

In summary, the *Fitzgerald* case highlights certain problems arising from a lack of legislative response following *Sell*. This may well be the case in other states that have not taken a proactive approach to incorporating *Sell* into relevant law. Finally, as the *Fitzgerald* concurrence and *Sell* emphasized, states should still consider pursuing involuntary medication for competency patients by alternative means such as dangerousness, using a *Sell* hearing only in rare circumstances.

## Sentencing for Cocaine Offenses

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### The U.S. Supreme Court Ruled on Eligibility for Resentencing of Crack Cocaine Offenses under the First Step Act of 2018

DOI:10.29158/JAAPL.210156-21

**Key words:** resentencing; crack; cocaine; First Step Act

In *Terry v. United States*, 141 S.Ct. 1858 (2021), the U.S. Supreme Court considered whether Tarahrick Terry, who had been convicted of a crack cocaine offense, was entitled to resentencing under the First Step Act of 2018 (Pub. L. No. 115-391 (2018)). The Court ruled that Mr. Terry was not entitled to resentencing because the provision under which he was convicted did not concern a mandatory minimum penalty and, therefore, he was not eligible for sentence reduction under the First Step Act of 2018.

#### Facts of the Case

In 2008, Mr. Terry pleaded guilty to one count of possession with intent to distribute crack cocaine. At that time, sentencing was controlled by a federal act that had established mandatory minimum penalties for certain drug offenses, including cocaine (21 U.S.C. § 812 (2006) ('Act')). The Act included two penalties based on the quantity of drugs in the defendant's

possession triggered by 5 grams and 50 grams of crack and a third penalty for those found with intent to distribute cocaine that did not depend on quantity.

At Mr. Terry's sentencing, the district court determined Mr. Terry had in his possession about 4 grams of crack cocaine under the Act, and that he was a career offender under the United States Sentencing Commission Guidelines Manual 4B1.1(b) (2008). Because the career-offender Guidelines recommended a higher sentence than the drug-quantity guidelines of the Act, the former controlled and the district court sentenced Mr. Terry to 188 months in prison.

Meanwhile, Congress was actively considering changing the quantity thresholds for crack cocaine penalties. Two years after Mr. Terry's sentencing, Congress passed the Fair Sentencing Act of 2010 (21 U.S.C. § 801 (2010)). Under the Fair Sentencing Act, Congress increased the triggering amount of crack for a five-year mandatory minimum sentence from 5 grams to 28 grams, and the triggering amount for a 10-year mandatory minimum sentence from 50 grams to 280 grams. Additionally, the Congressional Sentencing Commission amended the drug quantity table used to calculate sentencing guidelines, decreasing the recommended sentence for crack offenses. Subsequently, the First Step Act of 2018 made those statutory changes apply retroactively, giving some offenders an opportunity for resentencing.

Mr. Terry first sought resentencing under the new sentencing Guidelines. The district court denied his motion because his 2008 sentencing was based on recidivism and not on the quantity of drugs in his possession. Mr. Terry then sought resentencing under the newly enacted First Step Act of 2018, and the district court again denied his motion on the basis that a sentence reduction is only available for those whose crack offenses triggered a mandatory minimum sentence. The Eleventh Circuit affirmed the district court's decision, and the Supreme Court granted *certiorari*.

#### Ruling and Reasoning

The U.S. Supreme Court affirmed the decision of the Eleventh Circuit Court of Appeals, ruling that Mr. Terry was not eligible for resentencing under the First Step Act of 2018 because the Fair Sentencing Act only modified statutory penalties for crack cocaine offenses that triggered mandatory minimum sentences.

The Supreme Court said that an offender is eligible for a sentence reduction under the First Step Act only

if he previously received “a sentence for a covered offense” (*Terry*, p 1862). The First Step Act defined “covered offenses” as “violation of federal criminal statute, the statutory penalties for which were modified by” provisions in the Fair Sentencing Act (*Terry*, p 1862, citing the First Step Act, sec. 404).

The Court then reviewed elements of Mr. Terry’s offense, contained in 21 U.S.C. § 841(a)-(b). Section 841(a) makes it unlawful to knowingly or intentionally possess with intent to distribute any controlled substance. Section 841(b) lists additional facts that, if proved, trigger penalties. The Court noted that before 2010, there were three crack offenses relevant to the case here. The elements of the first offense were knowing and intentional possession with intent to distribute crack of at least 50 grams; this offense was punishable by 10 years to life, in addition to financial penalties and supervised release. The second offense was the same, but with quantity defined as at least 5 grams of crack and a reduced punishment sentence of 5 to 40 years. The elements of the third offense were knowing or intentional possession with intent to distribute some unspecified amount of schedule I or II drugs. Mr. Terry was convicted of this third offense, which before 2010 held statutory penalties of 0 to 20 years, in addition to financial penalties and a period of supervised release.

The Court concluded that because the statutory penalties for Mr. Terry’s offense remained the same after 2010, the Fair Sentencing Act did not modify the statutory penalties for that offense, though it did modify the first two crack offenses discussed above by increasing the triggering quantities for crack cocaine and providing more lenient sentencing ranges. The Court noted that Mr. Terry’s offense was “starkly different” from the offenses triggering mandatory minimums and that it was “hardly surprising” that the Fair Sentencing Act only changed statutory minimum penalties for the first two offenses because it addressed “cocaine sentencing disparity” and the third offense did not differentiate between crack and powder cocaine offenses (*Terry*, p 1863).

#### Concurring Opinion

Justice Sotomayor concurred in the judgment but wrote separately to clarify consequences of the Court’s decision. The concurring opinion noted the Fair Sentencing Act of 2010 and First Step Act of 2018 have helped to eradicate the vestiges of the

100-to-1 crack-to-cocaine disparity, which unduly affected Black Americans, but that the Acts have still left some individuals, like Mr. Terry, behind. While the sentencing range for Mr. Terry would normally have been about three to five years for the amount he possessed, he was sentenced as a career offender because of two prior drug convictions as a teenager for which he spent 120 days in jail. Because the Fair Sentencing Act and subsequent Guidelines amendments did not change ranges for career offenders, Mr. Terry and others similarly situated were not eligible for resentencing, regardless of the severity of their crimes. Justice Sotomayor further stated that career offenders were not free of influence from the 100:1 ratio, as courts would calculate the offender’s base offense level using the drug quantity tables, and courts sometimes entirely departed from the career offender Guidelines and instead sentenced defendants based on the drug quantity tables. The ineligibility for resentencing for career offenders like Mr. Terry was “no small injustice.”

#### Discussion

The opinion in *Terry* illustrates how the Court reviewed the legislative history and interpreted the relevant statutory language. The Court distinguished persons convicted under 21 U.S.C. § 841 based on the offense and penalty that was applied. The Court found convincing that the career offender category was not amended by the First Step Act of 2018 because its literal terms were not altered. As Justice Sotomayor noted in the concurring opinion, this results in sentencing disparity. Although recent legislation has resulted in some persons convicted of crack offenses being eligible for resentencing, others (like Mr. Terry) have been left out and remain ineligible for resentencing.

Since the U.S. Supreme Court in *Terry*, bipartisan legislation has been introduced in Congress to address fairer sentencing for crack cocaine offenders. Under the proposed legislation, currently titled the Terry Technical Correction Act, the sponsors’ intent is to provide retroactive sentencing relief to all those who were convicted of crack cocaine offenses before the Fair Sentencing Act of 2010. The Terry Technical Correction Act would provide low level career offenders like Mr. Terry the opportunity for resentencing under the newer, fairer guidelines. The reform marks progress toward increased proportionality and fairness in sentencing. If this proposed legislation

becomes law, it could trigger successful motions for resentencing hearings for career offenders who were previously determined ineligible under *Terry*.

The legislative effort for further reform under the proposed Terry Technical Corrections Act comes at a time of national discussion on how to reduce criminal recidivism in individuals with substance use disorders. Effective interventions do exist, including substance use treatment in jail and prison settings, and judicial diversion programs that emphasize treatment over incarceration (Mitchell O, Wilson DB, MacKenzie DL. Does incarceration-based drug treatment reduce recidivism? A meta-analytic synthesis of the research. *J Exp Criminol.* 2007; 3:353–375). Psychiatric clinicians are well positioned to leverage their expertise, including their understanding of the psychological and pharmacologic treatment options and knowledge of the rehabilitation potential of individuals with substance use disorders, to influence policy change.

## Rehabilitation Potential in Juvenile Sentencing

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### Washington Supreme Court Vacates Sentence Where Lower Court Failed to Properly Weigh Significance of Juvenile’s Rehabilitation behind Bars

DOI:10.29158/JAAPL.210156LI-21

**Key words:** juvenile; sentence; *de facto* life sentence

In *State v. Haag*, 495 P.3d 241 (Wash. 2021), the Washington Supreme Court overturned a 46-year sentence that had been imposed on Timothy Haag by a resentencing court following the U.S. Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460 (2012). The Washington Supreme Court ruled that the resentencing court failed to properly weigh mitigation factors for Mr. Haag, who had been convicted

and sentenced for acts that occurred when he was 17 years old. Six of the nine justices also said that the 46-year sentence is unconstitutional as it amounted to a *de facto* life sentence.

#### Facts of the Case

In July 1994, at the age of 17, Mr. Haag killed his 7-year-old neighbor, Rachel Dillard. In 1995, he was convicted of aggravated first-degree murder and sentenced to mandatory life without parole. In 2018, a resentencing hearing was conducted in accordance with Washington’s *Miller*-fix statutes (Wash. Rev. Code. § 10.95.030(3) (2015) and Wash. Rev. Code. § 10.95.035 (2015)) following *Miller v. Alabama*. At resentencing, Mr. Haag was 27 years old and sentenced to a term of 46 years to life, meaning the earliest he could be released was at the age of 63. At the resentencing hearing, two expert witnesses testified on Mr. Haag’s behalf. They had both administered the Structured Assessment of Violence Risk in Youth test and both opined that he would have been at low risk of reoffending at the time of the offense. Additional testing by one of the experts further supported the opinion that he was considered low risk for reoffending. Mr. Haag also presented evidence from other witnesses that he had matured while in prison. The record reveals that he had only one infraction while in prison and had earned a high school diploma. Mr. Haag also held work positions during his incarceration and became a Jehovah’s Witness. Mr. Haag himself testified to situations that occurred in prison in which he could have responded with violence, but he refrained.

The state produced no expert testimony and did not offer testimony to rebut the experts’ opinions about his low risk of reoffending. The state produced victim impact statements. The resentencing court said that it had a daunting task of weighing multiple factors and, on balance, imposed a minimum sentence of 46 years and a maximum sentence of life in prison. Mr. Haag appealed the decision of the resentencing court, arguing that the court “failed to meaningfully weigh the mitigating factors and that his sentence amounted to an unconstitutional *de facto* life sentence” (*Haag*, p 245). The Court of Appeals upheld the sentence. On further petition, the Washington Supreme Court granted review.

#### Ruling and Reasoning

Mr. Haag argued that the lower court erred in sentencing him to 46 years because it emphasized