

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 2, 2023*
Decided November 6, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1902

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES MCGEE,
Defendant-Appellant.

Appeal from the United States District
Court for the Southern District of
Illinois.

No. 21-cr-30034-DWD

David W. Dugan,
Judge.

ORDER

Charles McGee, who is serving a sentence for drug distribution, appeals the denial of his motion for relief under the First Step Act of 2018. But because his plea agreement precludes any challenge to his sentence, we dismiss the appeal.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

McGee pleaded guilty to distributing cocaine base, 21 U.S.C. § 841, and possessing a gun while trafficking drugs, 18 U.S.C. § 924(c). His plea agreement contained a broad appellate waiver. The district court selected a 120-month sentence, the combined statutory minimum.

Six months later, McGee moved under § 404(b) of the First Step Act to reduce his sentence. He first argued that the First Step Act reduced the sentencing disparity between cocaine and cocaine base. *See* First Step Act of 2018, Pub. L. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). Second, he argued that the pending EQUAL (Eliminating a Quantifiably Unjust Application of the Law) Act would further reduce the cocaine sentencing disparity. *See* H.R. 1693, 117th Cong. (2021).

Without inviting the government's response, the district court denied the motion. The court determined that McGee already had benefited from sentencing changes in the First Step Act because he was sentenced after its enactment. Further, to the extent McGee sought compassionate release under 18 U.S.C. § 3582(c), potential sentencing changes in the proposed EQUAL Act did not amount to extraordinary and compelling reasons for shortening his sentence because unenacted legislation is not binding law.

On appeal, McGee maintains that a sentence reduction is warranted by the amendments in the First Step Act and the proposed EQUAL Act. The government invokes language from McGee's plea agreement, in which he "waives his right to seek modification of . . . the sentence in any type of proceeding."

We agree with the government that the waiver is enforceable. We note that there is disagreement among the circuits on whether the government forfeits its right to enforce an appeal waiver if it does not object in the district court. *See United States v. Guzman*, 926 F.3d 991, 999 (8th Cir. 2019) (citing cases). But the government here had good reason for not earlier raising the argument—the district court denied McGee's motion before the government had an opportunity to respond. *See United States v. Williams*, 62 F.4th 391, 393 (7th Cir. 2023) (government entitled to raise exhaustion defense for first time on appeal because district court summarily denied prisoner's application under 18 U.S.C. § 3582(c)). And we will enforce an appeal waiver that—here—is knowing and voluntary and whose terms are express and unambiguous. *See United States v. Bridgewater*, 995 F.3d 591, 595–96 (7th Cir. 2021) (enforcing compassionate-release waiver under the First Step Act). Though McGee asserts that enforcing the waiver would be unjust, nothing about it is unconscionable: he benefited when the government dropped two of the charges against him. *See id.* at 596.

Therefore, we DISMISS the appeal.