 ratio—including the lowest level offenders.

We thank you for your leadership on this important matter.

Sincerely,

¹ 164 Cong. Rec. at S7764 (daily ed. Dec. 18, 2018).

² The Chairman's Note: Time for Senate to Act on Criminal Justice Reform, Office of Sen. Mike Lee (Nov. 16, 2018), <https://www.lee.senate.gov/public/index.cfm/2018/11/time-for-senate-to-act-on-criminal-justice-reform>.

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