

Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404

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The First Step Act of 2018 promised relief to inmates serving disproportionately long sentences for cocaine base distribution. Section 404, the focus of this Article, seemed straightforward. But in the spring and summer of 2019, district judges began reviewing section 404 cases and reaching dissonant results. Appeals followed, focused on four questions of judicial authority: (1) Who may judges resentence?, (2) May judges engage in plenary resentencing or merely sentence reduction?, (3) May judges resentence all concurrent criminal convictions or only crack cocaine convictions?, and (4) Must judges adopt the operative drug quantity from the original sentencing? Today, the law of section 404 remains incomplete in every circuit. This Article reviews the legislative history, text, and legal context of section 404. It finds that Congress intended broad judicial authority in section 404 resentencings.

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INTRODUCTION

After twenty years of private practice, attorney Robert Jonker was nominated for federal judicial service.¹ He was commissioned to the federal district court for the Western District of Michigan on July 16, 2007.² Less than two years later, Judge Jonker sentenced Walter Boulding to life in prison for selling cocaine base, or “crack.”³ The new judge felt that the sentence was too harsh,⁴ but Congress had left him with no choice. Mr. Boulding “had been convicted of two prior felony drug offenses, subjecting him to a mandatory minimum term of life imprisonment.”⁵ So, the judge ordered the twenty-nine-year-old to spend his life behind bars.⁶

In 2019, Judge Jonker resentenced Mr. Boulding under the First Step Act of 2018.⁷ The judge considered the sizeable drug quantities and weapons involved as well as Mr. Boulding’s leadership role in the drug distribution ring and threats of violence.⁸ Still, the judge reduced Mr. Boulding’s term of imprisonment.⁹ That sentence reduction is controversial. Some judges have found that the First Step Act does not extend to defendants with comparable criminal conduct.¹⁰ This Article argues that the First Step Act authorized Judge Jonker to reduce Mr.

1. *Jonker, Robert James*, FED. JUD. CTR., <https://www.fjc.gov/node/1392596> [<https://perma.cc/UH3Y-D2VK>] (last visited Sept. 10, 2020).

2. *Id.*

3. Transcript of Sent’g Hearing at 3, 25, *United States v. Boulding*, No. 1:08-cr-65-01 (W.D. Mich. filed May 13, 2009).

4. *Id.* at 3 (“You know, and in the Boulding case, in some senses with the congressional mandate of mandatory life in this situation, in some sense it’s an easy sentencing hearing. . . . On the other hand, in the more fundamental way, it’s a very difficult sentencing hearing for me, because life in prison is not the sentence I would impose on Mr. Boulding if I had the full discretion that I normally have in sentencing.”).

5. *United States v. Boulding*, 412 F. App’x 798, 801 (6th Cir. 2011); *see also* Verdict Form, *Boulding*, No. 1:08-cr-65-01.

6. *See United States v. Boulding*, 379 F. Supp. 3d 646, 648 (W.D. Mich. 2019) (“He was 29 years old at the time.”).

7. *Id.*; First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018).

8. *Boulding*, 379 F. Supp. 3d at 657.

9. *Id.*

10. *E.g.*, *United States v. Blocker*, 378 F. Supp. 3d 1125, 1128–29 (N.D. Fla. 2019) (declining to resentence defendant who admitted to conspiracy activity involving 500 grams of powder cocaine, much of which was converted to crack, because the quantity of crack rendered him ineligible for relief under the First Step Act); *cf. Boulding*, 379 F. Supp. 3d at 648, 655 (resentencing defendant even though the PSR attributed more than 650 grams of crack to his conspiracy).

Boulding's sentence. Further, it demonstrates that section 404 of the Act empowers judges to reduce the sentences of hundreds of defendants who distributed crack cocaine before 2010.

In many respects, Mr. Boulding's is an archetypal crack distribution case. The relevant events commenced in the fall of 2007.¹¹ That October, Holly Williams served a month for retail fraud.¹² The day of her release, she met up with Mr. Boulding.¹³ He offered a deal: he would supply her crack and pay her rent if she let him run his drug business out of her home in Kalamazoo, Michigan.¹⁴ She took the deal,¹⁵ and Mr. Boulding cut, packaged, and distributed crack from her house for nearly six months.¹⁶

Ms. Williams got tired of living in a crack house and enduring police raids, so she asked Mr. Boulding to leave.¹⁷ He refused and threw her belongings in the garbage.¹⁸ She and her landlord put up "no trespassing" signs.¹⁹ The signs did no good.²⁰ Eventually, Ms. Williams asked local law enforcement to help her get Mr. Boulding out of the house.²¹ When Mr. Boulding found out, he sent someone to scare her.²² Then, he called child protective services on her.²³ Finally, he asked an associate to kill her.²⁴ After that, the authorities took care of Ms. Williams's housing.²⁵

On February 28, 2008, the Kalamazoo Valley Enforcement Team (KVET) entered Ms. Williams's house and found Mr. Boulding sitting at a kitchen table packaging crack.²⁶ He tried to flee but the KVET officers

11. Transcript of Jury Trial at 5, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Mar. 5, 2009). This story is derived from Ms. Williams's trial testimony. She cooperated with authorities against Mr. Boulding after she was arrested for crack possession in her home. *Id.* at 27–34. The Government provided several inducements for her testimony. *See id.* at 12–13, 25 (describing the agreement between Ms. Williams and Mr. Boulding to provide her with rent money and crack cocaine in exchange for Mr. Boulding running his deals out of her house).

12. Transcript of Jury Trial at 5, *Boulding*, No. 1:08-cr-00065.

13. *Id.* at 9–11.

14. *Id.* at 3, 9–12.

15. *Id.* at 12.

16. *Id.* at 12–13, 15, 34.

17. *Id.* at 26–27, 29.

18. Transcript of Jury Trial at 29, *Boulding*, No. 1:08-cr-00065.

19. *Id.* at 30.

20. *Id.*

21. *Id.* at 30–31.

22. *Id.* at 31.

23. *Id.*; *see also id.* at 61 (reporting the testimony during cross-examination of Ms. Williams's involvement with CPS when she pled guilty for possession of cocaine).

24. Transcript of Jury Trial at 61, *Boulding*, No. 1:08-cr-00065; *see also id.* at 422, 438–439 (reporting the testimony of Terry Tatum, co-conspirator, that Mr. Boulding had offered to pay him to kill Ms. Williams). Mr. Tatum testified that they did not discuss the exact details or price for the job, and he did not attempt to kill Ms. Williams. *Id.* at 439.

25. *Id.* at 61–62.

26. *Boulding v. United States*, No. 1:12-CV-133, 2012 WL 13050870, at *1 (W.D. Mich. Aug. 2, 2012).

apprehended him.²⁷ “After waiving his Miranda rights, [Mr. Boulding] admitted to arresting officers that he was selling crack”²⁸

On March 3, 2008, a Drug Enforcement Administration agent filed a complaint against Mr. Boulding.²⁹ Six months later, the case went to trial.³⁰ “At *voir dire*, fifty-two prospective jurors entered the courtroom, and fourteen sat in the jury box.”³¹ They were all white; Mr. Boulding is not.³² The impact of the jurors’ race on Mr. Boulding’s case is unclear.³³

On October 3, 2008, the jury found Mr. Boulding guilty of the two counts on trial: “conspiracy to distribute and to possess with intent to distribute cocaine base . . . 50 grams or more . . . and possession with intent to distribute 5 grams or more of crack cocaine”³⁴

Prior to sentencing, probation filed a Presentence Report (PSR) that attributed “over 650 grams of crack cocaine” to Mr. Boulding.³⁵ Probation also recommended a two-level enhancement to the sentencing guidelines range for weapons and a four-level enhancement for Mr. Boulding’s leadership role.³⁶ Mr. Boulding objected to the enhancements.³⁷

On April 24, 2009, Judge Jonker sentenced Mr. Boulding.³⁸ Judge Jonker denied Mr. Boulding’s objections and held that an “AK-47 was in the mix of the conspiracy. . . . [T]he quantities exceeded the 500-gram level of crack . . . [and] Mr. Boulding was plainly a leader, if not the dominant leader of the group.”³⁹ At the time, the enhancements did not

27. *Id.*

28. *Id.*

29. Complaint at 1, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Mar. 3, 2008).

30. Transcript of Jury Trial at 1, *Boulding*, No. 1:08-cr-00065.

31. *United States v. Boulding*, 412 F. App’x 798, 799 (6th Cir. 2011).

32. *See id.* (noting that the initial jurors all appeared to be White and the defendants, including Mr. Boulding, are African American).

33. I.e., Mr. Boulding’s race could have affected myriad aspects of the criminal justice process, including charging, attempts at plea bargaining, the jury’s verdict, his prison experience, etc.

34. *See* Verdict Form at 1, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Oct. 3, 2008) (finding Mr. Boulding and his co-conspirator Willie Rayshaun Richardson guilty of conspiracy); *see also* *United States v. Boulding*, 379 F. Supp. 3d 646, 648 (W.D. Mich. 2019) (“The jury found that the quantity of crack cocaine involved in the conspiracy beyond a reasonable doubt was 50 grams or more of crack cocaine, the highest quantity determination the verdict form asked them to reach.”).

35. *Boulding*, 379 F. Supp. 3d at 648.

36. Transcript of Sent’g Hearing at 8, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed May 13, 2009).

37. *Id.*

38. *Id.* at 1.

39. *Id.* at 24–25.

really matter. The statutory mandatory minimum for Mr. Boulding's crimes was life.⁴⁰

Judge Jonker explained that “life in prison is not the sentence I would impose on Mr. Boulding if I had the full discretion that I normally have in sentencing.”⁴¹ But Congress had deprived him of that discretion.⁴² So, Judge Jonker sentenced Mr. Boulding to life imprisonment on the distribution count,⁴³ and 360 months, concurrent, on the possession count.⁴⁴

In April 2009, Mr. Boulding appealed his conviction and sentence to the Sixth Circuit.⁴⁵ In February 2011, he lost his appeal.⁴⁶

In July 2011, Mr. Boulding petitioned the Supreme Court for a writ of certiorari.⁴⁷ In October 2011, his writ was denied.⁴⁸

In February 2012, Mr. Boulding filed for habeas relief under 28 U.S.C. § 2255.⁴⁹ In August 2012, his motion was denied.⁵⁰ After that, Mr. Boulding stopped pursuing relief.

Then, on December 26, 2018, Mr. Boulding filed a pro se motion for relief under section 404 of the First Step Act.⁵¹ On December 31, 2018, the clerk of court docketed Mr. Boulding's motion for resentencing.⁵² Within a month, the federal public defender moved to represent Mr.

40. See *United States v. Boulding*, 412 F. App'x 798, 801 (6th Cir. 2011) (explaining that Mr. Boulding “had been convicted of two prior felony drug offenses, subjecting him to a mandatory [statutory] minimum term of life imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), and 851 . . . [for] the conspiracy charge.”).

41. Transcript of Sent'g Hearing at 3, *Boulding*, No. 1:08-cr-00065; see also *Boulding*, 412 F. App'x at 801 (“The judge indicated that he would not have imposed a life sentence if he had the discretion to impose a different sentence.”).

42. See Transcript of Sent'g Hearing at 3, *Boulding*, No. 1:08-cr-00065 (“[I]n some senses with the congressional mandate of mandatory life in this situation, in some sense it's an easy sentencing hearing. There's not a lot of guideline issues to talk about.”).

43. Judgment at 2, 1–2, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Apr. 27, 2009) (noting that Mr. Boulding was sentenced to life imprisonment on the distribution count under 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(iii) and 851).

44. *Id.* (noting that Mr. Boulding was sentenced on the possession count under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(iii), and 851).

45. Notice of Appeal, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Apr. 27, 2009).

46. *United States v. Boulding*, 412 F. App'x 798, 802 (6th Cir. 2011).

47. Letter from Sup. Ct., *Boulding v. United States*, No. 1:08-cr-00065 (filed July 11, 2011).

48. *Boulding v. United States*, 565 U.S. 892, 892 (2011) (denying cert.).

49. *Boulding v. United States*, No. 1:12-CV-133, 2012 WL 13050870, at *1 (W.D. Mich. Aug. 2, 2012).

50. *Id.* at *1, *5.

51. Motion for Resent'g, *Boulding v. United States*, No. 1:08-cr-00065 (W.D. Mich. Dec. 31, 2018); First Step Act of 2018, Pub. L. No. 115–391, § 404(b), 132 Stat. 5194, 5222 (2018).

52. Motion for Resent'g, *Boulding*, No. 1:08-cr-00065.

Boulding.⁵³ A few weeks later, the First Step Act arguments were fully briefed.⁵⁴

On May 16, 2019, Judge Jonker “exercise[d] [his] discretion to reduce Defendant Boulding’s imprisonment to a term of years.”⁵⁵ As of that day, Mr. Boulding no longer faced a life sentence. But an important question remains: did Judge Jonker have discretion to reduce Mr. Boulding’s sentence to a term of years? This Article argues that the First Step Act provides such authority.

I. THE AMBIGUOUS PROMISE OF THE FIRST STEP ACT

The First Step Act promised relief to inmates serving disproportionately long sentences for cocaine base distribution.⁵⁶ Section 404, the focus of this Article, seemed straightforward. Following more than a decade of criminal justice reform, the First Step Act made retroactive some statutory mandatory minimums.⁵⁷ It also permitted judges to review the sentences imposed in pre-2010 crack distribution cases.⁵⁸ In the spring and summer of 2019, district judges across the

53. See Docket at 23, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. Jan. 31, 2019) (“Federal Public Defender recommends that Anna Rebekah Rapa be appointed to represent defendant Walter Greenking Boulding.”); First Step Act of 2018, Pub. L. No. 115–391, § 404(b), 132 Stat. 5194, 5222 (2018).

54. See Gov’t Response to Defendant’s First Step Act Motion for Sent’g Reduction, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Feb. 21, 2019); see also Defendant’s Brief in Support of Sent’g Reduction Under the First Step Act, *Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Feb. 27, 2019).

55. *United States v. Boulding*, 379 F. Supp. 3d 646, 656 (W.D. Mich. 2019), *vacated in part*, 960 F.3d 774 (6th Cir. 2020).

56. 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (“Today we have an opportunity to do something about addressing the ills of this system. That is why I am proud this is a bipartisan compromise bill with extraordinary leadership on both sides of the aisle, saying: Hey, there are things we need to begin to correct for this system. There are ways to make this system more fair. There are ways to make this system better reflect our collective values and ideals. Because of this collection of work done over the last years, this bill includes critical sentencing reform that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts.”).

57. See, e.g., First Step Act of 2018, Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222 (2018) (adopting the Fair Sentencing Act’s adjustments to 21 U.S.C. 841(b)(1)); see also Fair Sentencing Act of 2010, Pub. L. No. 111–220, § 2, 124 Stat. 2372, 2372 (2010) (“(21 U.S.C. 841(b)(1) is amended—(1) in subparagraph (A)(iii), by striking ‘50 grams’ and inserting ‘280 grams . . .’”).

58. See, e.g., Op. & Ord. at 648–50, 657, *United States v. Boulding*, 379 F. Supp. 3d (W.D. Mich. 2019) (No. 1:08-cr-65-01) (“He was 29 years old at the time. . . . [T]he Court again made it clear that life in prison was greater than necessary to achieve the purposes of sentencing . . . [stat- ing] I don’t think it’s necessary to incapacitate Mr. Boulding and protect the public for life. I think a lengthy custodial sentence followed by supervised release would do that. . . . But as the Court stated then, and reiterates now, a sentence of life imprisonment is too much punishment.”).

nation began reviewing the cases and reaching dissonant results.⁵⁹ Appeals followed, largely focused on questions of judicial authority.

Section 404 appeals turned on four key issues: (1) who judges may resentence (i.e., eligibility for relief), (2) whether judges may engage in plenary resentencing or merely sentence reduction, (3) whether judges may resentence all concurrent criminal convictions or only crack cocaine convictions, and (4) whether judges must adopt the operative drug quantity from the original sentencing.

By late spring 2020, the circuit courts had begun to determine the extent of judicial authority under the First Step Act.⁶⁰ Still, the law of section 404 remained incomplete in every circuit, as discussed below. Given the large number of First Step Act defendants,⁶¹ and the complexity of these cases, this area of law will take years to develop.

This Article argues that the First Step Act affords judges adequate authority to provide broad relief through resentencing. It proceeds in four parts. First, this Article describes the modern federal sentencing process

59. See *United States v. White*, 413 F. Supp. 3d 15, 30 (D.D.C. 2019) (“White, Hicks, and Hughes’ pending motions for reduced sentences under Section 404 raise several key questions with which district courts across the country are grappling and arriving at different answers about the scope of eligibility and available relief as well as the applicability of extant constitutional rules articulated in *Apprendi v. New Jersey* . . . and *Alleyne v. United States* . . .”) (citations omitted).

60. A May 22, 2020 Westlaw search of “U.S. Courts of Appeals Cases” for the phrase “First Step Act” yielded 262 results. The author reviewed each result. A majority of these decisions concerned other facets of the First Step Act, such as compassionate release, and mentioned the First Step Act in passing. See, e.g., *United States v. Brown*, 935 F.3d 43, 49 (2d Cir. 2019) (“Resentencing will also afford Brown the opportunity to argue that he should benefit from [S]ection 403(b) of the First Step Act of 2018.”). In some cases, Courts of Appeals determined the First Step Act granted district judge limited discretion to reduce a sentence rather than plenary resentencing authority. See, e.g., *United States v. Hegwood*, 934 F.3d 414, 415, 418 (5th Cir. 2019) (“[T]he First Step Act does not allow plenary resentencing. . . . [But] [i]t is clear that the First Step Act grants a district judge limited authority to consider reducing a sentence previously imposed.”). Some Courts of Appeals held that the First Step Act’s change to the mandatory minimum sentence for defendants with two or more prior serious drug convictions from life imprisonment to twenty-five years’ imprisonment did not apply retroactively to defendants sentenced before the Act’s enactment. See, e.g., *United States v. Means*, 787 F. App’x 999, 1000–01 (11th Cir. Sept. 11, 2019) (“[T]his portion of the First Step Act was not made retroactive to defendants who were sentenced before the Act’s enactment on December 21, 2018.”). Many early 2019 cases included appeals filed prior to the passage of the First Step Act, see, *In re Scott*, 764 F. App’x 261, 262 (3d Cir. 2019) (mem.) (“To that end, the Federal Public Defender requested 30 days to examine Scott’s case to determine ‘if the First Step Act impacts him, and whether that avenue is more advantageous than proceeding under § 3582.’”). The D.C. Circuit Court of Appeals for the D.C. Circuit had one First Step Act case involving a defendant sentenced in 2018. *Young v. United States*, 943 F.3d 460, 461 (D.C. Cir. 2019). Still, more than ninety-nine cases had some bearing on the arguments in this Article and were closely analyzed.

61. U.S. SENT’G COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 4 (2019), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20191030-First-Step-Act-Retro.pdf> [<https://perma.cc/TRB9-V7XD>] (listing total number of granted motions for sentence reductions as 1,987 as of January 9, 2019).

as context for the sentences challenged under the First Step Act. Second, this Article offers a brief history of federal drug sentencing reform, from the war on drugs to the First Step Act. This Article notes that by 2017, many offenders had benefited from criminal justice reform,⁶² but a group of defendants sentenced at the height of the nation's "crack epidemic"⁶³ remained unaffected. They are the defendants at issue in this Article. Third, this Article addresses the four key section 404 issues in turn. Fourth, this Article concludes that 18 U.S.C. § 3355 helps guide appellate courts' determinations of judicial authority under the First Step Act. It also argues that three modern safeguards preclude a return to 1970s-era indiscriminate sentencing: (1) the Sentencing Guidelines, (2) § 3553, and (3) political attention.

II. FEDERAL SENTENCING: CONTEXT AND PROCESS

Typically, an assistant United States attorney files a charging document with the federal district court⁶⁴ and the criminal case begins. The charging document channels the criminal defendant onto a pathway that ends at sentencing. It lists specific charging statute(s),⁶⁵ which can: (1) mandate incarceration,⁶⁶ (2) carry mandatory minimum penalties,⁶⁷

62. See, e.g., Caryn Devins, *Lessons Learned from Retroactive Resentencing after Johnson and Amendment 782*, 10 FED. CTS. L. REV. 39, 44–45 (2018) ("The proposed Guidelines amendment, designated Amendment 782, reduced by two levels the offense levels assigned to the drug quantities described in U.S.S.G. § 2D1.1. Absent an objection from Congress, the Amendment became effective November 1, 2014. The Commission voted to make the reduction retroactive. As a result, approximately 30,000 individuals had their sentences reduced, with an average decrease of 25 months."); Colleen V. Chien, *The Second Chance Gap*, MICH. L. REV. (forthcoming 2020) (manuscript at 4–6); *Johnson v. United States*, 135 S. Ct. 2551, 2562–63 (2015); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

63. See THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 1 (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Federal-Crack-Cocaine-Sentencing.pdf> [<https://perma.cc/P9VW-KTV5>] ("Newscasters used words like 'crisis' and 'epidemic'—later shown to be exaggerated—to describe the impact of crack.").

64. Typically, a charging document is an Information, but Walter Boulding's case commenced with a Complaint filed by a Drug Enforcement Administration agent. See Complaint at 1, *United States v. Boulding*, No. 1:08-cr-00065 (W.D. Mich. filed Mar. 3, 2008). Page one of that Complaint contained the relevant charging statutes, as sworn by the agent. *Id.*

65. E.g., 21 U.S.C. §§ 841(a)(1), (b)(1) and § 846 are typical charging statutes for cocaine base cases.

66. The specific charging statute(s) can mandate incarceration rather than probation. See 18 U.S.C. § 3561(a) (2010) ("In general . . . a defendant who has been found guilty of an offense may be sentenced to a term of probation unless—(1) the offense is a Class A or Class B felony and the defendant is an individual . . .").

67. See, e.g., 21 U.S.C. § 841(b)(1)(A) (imposing a ten-year mandatory minimum sentence on defendants convicted of manufacturing or distributing certain drugs at minimum specified quantities (e.g., fifty grams or more of methamphetamines)); cf. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 205 (1993) ("The principal statute, 21 U.S.C. § 841(a), declares it to be unlawful for any person to manufacture or distribute a controlled

(3) require consecutive sentencing,⁶⁸ and (4) establish terms of post-incarceration release.⁶⁹ The charging document also lists key facts of the offense.⁷⁰ These offense-related facts, along with the offense conduct and criminal history facts found at sentencing, trigger certain sentencing guidelines.⁷¹

Prior to sentencing, the prosecutor and defense counsel send memos to the probation officer preparing the Presentence Report; the memos discuss the offense conduct, including any estimated drug quantities, and the defendant's criminal history.⁷² The attorneys typically file sentencing memos with the court as well. At sentencing, a judge uses the charging statute(s) to determine statutory maximum and minimum penalties. Then, the judge considers the defendant's past criminal history,⁷³ present criminal conduct, and, when relevant, drug quantity, to calculate a sentencing guidelines range.⁷⁴ Today, the guidelines range is

substance. The penalty provisions, set forth in § 841(b), provide that 'in the case of a violation of subsection (a) of this section involving [various drug quantities], such person shall be sentenced to a term of imprisonment which may not be less than [various terms of years].' . . . To date, the courts have uniformly held that the drug quantities specified in § 841(b) are not elements of the offense but solely sentencing factors to be considered by the judge.").

68. See, e.g., 18 U.S.C. §§ 1028A(a)(1), (b)(2) (2004) (requiring a two-year consecutive term of imprisonment for identity theft in conjunction with any of the statute's enumerated felonies).

69. See, e.g., 18 U.S.C. § 3583(d) (setting specific minimum and maximum terms for supervised release after imprisonment for convictions under 18 U.S.C. § 2243(b) (sexual abuse of a ward) triggering a post-incarceration requirement to register as a sex offender under 18 U.S.C. § 3583(d)).

70. See, e.g., Information at 1–3, United States v. Chesney, No. 18-cr-00257 (D. Conn. filed Oct. 23, 2018) (listing the defendant's two alleged health care fraud co-conspirators, the alleged initiation dates for those conspiracies, the types of information the defendant allegedly stole from Medicaid client files, and the onset date for the defendant's use of her cell phone to photograph Medicaid client files, etc.).

71. See, e.g., U.S. SENT'G GUIDELINES MANUAL § 2D1.1(a)(1) (U.S. SENT'G COMM'N 2018) (describing that a base level offense of 43 is reached "if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense").

72. Alan Ellis, *Federal Presentence Investigation Report*, 29 CRIM. JUST. 48, 48 (2014) ("In most cases, this [prosecutorial] memo is neither flattering nor helpful to the client. Accordingly, our [defense] office prepares our own memo for the USPO . . .").

73. I.e., *id.* at 48, 49. The offense conduct determined at sentencing may comprise facts: (1) pled by the defendant, (2) adopted from Probation's PSR, or (3) found by a jury or judge. The judge will separately find the defendant's criminal history category based upon the filings of the parties and probation.

74. See *Peugh v. United States*, 569 U.S. 530, 536 (2013) ("First, 'a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'") (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)); see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 71, at § 5(A) (demonstrating that the judge locates the total offense level on the left-vertical axis of the Sentencing Table and the criminal history category on the top-horizontal axis, e.g., for a criminal history category II with a total offense level

normative.⁷⁵ Prior to 2005, as discussed below, the guidelines were treated as mandatory.

The statutory and guidelines parameters can be altered by plea agreements, government motions, and—in certain drug cases—the statutory safety valve.⁷⁶ A court may impose a sentence below a statutory minimum when (1) the government drops the count(s) carrying the mandatory minimum(s),⁷⁷ (2) the government properly moves for a substantial assistance departure,⁷⁸ or (3) the defendant in a controlled

of 17, the resulting guideline range is 27-33 months); *see also id.* at § 2D.1.1(a)(5) (“Base Offense Level (Apply the greatest): . . . (5) the offense level specified in the Drug Quantity Table set forth in subsection (c) . . .”).

75. *See Peugh*, 569 U.S. at 537 (“We have indicated that ‘a district court’s decision to vary from the advisory Guidelines may attract greatest respect when’ it is based on the particular facts of a case. Overall, this system ‘requires a court to give respectful consideration to the Guidelines,’ but it ‘permits the court to tailor the sentence in light of other statutory concerns as well.’”) (citations omitted).

76. 18 U.S.C. § 3553 (f); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 71, at § 5K1.1; Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 102 (2018); *First Step Act*, ESP INSIDER EXPRESS SPECIAL EDITION (U.S. Sent’g Comm’n), Feb. 2019 at 7 [hereinafter ESP INSIDER EXPRESS] (explaining that section 402 of the First Step Act broadens the safety valve at 18 U.S.C. § 3553(f)).

77. The government may drop counts of the charging document for lack of evidence or to induce a guilty plea on other counts. U.S. Dep’t of Just., Just. Manual § 9-27.400 (2018) (The basic policy is that charges are not to be bargained away or dropped in ways that represent a significant departure from the principles set forth herein.”). Most criminal defendants will ultimately plead guilty to one or more counts of the charging document or superseding document (e.g., a superseding Indictment). *See also* Joy & Uphoff, *supra* note 76, at 98; (“[N]early all defendants plead guilty . . . [E]ven innocent defendants will decide to plead guilty instead of going to trial”); Miko M. Wilford, Annabelle Shestak & Gary L. Wells, *Plea Bargaining*, in PSYCH. SCI. & L. 266, 266–67 (Neil Brewer & Amy Bradfield Douglass ed., 2019) (“Over 97% of U.S. federal convictions . . . are secured via guilty pleas and are never presented at trial [T]he United States accepts . . . bargains that can . . . reduce defendants’ charges (charge bargaining)”) (citation omitted); *see also* Missouri v. Frye, 566 U.S. 134, 144 (2012) (“To a large extent . . . horse trading . . . determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”) (citations omitted).

78. *See* U.S. SENT’G GUIDELINES MANUAL, *supra* note 71, at § 5K (noting dissonance within the Circuits regarding sufficient support for a government motion for departure from a statutory mandatory minimum). Ideally, the government: (1) files a § 5K1.1 motion, (2) details the substantial assistance provided by the cooperating witness, (3) invokes the judge’s power to depart from the statutory minimum under § 3553(e), and (4) specifically asks the judge to depart below the statutory mandatory minimum. *See*, 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”); U.S. SENT’G GUIDELINES MANUAL, *supra* note 71, at § 1B1.8 (explaining that the government’s motion should specify whether it is requesting the court to grant a departure below the statutory minimum, below the bottom of the guideline range, or both.); AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 42 (U.S. SENTENCING COMM’N 2017) (“[O]ffenders convicted of an offense carrying a mandatory minimum penalty are provided an incentive to plead guilty 18 U.S.C. § 3553(e) grants the court limited authority to impose a sentence below a mandatory minimum penalty.”).

substances case meets the exacting criteria for a safety valve departure.⁷⁹ A defendant facing a mandatory statutory minimum under 21 U.S.C. §§ 841, 844, 846, 960, or 963⁸⁰ may receive a sentence below that minimum by “meeting certain ‘safety valve’ requirements as a low-level nonviolent offender.”⁸¹ On its face, the statutory safety valve is a matter of judicial discretion. In reality, prosecutors are also gatekeepers of the safety valve because they dictate the terms of witness cooperation.⁸²

In sum, federal sentencing begins with a charging document. That document sets a statutory framework that can be altered by plea, motion, or, in narrow circumstances, the statutory safety valve. The charging document, combined with additional facts submitted by probation or the parties, enables the judge to calculate a sentencing guidelines range. A typical federal criminal sentence reflects a charging document, a plea agreement, a draft and final PSR, probation’s sealed sentencing recommendation to the judge, the government’s sentencing memorandum, and the defendant’s sentencing memorandum.⁸³ Based upon this information, the judge strives to impose a parsimonious sentence that is “sufficient, but not greater than necessary”⁸⁴ to achieve justice.

For decades, Congress limited the discretion of sentencing judges, particularly in drug cases.⁸⁵ Federal laws compelled lengthy sentences for defendants like Mr. Boulding. Judge Jonker and others criticized the severe results. But Congress did not relent until 2010. By then, the federal prison population had grown significantly.⁸⁶

79. See MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* 30 (2016) [hereinafter LYNCH, *HARD BARGAINS*] (explaining that, pre-First Step Act, the safety valve test requires that (1) the defendant generally had no more than a petty misdemeanor, (2) the defendant did not use violence or a gun during the offense, (3) no serious bodily injury or death resulted, (4) the defendant was not a leader in the offense, and (5) the defendant truthfully provided information and evidence to the government).

80. 18 U.S.C. § 3553(f).

81. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 6 (2015).

82. See LYNCH, *HARD BARGAINS*, *supra* note 79, at 31 (“In particular, the fifth prong can become a sticking point, as some U.S. attorneys expect defendants to inform on their coconspirators in order to earn the safety valve.”).

83. See, e.g., Docket, *United States v. Holloway*, No. 18-cr-00147 (D. Conn. July 10, 2018) (docket including the following filings: ECF No. 1: Sealed Complaint; No. 25: Plea Agreement; No. 37: Presentence Investigation Report (Draft Report); No. 38: Presentence Investigation Report (Final Report); No. 39: Sealed Sent’g Recommendation; No. 40: Defendant’s Sent’g Memorandum; No. 41: Gov’t’s Sent’g. Memorandum); but note that there are differences across districts and eras (e.g., with respect to, for example, whether the government will file a sentencing memorandum).

84. 18 U.S.C. § 3553 (a).

85. See LYNCH, *HARD BARGAINS*, *supra* note 79, at 31 (“[T]he bulk of sentencing reforms through the mid-2000s served to ensure lengthy sentences, especially in drug cases . . .”).

86. See *Past Inmate Populations Totals*, FED. BUREAU PRISONS (Dec. 26, 2019)

III. CONGRESSIONAL REFORM OF THE FEDERAL SENTENCING SYSTEM: 1980–2018

Modern criticism of federal sentencing began in the 1950s⁸⁷ and reached a fever pitch in the late 1970s.⁸⁸ From mid-century, criminologists and legal scholars documented empirical differences in sentencing, including above-average prison terms for African Americans⁸⁹ and male offenders.⁹⁰ In the 1970s, academics and journalists reported striking differences among districts⁹¹ and circuits.⁹²

https://www.bop.gov/mobile/about/population_statistics.jsp#old_pops [<https://perma.cc/SEN5-S4D3>] (showing that the federal prison population grew by nearly 800% from 1980 to 2010).

87. See Michael H. Tonry, *Criminal Law: The Missing Element in Sentencing Reform*, 35 VAND. L. REV. 607, 607–08 (1982) (explaining that the earlier reform led to mid-century indeterminate sentencing).

88. See, e.g., Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 95 (1978) (“The literature on sentencing is replete with examples of widely disparate sentences imposed on similarly situated offenders.”); *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958) (arguing that the justice system is not focused on protecting defendants during sentencing); Louis B. Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 691 (1981) (“Rehabilitation replaces retribution as the dominant goal of penal systems. Retribution makes a comeback.”).

89. See *1972 Sentencing Study, Southern District of New York: Hearing Before the Subcomm. on Crim. L. & Procedures of the Comm. on the Judiciary of the U.S. Sen.*, 93rd Cong. 5340 (1973) [hereinafter *1972 Sentencing Study*] (showing that the U.S. Attorney’s Office for the Southern District of New York found that 28% of white defendants convicted of interstate thefts were sentenced to prison during a four-year period, while 48% of African American defendants convicted of the same offense were incarcerated, etc.).

90. See Debra A. Curran, *Judicial Discretion and Defendant’s Sex*, 21 CRIMINOLOGY 41, 42, 51–52 (1983) (discussing how research on gender disparities in sentencing had previously failed to “control for legally relevant variables such as seriousness of offense and criminal history of the defendant,” but finding that when controlling for these variables, “[f]emale defendants received more lenient dispositions than their male counterparts, even when offense seriousness[,] total counts, and criminal history were controlled”).

91. See *1972 Sentencing Study*, *supra* note 89, at 5342 (reporting that the U.S. Attorney’s Office for the Southern District of New York evaluated 645 sentences and found that “a person convicted of interstate transportation of a stolen motor vehicle in [S.D.N.Y.] will receive a 50% higher sentence than a person convicted in [N.D.N.Y.]. If he has the misfortune of being convicted in [E.D.N.Y.], the sentence will be more than double that of the [N.D.N.Y.]”).

92. Franklin D. Kramer, *Different Judges, Different Justice*, WASH. POST, Nov. 14, 1975, at A3, reprinted in 121 CONG. REC. 36731–732 (1975) (statement of Sen. Kennedy); Hoffman & Stover, *supra* note 88, at 95 (“In 1967, the President’s Commission on Law Enforcement and the Administration of Justice reported this problem as pervasive. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals described sentencing practices in this country as appalling.”); TWENTIETH CENTURY FUND. & ALAN M. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976). *Cf.*, 1 NAT’L RES. COUNCIL, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 13–20 (Alfred Blumstein et al. eds., 1983) (urging caution regarding empirical studies of demographic drivers of sentencing disparities because many findings were preliminary, magnitudes of effects were not always known, non-demographic offender characteristics accounted for significant sentencing variances, etc.).

A 1975 *Washington Post* article read:

While the average federal sentence was 42.2 months, it was 18.4 months in the Southern District of Georgia, yet 94.9 months in the Western District of Michigan. Average bank robbers received 134.5 months nationwide, but in Northern District of Georgia, they received 204 months, while in Northern District of Illinois only 67.1.⁹³

By the late 1970s, sentencing was viewed “as arbitrary, discriminatory, and unprincipled.”⁹⁴ Many felt that “the broad discretion of sentencing courts and parole officers had led to significant sentencing disparities among similarly situated offenders.”⁹⁵ Prison officials reported hostility among offenders serving disparate sentences for similar crimes.⁹⁶ Meanwhile, the public was incensed by the nation’s growing crime problem.

93. Kramer, *supra* note 92, at A3; *see also id.* (“Different judges choose [sentences] differently.”).

94. *See Hoffman & Stover, supra* note 88, at 89 (quoting NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 45 (1974)) (describing the widespread criticism of sentencing procedures); Norval Morris, *The Sentencing Disease: The Judge’s Changing Role in the Criminal Justice Process*, 18 *JUDGES* J. 8, 9 (1979) (“Careful research and professional knowledge have established that our state and federal sentencing systems are characterized by unjust disparities. Like cases are not treated alike. Sentencing remains a random lottery.”). *See also* Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 *J. CRIM. L. & CRIMINOLOGY* 524, 534–35 (1981) (“The survey [in which 264 active federal judges were given sentencing hypotheticals and interviewed] results suggests that sentence disparity does exist. The amount of such disparity varies depending on which aspect of the sentencing decision is examined. If one concentrates strictly on the decision to incarcerate, the disparity is modest. However, when one examines the full range of sentencing options simultaneously, more dissensus appears. More variance in sentences is explained by differences among individual judges than by any other single factor.”); *1972 Sentencing Study, supra* note 89, at 5341 (1973) (“During the six-month period covered by the Southern District of New York sentencing study, . . . [t]he chances of a defendant going to jail are still largely determined by which judge his case is assigned to.”).

95. *See* Peugh v. United States, 569 U.S. 530, 535 (2013) (noting that the disparities in sentencing prior to 1984 led to the creation of the United States Sentencing Commission); *see also* Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 *AM. CRIM. L. REV.* 353, 354 (1979) (“For example, a bank robber may receive a judicially mandated sentence ranging from probation to a twenty-five year prison term, but it is the United States Parole Commission, not the court, that typically decides the point at which the convicted offender should be released.”). *Cf.* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 *U. PA. L. REV.* 733, 734 (1980) (“Scholars, legislators, and reformers share common ground . . . that judicial discretion should not be entirely eliminated, but that it should operate within much narrower bounds, should be informed by meaningful standards, and should be subject to appellate review. . . . Control of judicial discretion could cause many more problems than it solves, unless prosecutorial discretion and plea bargaining are also brought under control.”); Martin R. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 *DUKE L. J.* 1103, 1124, 1139 (1980) (arguing that the courts had begun to tackle the problem of disparately harsh sentencing in capital cases and a small number of non-capital cases, and cautioning against legislated determinate sentencing).

96. *See Hoffman & Stover, supra* note 88, at 95–96 (“Prison officials have stressed that disparities are particularly apparent when offenders are confined together. This creates frustration and hostility that is demoralizing and counterproductive to rehabilitative efforts.”).

During the 1960s and 70s, violent crime and homicide rates increased nearly every year, sometimes by double-digits.⁹⁷ The public was “terrified of crime in the streets,”⁹⁸ particularly aggravated assault, murder, rape, and robbery.⁹⁹ Many believed that haphazard sentencing was undermining deterrence and contributing to recidivism.¹⁰⁰ Their dissatisfaction fueled a growing criminal justice reform movement.

Throughout the 1970s, corrections experts, academics, and legislators debated sentencing reform.¹⁰¹ By mid-decade, the “sentencing reform movement [was] underway in earnest,”¹⁰² at least in the states.¹⁰³ By 1980, according to Senator Edward M. Kennedy, “the battle lines [were] drawn between those who advocate[d] liberal use of imprisonment (with little or no express encouragement of sentencing alternatives) and those

97. See ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUST. STATISTICS, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, 2 (2011) (“The homicide rate doubled from the early 1960s to the late 1970s, increasing from 4.6 per 100,000 U.S. residents in 1962 to 9.7 per 100,000 by 1979. . . . In 1980 the rate peaked at 10.2 per 100,000 and subsequently fell to 7.9 per 100,000 in 1984.”); NATHAN JAMES, CONG. RESEARCH SERV., R45236, RECENT VIOLENT CRIME TRENDS IN THE UNITED STATES 4 (2018) (depicting yearly increases and decreases in the annual violent crime rate from 1960 to 2016); STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 92 (2012) (depicting twentieth-century United States and English homicide rates).

98. David L. Bazelon, *Missed Opportunities in Sentencing Reform*, 7 HOFSTRA L. REV. 57, 57 (1978).

99. S. JOURNAL, 94th Cong., 1st Sess. 646 (1975) (statement of the President of the United States given by the President of the Senate Pro Tempore) (postulating that these crimes trouble the citizenry the most).

100. See Schulhofer, *Due Process of Sentencing*, *supra* note 95, at 733–34 (“Several factors, by now familiar to a wide public, have generated a broad consensus in support of one immediate goal—the restriction of judicial sentencing discretion. . . . The inconsistencies and uncertainties associated with broad, unstructured discretion are, of course, unfair in themselves; they are also thought to undermine the deterrent effectiveness of the criminal law and to promote resentment among prisoners, thereby increasing their sense of alienation and mistrust. The sentencing process has come to seem so haphazard that it generates cynicism among the public and lack of confidence in the regularity, reliability, and effectiveness of the legal system generally.”).

101. See Edward M. Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423, 428 (1980) (“During the past decade, the debate over criminal sentencing reform has intensified in Congress, in state legislatures, and among academicians and corrections experts.”).

102. See, e.g., Tonry, *supra* note 87, at 607; see also *id.* at 607–08 (“Denver has adopted the first descriptive sentencing guidelines system. The California legislature enacted the California Uniform Determinate Sentencing Law in 1976. Several states, including New York and Massachusetts, have enacted mandatory sentencing laws, and Maine adopted a determinate sentencing statute and abolished its parole board in 1976.”); *id.* at 616–23 (reviewing contemporary sentencing reforms across the states).

103. See, e.g., S. JOURNAL, 94th Cong., 1st Sess. 646 (1975) (showing early federal reform efforts—“[b]y Mr. Kennedy . . . S. 2698. A bill to amend title 18, United States Code, so as to impose mandatory minimum terms with respect to certain offenses, and for other purposes, Referred to the Committee on the Judiciary. By Mr. Kennedy. . . . S. 2699. A bill to amend title 18, United States Code, so as to establish certain guidelines for sentencing, establish a United States Commission on Sentencing, and for other purposes. Referred to the Committee on the Judiciary.”).

who urge[d] that there be a general presumption against imprisonment, and more innovative and imaginative alternatives to a sentence of imprisonment.”¹⁰⁴ Both sides agreed that the federal system was not working¹⁰⁵ and that federal judges were largely ambivalent about reform.¹⁰⁶

In 1984, Congress passed the Sentencing Reform Act¹⁰⁷ as part of the larger Comprehensive Crime Control Act.¹⁰⁸ The Sentencing Reform Act abolished the federal parole system,¹⁰⁹ established judicial sentencing factors,¹¹⁰ and instituted drug quantity sentencing.¹¹¹ But the “centerpiece of the Act was its establishment of a permanent sentencing

104. Kennedy, *supra* note 95, at 356 (noting that over the past decade “the debate over sentencing reform ha[d] intensified”).

105. *Id.*; *see also* Kramer, *supra* note 92, at A3 (“The need for reform has been recognized in Congress. None other than [Republican] Senator Roman Hruska of Nebraska has stated that it ‘seems somehow unfair’ that sentencing disparities should be so great.”).

106. *See* JOHN BARTOLOMEO, FED. J.R. PROGRAM, FJRP-81/005, JUDICIAL REACTIONS TO SENTENCING GUIDELINES 3–4 (1981) (“While federal judges hardly offer wholesale endorsements of current federal sentencing practices, relatively few express serious criticism of the current process. More than one-third (38%) believe that the current process is either ‘ideal’ or ‘about the best that can be achieved.’ Another third (35%) regard it as ‘adequate.’ [By contrast s]ixty-four percent of U.S. Attorneys/Assistant U.S. Attorneys and 57% of defense attorneys (as contrasted with 23% of the judiciary) find fault with current sentencing practices (Table 1 [note: Federal judges $n=264$; U.S. Attorneys/AUSAs $n=103$; Defense attorneys $n=100$]); *cf.* Frank A. Kaufman, *The Sentencing Views of Yet Another Judge*, 66 GEO. L. J. 1247, 1256 (1978) (“None of us who perform sentencing functions can look with any great degree of pride upon the systems which we have built and which we administer. But . . . I believe that they are soundly bottomed and that we should move at long last toward their prompt implementation, not toward their abandonment.”).

107. Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 211, 98 Stat. 1987.

108. Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1976.

109. *See, e.g.*, Sentencing Reform Act of 1984, Pub. L. 98–473, tit. II, ch. 2, sec. 214(c), 98 Stat. 2014 (codified as amended at 18 U.S.C. § 5042) (“Section 5042 is amended by—(1) striking out ‘parole or’ each place it appears in the caption and text; and (2) striking out ‘parolee or’.”).

110. *See id.* at sec. 212(a)(2), § 3553(a), 98 Stat. 1987, 1989 (codified as amended at 18 U.S.C. § 3553(a)) (requiring sentencing judges to consider seven individualized sentencing factors in determining the particular sentence to be imposed, including “(1) the nature and circumstances of the offense, and the history and characteristics of the defendant”).

111. *See* United States v. Wirsing, 943 F.3d 175, 177 (4th Cir. 2019) (“In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, which separated drugs into five ‘schedules’ according to their potential for abuse. The statute assigned penalties in accordance with a drug’s schedule and whether it was a narcotic, without considering quantity (with one minor exception related to distribution of ‘a small amount of marihuana for no remuneration’). That changed in 1984, when Congress introduced quantities to the [Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98–473, § 502, 98 Stat. 1837, 2068–69 (codified at 21 U.S.C. § 841(b))] statute.”) (citations omitted).

commission”¹¹² to promulgate mandatory sentencing guidelines.¹¹³

The commission’s new guidelines went into effect in late 1987.¹¹⁴ Initial reviews of their effects were mixed. Within a few years, the commission reported modest reductions in sentencing disparities among certain drug and fraud offenders.¹¹⁵ Some practicing attorneys and judges also reported greater “fairness, uniformity, and certainty” in sentencing.¹¹⁶

But others felt that the guidelines were yielding harsher sentences,¹¹⁷ especially for African American defendants.¹¹⁸ The 100-to-1 sentencing

112. See Hon. William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795, 798 (1992) (“The centerpiece of the [Sentencing Reform] Act was its establishment of a permanent sentencing commission to develop and, over time, refine sentencing Guidelines that would channel the previously unguided sentencing discretion of judges.”); see also Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), § 991, 98 Stat. 1837 (2017) (codified at 28 U.S.C. § 991) (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission . . .”).

113. See, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a)(2), § 3553(b), 98 Stat. 1989-90 (codified at 18 U.S.C. § 3553(b)) (“Application of Guidelines in Imposing a Sentence—[t]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”); cf. *United States v. Booker*, 543 U.S. 220, 245 (2005) (“We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, incompatible with today’s constitutional holding.”).

114. Wilkins, *supra* note 112, at 799 (“[The Guidelines] became effective on November 1, 1987.”).

115. See *id.* at 808 (“The Commission recently analyzed sentences before and after Guideline implementation for offenders convicted of bank robbery, cocaine distribution, heroin distribution, and bank embezzlement. . . . Overall, the research demonstrated that the range of sentences imposed on the majority of offenders has decreased significantly under the Guidelines, compared to sentences imposed under the old law on similar offenders convicted of similar offenses.”).

116. *Id.* at 820; see also Joe B. Brown, *The Sentencing Guidelines are Reducing Disparity*, 29 AM. CRIM. L. REV. 875, 876-77 (1992) (“[M]y experience with the Guidelines has reinforced my firm belief that they have reduced disparity and, for the most part, do produce fairer sentences. Despite continual criticism from many judges and the defense bar, the opinion of the U.S. Attorneys and Assistants who work closely with the Guidelines is overwhelmingly favorable.”).

117. See Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 772 (1992) (reviewing sentencing data for four districts of the Eighth Circuit in 1989 and concluding that “an offenders sentenced under the new Guidelines in place, offenders were now likely to serve sentences more than twice as long as someone sentenced under pre-Guidelines law”).

118. See Joseph F. Weis Jr., *The Federal Sentencing Guidelines – It’s Time for a Reappraisal*, 29 AM. CRIM. L. REV. 823, 826 (1992) (discussing the harsh results produced by the Guidelines given certain offenders’ socio-economic circumstances); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 AM. CRIM. L. REV. 899, 901 (1992) (“[T]he addicted prostitute who took telephone messages goes off to federal prison for five or six years, the addict street dealer gets at least nine years, while the sophisticated supplier who organized the enterprise ends up with an eighteen-month sentence.”); MICHAEL TONRY, *SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2005* (2016) (discussing how the guidelines were criticized on normative, fairness, outcome, technocratic, and policy grounds).

disparity between crack cocaine and powder cocaine, for instance, “closely track[ed] inner city ethnic and racial lines” and resulted in significantly longer sentences for urban African American defendants.¹¹⁹ The effect of the guidelines, on their own, was difficult to determine because the guidelines were part of a larger tough-on-crime framework.

The guidelines were instituted at the height of the tough-on-crime era.¹²⁰ From the beginning, the guidelines were supplemented by “statutory mandatory minimum and enhancement sentencing schemes passed by Congress on a regular basis.”¹²¹ As the Honorable Joseph F. Weis Jr. of the Third Circuit observed, mandatory minimums were “applied most frequently in cases of illegal drug trafficking . . . [and] [t]he imprisonment terms [were] arbitrarily selected by Congress, often seemingly as a response to a perceived public call to be ‘tough on crime.’”¹²² For example, the Anti-Drug Abuse Act of 1986 “greatly enhanced the use of mandatory prison sentences for many drug

119. See Uelmen, *supra* note 118, at 904; see also *id.* (“This means that the Guideline sentence for a white defendant selling one ounce of powdered cocaine on Long Island is level fourteen (fifteen to twenty-one months) while the Guideline sentence for a black defendant selling one ounce of ‘crack’ cocaine in Harlem is level twenty-eight (seventy-eight to ninety-seven months)”; Heaney, *supra* note 117, at 778 (“[T]he weight of drugs ‘involved in the crime’ includes not only the drugs an offender has in his possession when apprehended, but also any and all additional quantities that can be considered ‘part of the same course of conduct or common scheme or plan’ as the offense of conviction.”).

120. TONRY, *supra* note 118, at 96 (2016) (“The legislation was enacted, the commission was appointed, and the guidelines took effect . . . just as the tough on crime period hit its stride.”); see also Heaney, *supra* note 117, at 781 (“The Commission has blamed the longer sentences given to Blacks on mandatory minimum sentencing laws and prosecutors’ failure to consistently charge conduct requiring these sentences. I believe these are important factors, but the Guidelines themselves play a role in the disparities.”); see also EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 40 (2019) (“As crime rose in the late 1970s and early 1980s, however, so did public concern about violence committed by people who were out of jail awaiting trial. In 1984, Congress amended the Bail Reform Act, instructing federal judges to consider dangerousness in setting bail. For crimes of violence, as well as some drug crimes, the presumption in federal cases would now be confinement, not release.”).

121. LYNCH, HARD BARGAINS, *supra* note 79, at 60; see also Mona Lynch, Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era, 43 N.Y.U. REV. L. & SOC. CHANGE 59, 63 n.15 (2019) [hereinafter Lynch, Booker Circumvention?] (“The Guidelines have also been supplemented by statutory mandatory minimum and enhancement sentencing schemes passed by Congress on a regular basis since 1984.”).

122. Weis *supra* note 118, at 823; see also *id.* (“Mandatory minimums require judges to impose prison terms of not less than the number of years specified by Congress as punishment for certain offenses These sentences must be imposed without regard to such factors . . . often used by courts in determining appropriate punishment.”).

offenses.”¹²³ It also originated the crack to powder cocaine disparity.¹²⁴ The Anti-Drug Abuse Act of 1988 “creat[ed] a mandatory minimum penalty for simple possession of crack cocaine . . . the only federal mandatory minimum for a first offense of simple possession of a controlled substance.”¹²⁵

The new sentencing regime contributed to a nearly eightfold increase in the federal prison population from 1980 to 2010.¹²⁶ By the late 1990s, it was clear that Congress had upset the balance of the federal sentencing system.¹²⁷ This time, reform began with the Court.

In the mid-2000s, the Supreme Court held that mandatory sentencing guidelines violated defendants’ constitutional rights in *Booker*, *Gall*, and *Kimbrough*.¹²⁸ In *Booker*, a jury found beyond a reasonable doubt that the defendant possessed at least 50 grams of crack cocaine.¹²⁹ That amount translated to a guidelines sentence of 210 to 262 months.¹³⁰ However, the sentencing judge found by a preponderance of the evidence

123. FREDERIC G. REAMER, HEINOUS CRIME: CASES, CAUSES, AND CONSEQUENCES 134 (2005); *see also* *Dorsey v. United States*, 567 U.S. 260, 266 (2012) (“[The Anti-Drug Abuse Act of 1986] sets forth mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense.”); *Kimbrough v. United States*, 552 U.S. 85, 95–97, 99 (2017) (“The 1986 [Anti-Drug Abuse Act] created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses.”).

124. *See United States v. Wirsing*, 943 F.3d 175, 177 (4th Cir. 2019) (“The disparity between crack and powder cocaine originated in a statute enacted two years later: the Anti-Drug Abuse Act of 1986.”).

125. COCAINE AND FEDERAL SENT’G POL’Y 1–2 (U.S. SENT’G COMM’N 1995).

126. FED. BUREAU PRISONS, *supra* note 86 (showing 24,640 inmates in 1984 and 210,227 inmates in 2010).

127. *See* LYNCH, HARD BARGAINS, *supra* note 79, at 60; *see also* Lynch, *Booker Circumvention?*, *supra* note 121, at 60 (arguing that by the late 1990s, Congress had “severely constrained judicial discretion . . . and sought to limit prosecutors’ discretion in plea bargaining”); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: *SENTENCING GUIDELINES IN FEDERAL COURTS* 142 (1998) (“The problem, in sum, is not that prosecutors have discretion, or that the exercise of that discretion inevitably results in sentencing ‘disparities’—that is obviously true, and obviously unavoidable. The problem is that judges—the impartial arbiters under our constitutional order—have now been denied countervailing discretionary authority to restrain prosecutorial power.”); TONRY, *supra* note 118, at 156 (arguing that the sentencing guidelines have failed and must be reimagined).

128. *See United States v. Booker*, 543 U.S. 220, 258 (2005) (finding the provision of the federal sentencing statute that makes the Guidelines mandatory would be incompatible with today’s constitutional holding); *Gall v. United States*, 552 U.S. 38, 46–51 (2007) (noting that after *Booker*, the Guidelines are advisory, not mandatory); *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (“This Court’s remedial opinion in *United States v. Booker* instructed district courts to read the United States Sentencing Guidelines as ‘effectively advisory’ . . . [T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”).

129. *Booker*, 543 U.S. at 227.

130. *Id.*

that Mr. Booker possessed an additional 566 grams of crack.¹³¹ Given that quantity, the sentencing guidelines required the judge to impose a 360 months to life sentence.¹³² In a two-part opinion, the Supreme Court explained that the jury's verdict did not authorize the longer sentence, but the judge would be reversed if he did not impose it.¹³³ As a result, the mandatory guidelines provision of the Sentencing Reform Act of 1984 violated the Sixth Amendment¹³⁴ and must be severed.¹³⁵

In *Gall*, the Eighth Circuit reversed a probation sentence on the grounds that the sentencing judge had failed to show extraordinary circumstances permitting a variance below the 30-month bottom of the guidelines range.¹³⁶ The Supreme Court reversed, reiterating *Booker*, and holding that appellate courts must apply abuse-of-discretion review, not a heightened standard of review, to sentences outside the Guidelines range.¹³⁷

In *Kimbrough*, the Supreme Court held that the sentencing court had not abused its discretion in finding that the sentencing guidelines' "100-to-1 [crack-to-powder cocaine] ratio itself created an unwarranted disparity within the meaning of § 3553(a)."¹³⁸

The Supreme Court's sentencing guidelines rulings restored some judicial discretion but did not alter the guidelines themselves or statutory mandatory minimums, including harsh crack penalties under § 841(b).¹³⁹ Post-*Booker*, the federal prison population continued to grow.¹⁴⁰

In 2007, the Sentencing Commission addressed the crack-to-powder cocaine disparity by reducing the base offense levels for crack cocaine

131. *Id.*

132. *Id.*

133. *Id.* at 235.

134. *Id.* at 244; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

135. *Booker*, 543 U.S. at 258.

136. *Gall*, 552 U.S. at 45–46.

137. *Id.* at 50.

138. *Kimbrough v. United States*, 552 U.S. 85, 111 (2007).

139. *See, e.g.*, 21 U.S.C. § 841(b) (imposing mandatory penalties for crack cocaine and related offenses); *see also* *DePierre v. United States*, 564 U.S. 70, 89 (2011) (defining crack cocaine in relation to other drugs for sentencing purposes).

140. LYNCH, *HARD BARGAINS*, *supra* note 79, at 6 (showing federal prison growth from 1970 to 2012); *see the special section on prison reduction in volume 10, issue 4 of CRIMINOLOGY & PUB. POL'Y* 873, 909–37 (2011) (with essays by Megan Kurlychek, Susan Turner, and Faye S. Taxman).

convictions.¹⁴¹ A year later, the Sentencing Commission made the change retroactive.¹⁴² Then Congress got involved.

In 2010, Congress passed the Fair Sentencing Act.¹⁴³ The Act “alleviate[d] the severe sentencing disparity between crack and powder cocaine [by] reduc[ing] the statutory penalties for cocaine base offenses.”¹⁴⁴ The law’s second section increased the crack cocaine quantities necessary to trigger mandatory minimum sentences under the Controlled Substances Act and Controlled Substances Import and Export Act.¹⁴⁵ The Fair Sentencing Act affected defendants sentenced in late 2010 or after.

Following the Act, the Sentencing Commission further adjusted crack cocaine offense levels and made that change retroactive.¹⁴⁶ “As a result of the 2007 and 2010 [remedies], courts reduced the sentences of approximately 24,181 individuals collectively.”¹⁴⁷ But the changes did not help certain defendants sentenced to mandatory statutory minimums prior to 2010.¹⁴⁸ The First Step Act of 2018 offered relief to those defendants.¹⁴⁹

The central aim of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act, as the

141. See Devins, *supra* note 62, at 45 (“In 2007, the Sentencing Commission reduced the base offense levels for crack cocaine offenses”); see also *United States v. Wirsing*, 943 F.3d 175, 177 (4th Cir. 2019) (“[B]etween 1995 and 2007, the United States Sentencing Commission issued four reports to Congress advising that ‘the ratio was too high and unjustified.’ First, ‘research showed the relative harm between crack and powder cocaine [was] less severe than 100 to 1.’ In fact, ‘[t]he active ingredient in powder and crack cocaine is the same’; the difference is in how the drugs are ingested, with crack ‘produc[ing] a shorter, more intense high.’”) (internal citations omitted).

142. See Devins, *supra* note 62, at 45 (“In March 2008, the Commission applied th[e] change retroactively.”) (citing U.S. SENTENCING GUIDELINES MANUAL 2011).

143. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; see Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, YALE L.J. F. 791, 793 (2019) (noting the growing bipartisan agreement that the sentencing system needed reform and Congress’s slow path toward that reform, and characterizing the Fair Sentencing Act as an “incredibly modest sentencing reform”).

144. *United States v. Peters*, 843 F.3d 572, 575 (4th Cir. 2016).

145. See Fair Sentencing Act of 2010 § 2 (“COCAINE SENTENCING DISPARITY REDUCTION. (a) . . . Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended . . . (1) in subparagraph (A)(iii), by striking ‘50 grams’ and inserting ‘280 grams’; and . . . (2) in subparagraph (B)(iii), by striking ‘5 grams’ and inserting ‘28 grams’. (b) . . . Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended.”).

146. Devins, *supra* note 62, at 45.

147. *Id.*

148. See, e.g., *United States v. Wirsing*, 943 F.3d 175, 179 (4th Cir. 2019) (“Against this background, Congress enacted the First Step Act in December 2018. The First Step Act filled some gaps left by the Fair Sentencing Act. For example, before the First Step Act, the defendant in *Dean* could not access the benefits of the Fair Sentencing Act: he was sentenced in June 2010, shortly before the Fair Sentencing Act’s enactment, and he was ineligible for relief under Amendment 782.”).

149. See 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein) (explaining that The First Step Act of 2018 made “the Fair Sentencing Act retroactive”).

title suggests, was to enhance prison-based anti-recidivism programming and to expand early release opportunities (e.g., good time credits).¹⁵⁰ Still, the bill reflected a broader consensus that (1) Congress had created unjustly harsh sentences for certain crimes,¹⁵¹ (2) the mid-1980s sentencing regime had resulted in untenable prison growth and crowding,¹⁵² (3) too much of the federal justice budget was being spent on prisons (e.g., versus law enforcement),¹⁵³ and (4) rehabilitation was a social good and appropriate aim of the federal justice system.¹⁵⁴

150. See 164 CONG. REC. S7641–42 (daily ed. Dec. 17, 2018) (statement of Sen. Cornyn) (discussing how Texas reduced its recidivism rate and advocating similar federal reform); 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (“Recidivism rates are far too high and drive crime rates up.”); 164 CONG. REC. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Schumer) (lauding the bill for providing “those in prison [with] the kind of training and drug treatment they need so that they can be successful and productive citizens when they get outside.”); 164 CONG. REC. S7769 (daily ed. Dec. 18, 2018) (statement of Sen. Portman) (“We have committed ourselves here in Congress to . . . try to reduce crimes, bring families back together, and help people be able to live out their purpose in life.”).

151. See 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (“The FIRST STEP Act . . . addresses overly harsh and expensive mandatory minimums for certain non-violent offenders.”); 164 CONG. REC. S7745 (daily ed. Dec. 18, 2018) (statement of Sen. Blumenthal) (“These draconian prison terms provide few incentives for prisoners to prepare for reentry, and that is the gap the FIRST STEP Act seeks to address.”); *id.* at S7747 (statement of Sen. Klobuchar) (“The sentencing laws on low-level drug offenders were implemented decades ago This has resulted in prison sentences that actually don’t fit the crime.”); *id.* at S7749 (statement of Sen. Leahy) (“For far too long, the legislative response to any and all public safety concerns was as simple as it was flawed: No matter the perceived ill, we turned to arbitrary and inflexible mandatory minimums to cure it. . . . It routinely results in low-level offenders spending far longer in prison than either public safety or common sense requires.”).

152. See 164 CONG. REC. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (“America has 5 percent of the world’s population, 25 percent of the world’s prisoners—more than Russia or China.”); *id.* at S7646 (statement of Sen. Jones) (arguing that the “system of justice . . . has incarcerated so many people—more than just about any civilized country in the world—and yields very little results”); 164 CONG. REC. S7762 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (“Since 1980 alone, our Federal prison population has exploded by 800 percent [t]his is because of failed policies by this body”).

153. See 164 CONG. REC. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (“Federal prison spending has increased by nearly 600 percent [since 1980] Our overcrowded Federal prisons consume one-quarter of the Justice Department’s discretionary budget. This undermines other important priorities, like preventing crime in our neighborhoods and treating drug addiction.”); *id.* at S7649 (statement of Sen. Grassley) (“Locking up low-level offenders for needlessly long prison sentences diverts resources that are needed elsewhere to fight crime.”); 164 CONG. REC. S7744 (daily ed. Dec. 18, 2018) (statement of Sen. Blumenthal) (“The Federal Government currently spends billions every year maintaining our prison population—the largest in the world. If we really want to keep people safe, there should be more dedication of resources to State and local enforcement, who patrol our streets, keep our communities safe, and provide role models for many of our young people.”).

154. See 164 CONG. REC. S7769 (daily ed. Dec. 18, 2018) (statement of Sen. Portman) (“We believe in redemption in this country. . . . Let’s do something about it. Let’s not hold people back because of their mistakes in the past but, instead, give them the tools to be able to lead a better life, a more productive life.”); *cf. Id.* at (statement of Sen. Kennedy) (“Justice exists when people receive what they deserve, and that is what the American criminal justice system is about. It is not supposed

Prison reform was the sole focus of early versions of the First Step Act.¹⁵⁵ However, sponsors could not get the votes they needed without sentencing reform.¹⁵⁶ So, “Democrats and Republicans . . . worked it out”¹⁵⁷ and produced a combined prison/sentencing reform act. In early 2019, the First Step Act, particularly section 404, launched the federal courts into uncharted territory.

IV. UNRESOLVED ISSUES IN SECTION 404 CASES

Section 404 of the First Step Act is four sentences long. It reads:

(a) Definition of Covered Offense.—In this section, the term “covered offense” means 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, that was committed before August 3, 2010.

(b) Defendants Previously Sentenced.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.

(c) Limitations.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 or if a previous motion made under this section to reduce the sentence was, after the

to be primarily about deterrence and rehabilitation, though those are important goals. The ultimate goal is justice. That is why I think this bill is backward.”).

155. See H.R. REP. NO. 115-699, at 22 (2018) (“H.R. 5682 will enhance public safety by improving the effectiveness and efficiency of the Federal prison system It also makes various changes to Bureau of Prisons’ policies and procedures to ensure prisoner and guard safety and security.”).

156. See 164 CONG. REC. H4311 (daily ed. May 22, 2018) (statement of Rep. Goodlatte) (“I know there are some in this body who are opposing this legislation because it does not include sentencing reform.”); *id.* (statement of Rep. Nadler) (“Nor do I believe more balanced reform is not viable when Senator Chuck Grassley, the chairman of the Senate Judiciary Committee, told us: ‘For any criminal justice system proposal to win approval in the Senate, it must include . . . sentencing reforms.’”); 164 CONG. REC. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (“I didn’t like the original version of this bill because I thought we could do better and we should add criminal sentencing to prison reform.”); see also Letter from the Leadership Conference on Civil and Human Rights to House of Representatives (May 21, 2018), as reprinted in 164 CONG. REC. H4316 (daily ed. May 21, 2018) (“[W]e write to urge you to vote NO on The FIRST STEP Act (H.R.5682). While well intentioned, this bill takes a misguided approach to reforming our federal justice system.”)

157. See 164 CONG. REC. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (“We sat down, Democrats and Republicans, and worked it out.”); see Hopwood, *supra* note 143, at 794–95 (“Between 2015 and 2018, Congress could not pass the Sentencing Reform and Corrections Act, which stalled in the Senate. And many other reforms died on the vine after being introduced in Senate and House committees. But then, almost miraculously, Congress passed a federal prison and sentencing reform bill called the First Step Act in December 2018.”).

date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.¹⁵⁸

Despite the brevity of the text, judges must navigate four complex issues in implementing section 404 sentence reductions. First, who is eligible for resentencing. Second, whether judges may engage in plenary resentencing or merely sentence reduction. Third, whether judges may resentence all concurrent criminal convictions or only crack cocaine convictions. And finally, whether judges must adopt the operative drug quantity (or quantities) from the original sentencing.

A. Eligibility for First Step Act Review

The first question courts have had to grapple with is whether Congress intended a broad, categorical approach to section 404 eligibility or a narrow offense-conduct approach.

To obtain a section 404 review, a defendant must demonstrate that he or she was sentenced on a “covered offense,” or “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.”¹⁵⁹ The majority view of eligibility,¹⁶⁰ as summarized by the U.S. Sentencing Commission, is that “[a]ny defendant sentenced for a crack cocaine offense before the effective date of the Fair Sentencing Act of 2010 who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act.”¹⁶¹

Or, as Judge Jonker explained, “eligibility under the language of the First Step Act turns on a simple, categorical question: namely, whether a defendant’s offense of conviction was a crack cocaine offense affected by the Fair Sentencing Act. If so, the defendant is categorically eligible for consideration”¹⁶² Under this view, the statutes of conviction

158. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5222 (internal citations omitted).

159. *Id.* at § 404(a).

160. See, e.g., *United States v. Wirsing*, 943 F.3d at 175, 179 (4th Cir. 2019) (“The First Step Act filled some gaps left by the Fair Sentencing Act.”); *United States v. Pierre*, 372 F. Supp. 3d 17, 18 (D.R.I. 2019) (“Section 404 of the [First Step] Act provides that a district court may ‘impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.’”); *United States v. Simons*, 375 F. Supp. 3d 379, 381 (E.D.N.Y. 2019) (“The [First Step] Act permits courts to retroactively lower the sentence of a defendant convicted of certain Controlled Substances Act violations involving crack cocaine.”).

161. *ESP INSIDER EXPRESS*, *supra* note 76, at 7 (answering “[w]ho is eligible for a sentence reduction based retroactive application of the Fair Sentencing Act of 2010”).

162. See *United States v. Boulding*, 379 F. Supp. 3d 646, 651–52 (W.D. Mich. 2019) (“Quantity is simply not part of the statutory test for eligibility under the First Step Act. Eligibility turns entirely on the categorical nature of the prior conviction. All other issues, including the proper

control eligibility.

By contrast, the minority view holds that the offense conduct, particularly the drug quantity, controls eligibility.¹⁶³ At least two arguments support this view. First, Congress defined “covered offense” as “violation of a Federal criminal statute”, and “violation” typically refers to “criminal conduct.”¹⁶⁴ Second, Congress intended “statutory penalties” to modify “violation”¹⁶⁵ or the criminal conduct.

Judges have rejected this narrower reading of eligibility on at least three grounds. First, they find the offense-conduct view unsupported by the text and broader context of section 404.¹⁶⁶ For instance, they point to the close proximity of the phrase “[f]ederal criminal statute” to “were modified by . . . the Fair Sentencing Act of 2010.”¹⁶⁷ This proximity recommends a categorical approach to eligibility according to judges in the majority. Second, some find the offense-conduct approach contrary to congressional intent. These judges find that the Act’s remedial purpose and history require a broad threshold inquiry into defendant eligibility.¹⁶⁸ Third, others contend that “the ‘weight of persuasive authority’ supports reading section 404(a) and determining eligibility by reference to the statute underlying a defendant’s conviction and penalty.”¹⁶⁹

In addition to these arguments, pre-passage eligibility estimates and post-passage Sentencing Commission data suggest that Congress intended to create a categorical approach to eligibility. Prior to the passage of the First Step Act, Senator Cotton and the Marshall Project¹⁷⁰

quantity determination, are a part of a reviewing court’s discretionary call on whether to modify an eligible defendant’s sentence.”); *see also* Devins, *supra* note 62, at 102 (discussing due process arguments for the categorical approach in resentencing cases following *Johnson v. United States* and Sentencing Commission Amendment 782).

163. *See, e.g.*, *United States v. Blocker*, 378 F. Supp. 3d at 1125, 1129 (N.D. Fla. 2019) (“The statute thus adopts the offense-controls theory, not the indictment-controls theory. On the government’s view of the facts, Mr. Blocker’s crimes are not ‘covered offenses.’ If those are the actual facts, the First Step Act does not authorize a sentence reduction.”).

164. *Id.*

165. *See* *United States v. White*, F. Supp. 3d 15, 32 (D.D.C. 2019) (“The government grounds this drug-quantity-driven eligibility theory in the text of Section 404(a), explaining that ‘the eligibility inquiry’ depends on whether the statutory penalties for the ‘violation’ that the defendant committed were modified by the FSA.”).

166. *Id.* at 33 (“The government’s multi-layered construction of the ‘covered offense’ definition in Section 404(a) is inconsistent with both the statutory text and normal canons of statutory interpretation.”).

167. *Id.*

168. *Id.* (“In this regard, the government’s drug quantity approach ‘misreads the text of the First Step Act, undermines the purpose of the Act, and is inconsistent with the decisions of the vast majority of courts that have decided this issue.’) (internal quotation marks and citation omitted).

169. *Id.* at 38 (internal citation omitted).

170. The Marshall Project is a nonprofit news organization focused on criminal justice reporting and reform. *See* THE MARSHALL PROJECT, <https://www.themarshallproject.org/>

separately estimated that a few thousand federal inmates would be eligible for section 404 relief.¹⁷¹ In January 2020, the Sentencing Commission reported that judges had granted nearly 2,000 motions for First Step Act reconsideration.¹⁷² This pre-Act, post-Act data alignment suggests that the moving defendants are likely eligible for reconsideration.

Thus, stronger evidence suggests that Congress intended a categorical—not offense-conduct—approach to section 404 eligibility.¹⁷³ The circuit courts have largely adopted this view.

As of late May 2020, seven circuits have adopted a categorical approach to section 404 eligibility.¹⁷⁴ Several unpublished opinions

[<https://perma.cc/YB4Y-LLNM>] (last visited Aug. 27, 2020); *see also* Justin George, *What's Really in the First Step Act?*, THE MARSHALL PROJECT (Nov. 16, 2018, 12:45 PM), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [<https://perma.cc/9TLZ-LGLL>].

171. Salvador Rizzo, *Does the Sentencing Bill Give Early Release to Drug Traffickers, Sex Offenders?*, WASH. POST, (Nov. 30, 2018, 2:00 AM), <https://www.washingtonpost.com/politics/2018/11/30/does-sentencing-bill-give-early-release-drug-traffickers-sex-offenders/> [<https://perma.cc/4G5J-PDLJ>]; *see also* United States v. Hayes, 555 U.S. 415, 429 (2009) (“The remarks of a single Senator are ‘not controlling,’ but, as Hayes recognizes, the legislative record is otherwise ‘absolutely silent.’”) (internal quotation marks and citations omitted).

172. U.S. SENT’G COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 4 (2020) (“[There were] 2,387 cases in which the court granted a motion for a sentence reduction due to Section 404 of the First Step Act of 2018”).

173. *See* United States v. Williams, 402 F. Supp. 3d 442, 448 (N.D. Ill. 2019) (“In the end, then, the straightforward reading of ‘offense’ is that it refers to the offense of conviction, not the defendant’s related conduct. To the extent that there is ambiguity, the rule of lenity would kick in and require an interpretation in favor of the defendant.”).

174. United States v. Smith, 954 F.3d 446, 448–51 (1st Cir. 2020) (adopting the categorical approach followed by other circuits and extending categorical eligibility to § 841(b)(1)(C) convictions); United States v. Holloway, 956 F.3d 660, 664 (2d Cir. 2020) (“To be eligible, then, Holloway was required to demonstrate that he was sentenced for a particular ‘violation of a Federal criminal statute,’ and that the applicable statutory penalties for that violation were modified by the specified provisions of the Fair Sentencing Act.”); United States v. Wirsing, 943 F.3d 175, 186 (4th Cir. 2019) (“All defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under that Act”); *see also* United States v. Gravatt, 953 F.3d 258, 263–64 (4th Cir. 2020) (remanding for consideration of a hybrid case involving crack and powder cocaine convictions because the crack conviction opened the door for First Step Act resentencing); United States v. Jackson, 945 F.3d 315, 320–21 (5th Cir. 2019), *cert. denied*, No. 19-8036, 2020 WL 1906710 (U.S. Apr. 20, 2020) (“Jackson has a covered offense. He meets all the requirements of section 404(a): He was convicted of violating a statute whose penalties the Fair Sentencing Act modified, and the violation occurred ‘before August 3, 2010.’ He also doesn’t transgress the ‘limitations’ of section 404(c) He is thus eligible for resentencing.”); United States v. Beamus, 943 F.3d 789, 791 (6th Cir. 2019) (“By its terms, the First Step Act permits Beamus to seek resentencing. He was convicted of an offense for which the Fair Sentencing Act modified the statutory penalty, and he has not received a reduction in accordance with that Act or lost such a motion on the merits.”); United States v. Shaw, 957 F.3d 734, 735 (7th Cir. 2020) (“To determine whether a defendant is eligible for a reduced sentence under the First Step Act, a court needs to look only at a defendant’s statute of conviction, not to the quantities of crack involved in the offense.”); United States v. McDonald, 944 F.3d 769, 772 (8th Cir. 2019) (“The

suggest that additional circuits will follow suit when the issue is properly before them.¹⁷⁵ Even if a uniform doctrine emerges, however, eligibility for convictions under § 841(b)(1)(C),¹⁷⁶ hybrid convictions (e.g., cocaine base and heroin) and post-release prison sentence reductions remain gray areas.¹⁷⁷

B. Sentence Reduction or Plenary Resentencing

The second question courts have had to grapple with is whether the First Step Act vests judges with narrow sentence reduction authority or broad plenary resentencing authority.

Section 404(b) states that “[a] court . . . may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . .

First Step Act applies to offenses, not conduct, and it is McDonald’s statute of conviction that determines his eligibility for relief”) (internal citation omitted).

175. *United States v. Hardwick*, 802 F. App’x 707, 709–10 (3d Cir. 2020) (per curiam) (“Although a life sentence was statutorily authorized when the District Court sentenced Hardwick, the Fair Sentencing Act has since reduced the statutory penalty for crack cocaine offenses like his to a term of five to 40 years. Hardwick’s motion under the First Step Act required the District Court to assess his request for a sentence reduction in light of that change to the statutory scheme.” (citing *Beamus*, 943 F.3d at 791–92; *Wirsing*, 943 F.3d at 185; *McDonald*, 944 F.3d at 772)); *United States v. Whittaker*, 777 F. App’x 938, 940 (10th Cir. 2019) (“The First Step Act of 2018, Pub. L. 115–391, 132 Stat. 5194, permits a district court to reduce a sentence based on the lower statutory sentencing ranges of the Fair Sentencing Act of 2010, Pub. L. 111–220, 124 Stat. 2372. But it applies only to defendants who were sentenced for crack cocaine offenses committed before August 3, 2010.”); *cf. United States v. Martinez*, 777 F. App’x 946, 947 (10th Cir. 2019) (“Martinez, however, was convicted of violating 21 U.S.C. § 841(b)(1)(C), a statutory provision that criminalizes possession with intent to distribute crack cocaine, irrespective of quantity. The Fair Sentencing Act had no effect on § 841(b)(1)(C) and, thus, Martinez’s crime of conviction is not a ‘covered offense’ under the Act.”); *United States v. Lahens*, 805 F. App’x 864, 865 (11th Cir. 2020) (per curiam) (“The parties here do not dispute that Lahens is statutorily eligible for a sentence reduction under the First Step Act. That is, they appear to agree that: (1) Lahens was convicted of a ‘covered offense’; (2) had the Fair Sentencing Act been in effect at the time of his conviction, he would have been subject to a lower statutory maximum and no mandatory minimum; and (3) because of the lower statutory maximum, he would have been subject to lower guideline range, even as a career offender.”).

176. *Smith*, 954 F.3d at 451 (“Congress intended to provide potential relief to persons like Smith whose penalties were dictated by § 841(b)(1)(C) and therefore were only indirectly affected by the minimum sentences called for by § 841(b)(1)(A)(iii) and § 841(b)(1)(B)(iii).”).

177. See *infra* Section IV.C., for a discussion about hybrid convictions. See *United States v. Venable*, 943 F.3d 187, 195 (4th Cir. 2019) (“[W]e hold that the district court erred in concluding the First Step Act did not authorize it to provide relief to Venable because he had finished serving his original term of imprisonment and was currently serving a term of imprisonment for revocation of supervised release.”); *United States v. Hanzly*, 802 F. App’x 850, 851 (5th Cir. 2020) (“Because Hanzly completed his federal term of imprisonment, he is ineligible for a reduction in his term of imprisonment.”); *United States v. Woods*, 949 F.3d 934, 937 (6th Cir. 2020) (“Given that Woods’s current 37-month sentence relates to his original offense under 21 U.S.C. § 841(a)(1)—a First Step Act ‘covered offense’—Woods is eligible for resentencing The district court did not find Woods ineligible under the First Step Act due to the fact Woods is currently serving a postrevocation sentence. Rather, the district court assumed eligibility and considered factors that weighed in favor or against granting a sentence reduction. And it treated Woods’s violation conduct as one factor in the analysis, not an independent and dispositive reason for denying a reduction.”).

were in effect at the time the covered offense was committed.”¹⁷⁸ Under the majority view,¹⁷⁹ section 404(b) permits resentencing judges to reduce the sentences for certain crack cocaine offenses. Beyond that reduction, judges are not permitted to engage in plenary resentencing.¹⁸⁰ For instance, judges may not disturb enhancements (e.g., for leadership roles).¹⁸¹ At least five arguments support the sentence-reduction view.

First, section 404 merely made the Fair Sentencing Act retroactive. Both 404(a) and (b) refer to “section 2 or 3 of the Fair Sentencing Act of 2010.”¹⁸² The majority of courts “read . . . these two provisions [as] discretion to reduce the defendant’s sentence on the covered offenses—the drug counts—to the sentence he would have received if section 2 [or 3] of the FSA had been in effect when he committed the drug offenses.”¹⁸³ Accordingly, some courts have declined to resentence defendants on powder cocaine or weapons charges because those charges were not affected by the Fair Sentencing Act.¹⁸⁴

178. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5222 (2018).

179. *See* *United States v. Sampson*, 360 F. Supp. 3d 168, 171 (W.D.N.Y. 2019) (collecting cases where the courts adopted the majority approach by reducing defendants’ sentences); *United States v. White*, F. Supp. 3d 15, 40 (D.D.C. 2019) (“Moreover, Section 404 appears in ‘Title IV’ of the First Step Act, titled ‘Sentencing Reform,’ and that Title’s provisions demonstrate Congress’s intention to maintain the finality of sentences already imposed. . . . Accordingly, this Court rejects the defendants’ claim that Section 404 created a ‘freestanding remedy that authorizes the district court to impose a reduced sentence for a covered offense,’ independent of § 3582(c), since that position fails to grapple with the statutory text of both § 3582(c) and the First Step Act that compel the contrary conclusion.”) (citations omitted).

180. *See generally* *Pepper v. United States*, 562 U.S. 476, 490 (2011) (“In light of the federal sentencing framework described above, we think it clear that when a defendant’s sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant’s rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.”).

181. A gray area exists in the majority view: whether judges may consider the full range of § 3553 factors, including rehabilitative conduct, during mere sentence reductions.

182. First Step Act of 2018, Pub. L. No. 115-391, § 404(a)–(b), 132 Stat. 5222 (2018).

183. *United States v. Rivas*, No. 04-cr-256, 2019 WL 1746392, at *6 (E.D. Wis. Apr. 18, 2019) (emphasis omitted). *See also* *United States v. Carter*, 792 F. App’x 660, 663 (11th Cir. 2019) (“Congress has expressly permitted courts to retroactively apply only the Fair Sentencing Act to defendants who qualify, while otherwise considering their sentence against the backdrop of the legal landscape at the time of their offense.”); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (“The calculations that had earlier been made under the Sentencing Guidelines are adjusted ‘as if’ the lower drug offense sentences were in effect at the time of the commission of the offense. That is the only explicit basis stated for a change in the sentencing. In statutory construction, the expression of one thing generally excludes another.”).

184. *See* *United States v. Burke*, No. 08-CR-63(1), 2019 WL 2863403, at *4 (E.D. Tenn. July 2, 2019) (“As such, this Court does not have jurisdiction to reduce a firearms sentence under the First Step Act.”); *United States v. Mainor*, No. 06-cr-140-1, 2019 WL 3425063, at *3 (E.D. Pa. July 30, 2019) (“Thus, Mainor’s twenty-year sentence on the powder cocaine charges is ineligible to be reduced under the First Step Act. And because the twenty-year powder cocaine sentence is to run concurrently with the ten-year crack sentence, even if the Court were to reduce Mainor’s

Second, plenary resentencing is prohibited by 18 U.S.C. § 3582. Section 3582 anticipates three resentencing circumstances: (1) case-specific, extraordinary, and compelling reasons or advanced age and at least thirty years of time served; (2) statutory changes or changes to Federal Rule of Criminal Procedure 35; or (3) lowering of the sentencing guidelines.¹⁸⁵ Most judges agree that First Step Act cases fall under the statutory change category, codified at § 3582(c)(1)(B).¹⁸⁶ That subsection authorizes resentencing courts to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35.”¹⁸⁷ In other words, subsection (c)(1)(B) directs courts back to the First Step Act to determine their authority.¹⁸⁸ The analysis then turns on whether the Act expressly permits plenary resentencing. The majority of judges finds no express authorizing language in the Act.¹⁸⁹ As a result, they determine that courts are prohibited under subsection (c)(1)(B) from conducting plenary resentencing in First Step Act cases.

Third, legislative history supports the majority view. On the day of the Act’s passage, Senator Feinstein stated that the First Step Act “fixes . . . and finally makes the Fair Sentencing Act retroactive so that people

sentence on the crack conviction, it would not affect his total time of his incarceration, which would still be twenty years.”).

185. 18 U.S.C. § 3582(c).

186. See *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019) (“However, the distinct language of the First Step Act compels the interpretation that motions for relief under that statute are appropriately brought under § 3582(c)(1)(B).”); *United States v. Davis*, 423 F. Supp. 3d 13, 16 (W.D.N.Y. 2019) (finding that 18 U.S.C. § 3582 (c)(1)(B) controls but plenary resentencing is not authorized).

187. 18 U.S.C. § 3582(c)(1)(B).

188. See *United States v. Rose*, 379 F. Supp. 3d 223, 232 (S.D.N.Y. 2019) (“[Section] 3582(c)(1)(B) merely redirects courts to Rule 35 and any other sources of authority that may exist, without providing any substantive standard of its own. Section 3582(c)(1)(B) is, therefore, not itself a source of authority for sentence modifications, nor does it delineate the scope of what the district court should consider when resentencing is authorized by another provision” (citations omitted); cf. *United States v. Glover*, 377 F. Supp. 3d 1346, 1355–56 (S.D. Fla. 2019) (holding that First Step Act merely authorizes a sentence reduction and 3582(c)(1)(B) does not permit additional arguments such as constitutional challenges).

189. See *Glover*, 377 F. Supp. 3d at 1357 (“[The Act] does not allow for a full de novo resentencing”); *United States v. Sampson*, 360 F. Supp. 3d 168, 171 (W.D.N.Y. 2019) (“Nowhere does the Act expressly permit [a] plenary resentencing or sentencing anew . . .”) (quoting *Davis*, 423 F. Supp. 3d at 16); *United States v. Crews*, 385 F. Supp. 3d 439, 444–45 (W.D. Pa. 2019) (“As Crews argues, this court is ‘not free to add words to a statute that Congress did not include in the statute it enacted.’ This court, therefore, cannot conduct a plenary resentencing under the First Step Act because the First Step Act specifically provides that the sentencing is limited to imposing a reduced sentence ‘as if sections 2 and 3 of the Fair Sentencing Act’ were in effect when the defendant committed the offense.”) (emphasis omitted) (citation omitted); *United States v. Rivas*, No. 04-cr-256, 2019 WL 1746392, at *6 (E.D. Wis. Apr. 18, 2019) (“The First Step Act does not ‘expressly permit’ the court to conduct a plenary resentencing.”); cf. *United States v. Allen*, 384 F. Supp. 3d 238, 243 (D. Conn. 2019) (“This question need not be resolved here because Mr. Allen is entitled to immediate release based on the Fair Sentencing Act’s modification of the statutory maximum penalty applicable to his offense.”).

sentenced under the old standard can ask to be resentenced under the new one.”¹⁹⁰ Senator Cardin also explained that the First Step Act, “makes retroactive the application of the Fair Sentencing Act, in which Congress addressed the crack-powder sentencing disparity, and allows individuals affected by this disparity to petition for sentence reductions.”¹⁹¹ Such statements support a narrow reading of judicial authority under the Act.

Fourth, longstanding precedent recommends sentence reduction rather than the creation of a new sentence.¹⁹² Typically, once a criminal sentence has been upheld on direct review, the judgment is considered final.¹⁹³ This “rule of finality” reflects the high cost of litigation, the public’s need for reliable justice,¹⁹⁴ and the parties’ need for certainty.¹⁹⁵ Section 3582 provides narrow exceptions to the rule of finality.¹⁹⁶ And, the Supreme Court recognizes exceptions for new substantive rules of offense conduct or covered offenders¹⁹⁷ and new procedures, “implicating the fundamental fairness and accuracy of the criminal proceeding.”¹⁹⁸ But, such exceptions remain limited.¹⁹⁹

190. 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein).

191. *Id.* (statement of Sen. Cardin).

192. See Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL’Y 179, 185 (2014) (“According to the prevailing view, championed in influential opinions and articles by Justice John Marshall Harlan, Judge Henry Friendly, and scholars like Paul Bator, Anthony Amsterdam, and Paul Mishkin, the government has a strong interest in preserving . . . a [final] judgment”).

193. *Id.*; see also *Teague v. Lane*, 489 U.S. 288, 310 (1989) (“[W]e now adopt Justice Harlan’s view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

194. See Scott, *supra* note 192, at 185 (concluding that a strong interest in preserving a final judgment is grounded in three practical considerations: the costs of re-litigation, the accuracy of new proceedings, and the damage to the reputation of the criminal justice system).

195. See *Mackey v. United States*, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring in part and dissenting in part) (“Finality in the criminal law is an end which must always be kept in plain view. . . . If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. . . . No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.”).

196. See *Dillon v. United States*, 560 U.S. 817, 827 (2010) (discussing the rule of finality in the § 3582(c)(2) context).

197. See *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (“*Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, ‘[n]ew substantive rules generally apply retroactively.’ Second, new ‘watershed rules of criminal procedure,’ which are procedural rules ‘implicating the fundamental fairness and accuracy of the criminal proceeding,’ will also have retroactive effect.”) (citations omitted).

198. *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

199. See Devins, *supra* note 62, at 41 (“The general bar on retroactivity, with its limited exceptions, intends to balance the purposes of collateral review against the interest in finality of criminal convictions.”).

Fifth, collegiality mitigates against plenary resentencing. As a rule, a lone trial judge makes factual findings and enters a criminal sentence, which his or her peers respect.²⁰⁰ Such collegiality, according to late Third Circuit judge, Collins J. Seitz, contributes to intellectual magnanimity and the image of the neutral judiciary.²⁰¹ First Step Act cases test this norm. In many First Step Act cases,²⁰² original sentencing judges are no longer presiding. Their successors sometimes find no compelling reason, such as a congressional mandate, to disturb their predecessors' factual findings in complex drug cases.²⁰³

A minority believes that section 404 authorizes resentencing judges to engage in extended, holistic, or even *tabula rasa*²⁰⁴ resentencing. While controversial, this plenary resentencing position is better supported by the text and context of the First Step Act.

Under the minority view, section 404(b) permits judges to convene a hearing with “all of the procedural trappings and collateral effects of the original sentencing, including . . . arguments that are ‘unrelated to the issue(s) that precipitated the rehearing, including any non-retroactive changes in the law’; and . . . the defendant’s presence, unless waived.”²⁰⁵ At least seven arguments support this view; the first three are statutory construction arguments.

200. See *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Crim. L. & Procedures of the S. Comm. on the Judiciary*, 93d Cong., 6515 (1973) (The Ass’n of the Bar of the City of New York Rep. on Sentencing Practices in the Fed. Courts in New York City) (discussing older judges’ reluctance to sentencing panels in the context of individual sentencing and collegiality).

201. See Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 27 (1991) (explaining that the effects of collegiality exist in general but also as between district judges and their appellate reviewers).

202. See, e.g., *United States v. Kramer*, No. 87-cr-40070, 2019 WL 3322374, at *1 (S.D. Ill. July 24, 2019) (containing a 1988 conviction); *United States v. Eidson*, No. 88-cr-00021, 2019 WL 3767570, at *1 (N.D. Cal. Aug. 9, 2019).

203. See, e.g., *United States v. Rivas*, No. 04-cr-256, 2019 WL 1746392, at *8 (E.D. Wis. Apr. 18, 2019) (“The First Step Act . . . does not authorize the court to disturb the 120-month sentence Judge Clevert imposed on Count One. It does not authorize the court to disturb Judge Clevert’s conclusion that the defendant qualified as a career offender, or ignore the requirement that a court must impose the five-year mandatory sentence required by § 924(c) to run consecutively to any other sentence imposed.”).

204. See *Tabula Rasa*, BLACK’S LAW DICTIONARY (7th ed. 1999) (defining *tabula rasa* as “a blank tablet ready for writing; a clean slate.”).

205. *United States v. Medina*, No. 05-cr-58, 2019 WL 3769598, at *5 (D. Conn. July 17, 2019) (quoting *United States v. Rose*, 379 F. Supp. 3d 223, 232 (S.D.N.Y. 2019)). See also *Shabazz v. United States*, 923 F.3d 82, 84 (2d Cir. 2019) (“The Supreme Court explained that, upon a remand for a plenary resentencing, a sentencing court must be allowed to consider the mandatory sentencing factors in 18 U.S.C. § 3553(a) as of the time of imposition of the new sentence, and, if appropriate, to grant a departure or variance based on the defendant’s conduct since the original sentencing.”).

First, section 404(b),²⁰⁶ which states that, “[a] court . . . may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect . . .”²⁰⁷ allows judges to impose any criminal sentence with two limitations: (1) that the new sentence must be less than the original sentence (“reduced”), and (2) that the new sentence must comport with the Fair Sentencing Act of 2010.²⁰⁸

Second, the word “impose,” used twice in the one-sentence section, refers to a past and future sentencing. Logically, “impose” has the same meaning throughout the sentence and section.²⁰⁹ As a result, resentencing judges have the same authority that original sentencing judges had: plenary authority.²¹⁰

Third, Congress typically uses “impose” to mean plenary sentencing.²¹¹ For instance, § 3553 instructs judges to “impose a sentence sufficient, but not greater than necessary.”²¹² Similarly, § 3661 announces that, “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted

206. *See* *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (“The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”).

207. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5222 (2018).

208. *Id.* at § 404(c).

209. *See* *Rose*, 379 F. Supp. 3d at 234 (“Indeed, the single sentence that is § 404(b) uses the verb ‘impose’ twice. The first part of § 404(b) is unequivocal that any motion for relief must be considered by the ‘court that imposed a sentence for a covered offense.’ In that instance, ‘imposed’ undoubtedly refers to the imposition of the original sentence, rather than any modification or reduction. Therefore, in order to construe § 404(b) as falling beyond the reach of 18 U.S.C. § 3553(a), the Court would have to give two different meanings to the verb ‘impose’ within the same sentence. Given the proximity of the repetition, the strength of the interpretative principle that ‘identical words and phrases within the same statute should normally be given the same meaning’ is at its zenith.”) (citing *FCC v. AT & T Inc.*, 562 U.S. 397, 408 (2011)).

210. *See, e.g.*, Sentencing Reform Act of 1984, § 3553, 98 Stat. 1989 (codified at 18 U.S.C. 3553(a)) (“The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant”).

211. *See* *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (“The rule of *in pari material*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. . . . The rule . . . assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject.”); *United States v. Simms*, 914 F.3d 229, 243 (4th Cir. 2019) (“Finally, the Government would have us interpret the materially identical 34-word phrase in [18 U.S.C.] § 924(c)(3)(B) and [18 U.S.C.] § 16(b) in entirely different ways. This argument flies in the face of the traditional rule that ‘a legislative body generally uses a particular word with a consistent meaning in a given context.’ . . . Thus, it is unsurprising that the Government has been unable to cite even one case in which the Supreme Court or this court have interpreted two materially identical statutes differently, as it urges us to do with § 924(c)(3)(B) and § 16(b).” (citing *Erlenbaugh*, 409 U.S. at 243)).

212. 18 U.S.C. § 3553(a).

of an offense . . . for the purpose of imposing an appropriate sentence.”²¹³ Both sections envision fact-finding and application of modern case precedents, or plenary sentencing.

By contrast, § 3582(c)(2) states, that a court, “may reduce the term of imprisonment” for a defendant whose “sentencing range . . . has subsequently been lowered by the Sentencing Commission.”²¹⁴ The difference between § 3582(c)(2) and section 404(b) is the verbal phrase indicating the congressionally authorized action. The verbal phrase in § 3582(c)(2) is “may reduce,” whereas the verbal phrase in section 404(b) is “may . . . impose.”²¹⁵ The direct object of section 404(b)’s “impose” is “reduced sentence.” This object phrase prohibits judges from imposing lengthier sentences following First Step Act review.²¹⁶ As an object phrase, however, “reduced sentence” cannot prescribe judicial authority; authority is conferred by verbs. Thus, a textual analysis of section 404(b), alone or with other criminal statutes, demonstrates that Congress authorized judges to conduct plenary resentencing in First Step Act cases.

213. 18 U.S.C. § 3661; *see also* § 3582(a) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

214. 18 U.S.C. § 3582(c)(2).

215. *Compare id. with* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5222 (2018).

216. *See* United States v. Rose, 379 F. Supp. 3d 223, 234 (S.D.N.Y. 2019) (“Some courts have held that because the district court can impose only a ‘reduced sentence’ under the First Step Act, the sentencing proceeding must not be a plenary one, and the term ‘impose’ cannot be given its usual meaning. While the restriction on the district court’s ability to impose a lengthier sentence could be a relevant factor, the nature of a sentencing cannot be dictated solely by a statutory limit on the sentencing range. Rather, federal criminal statutes almost invariably contain statutory maximums (and occasionally mandatory minimums) that constrain judicial discretion without divesting a sentencing proceeding of its plenary nature.”) (citation omitted).

Fourth, legislative history supports the minority view. Senate testimony shows that the First Step Act was intended as a “significant reform”²¹⁷ favoring judicial discretion.²¹⁸

(1) Sen. Amy Klobuchar, “Significantly, this bill will not automatically reduce any one person’s prison sentence. Instead, the bill simply allows people to petition courts and prosecutors for an individualized review based on the particular facts of their case.”²¹⁹

(2) Sen. Bill Nelson, “This legislation will allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime These rigid sentences that do not fit the crimes ought to be turned around, and that is exactly what this legislation does.”²²⁰

(3) Sen. Corey Booker “[T]his bill includes critical sentencing reform that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts.”²²¹

The legislative record contains no direct disagreement with these statements.²²²

Fifth, plenary resentencing is legally permitted and necessary. In general, Congress,²²³ the Sentencing Commission,²²⁴ prosecutors, and

217. See 164 CONG. REC. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (“[T]he Senate is considering passing probably the most significant bill to reform our criminal justice system in nearly a decade.”).

218. See, e.g., 164 CONG. REC. S7644 (Dec. 17, 2018) (statement of Sen. Durbin) (“These mandatory penalties don’t allow judges to distinguish between drug kingpins . . . and lower level offenders.”); 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (“Third, the bill provides for more judicial discretion by expanding the existing Federal safety valve to include more low-level, nonviolent offenders.”); 164 CONG. REC. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Schumer) (“Among other important changes, the legislation will give judges more discretion in sentencing for low-level, nonviolent drug offenders who cooperate with the government.”). Senator Grassley and Schumer’s remarks about judicial sentencing authority, generally or in initial sentencings, demonstrate a renewed congressional trust in sentencing judges that fairly extends to section 404 resentencings.

219. 164 CONG. REC. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

220. *Id.* at S7756 (statement of Sen. Nelson).

221. *Id.* at S7764 (statement of Sen. Booker).

222. See *United States v. Hayes*, 555 U.S. 415, 429 (2009) (“The remarks of a single Senator are ‘not controlling,’ but, as Hayes recognizes, the legislative record is otherwise ‘absolutely silent.’”) (citation omitted).

223. See, e.g., 18 U.S.C. § 3584(c) (“Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.”); see also *Dean v. United States*, 137 S. Ct. 1170, 1175–76 (2017) (discussing § 3553(a), § 3582, and § 3584(b), and concluding that “[a]s a general matter, the foregoing provisions permit a court imposing a sentence on one count of conviction to consider sentences imposed on other counts.”).

224. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 71, ch. 3, pt. D, introductory cmt. § 3D (providing “rules for determining a single offense level that encompasses all the counts of which the defendant is convicted.”); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE

judges treat original criminal sentences as “packages” encompassing the total counts of conviction, enhancements, consecutive sentences and more.²²⁵ Some reformers argue that resentencing should follow the same rules.²²⁶ But, as explained above, courts often view their authority more narrowly at resentencing than at original sentencing.²²⁷ As a result, advocates must justify the use of original sentencing procedures in resentencing hearings.

Three justifications support plenary resentencing in First Step Act cases. The first justification comes under 18 U.S.C. § 3582, which permits plenary resentencing in First Step Act cases. As explained above, the majority of judges view § 3582(c)(1)(B) as controlling.²²⁸ That subsection directs courts back to the First Step Act to determine their authority.²²⁹ While the majority of judges find no express permission for plenary resentencing in the Act, a minority of judges find no “substantive limit” on judicial discretion in the Act.²³⁰ These judges read the words

CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22–23 (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [<https://perma.cc/NY93-DAX2>] (“One potential problem in multiple count cases is how to increase the sentence when the multiplicity of counts does in fact reflect multiple harms. . . . The guidelines resolve this problem by directing that incremental amounts for each offense involving a distinct harm be added to the base offense level that corresponds to the most serious offense in the group.”).

225. See *United States v. Triestman*, 178 F.3d 624, 631 (2d Cir. 1999) (Sotomayor, J.) (“Although Triestman may have pled guilty to his drug charges in reliance on statements in his plea agreement and by the district court indicating that his total offense level for these convictions would be 26, these statements were made in the context of a larger interdependent sentencing package, which included sentences not only for the drug-related offenses but also for a § 924(c) conviction. . . . Although Triestman had finished serving his original 63-month sentence for his drug convictions at the time of his resentencing, this fact is of little consequence because Triestman was still serving the overall term on his larger sentencing package.”).

226. See Tracy Friddle & Jon M. Sands, “*Don’t Think Twice, It’s All Right*”: *Remands, Federal Sentencing Guidelines & the Protect Act—A Radical “Departure”?*, 36 ARIZ. ST. L.J. 527, 540 (2004) (arguing for plenary resentencing when one but not all counts are overturned on appeal because “[a]llowing the judge such an opportunity ‘effectuates the original sentencing intent.’ That intent, of course, ultimately is to ensure ‘that the punishment . . . fits both crime and criminal.’”); see also 18 U.S.C. § 3553(a) (detailing the factors to be considered when imposing a sentence).

227. See 18 U.S.C. § 3582 (“The court may not modify a term of imprisonment once it has been imposed except . . .”).

228. See *United States v. Rose*, 379 F. Supp. 3d 223, 232 (S.D.N.Y. 2019) (“Apart from those three circumstances, Section 3582(c)(1)(B), which some courts have characterized as the ‘procedural vehicle’ for First Step Act motions, allows for modifications ‘to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.’”) (quoting *United States v. Potts*, No. 98-CR-14010, 2019 WL 1059837, at *3 (S.D. Fla. Mar. 6, 2019)).

229. See *id.* at 232 (“[Section] 3582(c)(1)(B) merely redirects courts to Rule 35 and any other sources of authority that may exist, without providing any substantive standard of its own. . . . Section 3582(c)(1)(B) is, therefore, not itself a source of authority for sentence modifications, nor does it delineate the scope of what the district court should consider when resentencing is authorized by another provision.”) (quotation marks and citations omitted).

230. *Id.*

and phrases used in section 404, particularly the term “impose” as discussed above, as a grant of plenary authority. For these judges, the absence of the word “plenary” is not determinative of congressional intent.

The second justification derives from Supreme Court precedent holding that inter-defendant disparities do not preclude plenary resentencing. Under § 3553(a)(6), sentencing judges must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”²³¹ (e.g., defendants sentenced for crack distribution in 2011 versus First Step Act defendants). In 2011, the Supreme Court ruled on the limits of subsection (a)(6) in *Pepper v. United States*.²³²

The *Pepper* case began in 2003, when Chief Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa imposed a twenty-four-month sentence in a § 846 methamphetamine conspiracy distribution case.²³³ The sentence was a “75-percent downward departure from the low end of the Guidelines range.”²³⁴ In 2005, three days before the defendant completed his term of incarceration, the Eighth Circuit reversed and remanded for resentencing in light of the *Booker* decision.²³⁵ At the resentencing, Judge Bennett considered the defendant’s post-sentencing conduct and retained the twenty-four-month sentence through a combined “40-percent downward departure based on Pepper’s substantial assistance . . . and 59-percent downward variance based on . . . rehabilitation since his initial sentencing.”²³⁶ The Government appealed, and the Eighth Circuit held that Judge Bennett had abused his discretion in granting the downward variance based on post-sentencing rehabilitation.²³⁷ The Supreme Court granted certiorari and held that a district court could consider post-sentencing rehabilitation during a remand resentencing.²³⁸

231. 18 U.S.C. § 3553(a)(6).

232. See *Pepper v. United States*, 562 U.S. 476, 504 (2011) (“Finally, we note that §§ 3553(a)(5) and (a)(6) describe only two of the seven sentencing factors that courts must consider in imposing sentence. At root, *amicus* effectively invites us to elevate two § 3553(a) factors above all others. We reject that invitation.”).

233. See 21 U.S.C. § 846 (“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).

234. *Pepper*, 562 U.S. at 481–82.

235. *Id.* at 482.

236. *Id.* at 483.

237. *United States v. Pepper [(Pepper II)]*, 486 F.3d 408, 413 (8th Cir. 2007), *cert. granted, judgment vacated*, 552 U.S. 1089 (2008).

238. See *Pepper*, 562 U.S. at 490 (“In light of the federal sentencing framework described above, we think it clear that when a defendant’s sentence has been set aside on appeal and his case

Pepper suggests that broad resentencing frameworks permit judges to consider post-sentencing conduct.²³⁹ The *Pepper* Court held that post-sentencing rehabilitation may be considered even when it would benefit a resentenced defendant over a properly sentenced defendant.²⁴⁰ Extending *Pepper* to First Step Act cases requires a logical leap: that statutory-change resentencing should be treated like remand resentencing. While *Pepper* might not support that leap on its own, the case suggests that inter-defendant sentencing disparity, a § 3553 factor, is not sufficient grounds to prohibit judicial fact-finding at resentencing.²⁴¹

The third justification recognizes that plenary resentencing is necessary given the complexity of First Step Act cases. As described throughout this Article, First Step Act cases involve complex charges, offense conduct and offender characteristics.²⁴² Years—and sometimes decades²⁴³—separate the original sentences from resentencings under the First Step Act. Unlike Mr. Boulding, many defendants face new judges at their resentencings.²⁴⁴ While collegiality may guide these successors toward adoption of the factual record, the greater interests of

remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.”).

239. As opposed to narrow resentencing frameworks such as 18 U.S.C. § 3582(c)(2).

240. See *Pepper*, 562 U.S. at 502 (“To be sure, allowing district courts to consider evidence of postsentencing rehabilitation may result in disparate treatment between those defendants who are sentenced properly and those who must be resentenced. But that disparity arises not because of arbitrary or random sentencing practices, but because of the ordinary operation of appellate sentencing review.”); see also *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) (“The First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief that has already been available to later-sentenced defendants for nearly a decade.”).

241. See *Pepper*, 562 U.S. at 504 (“Finally, we note that §§ 3553(a)(5) and (a)(6) describe only two of the seven sentencing factors that courts must consider in imposing sentence. At root, *amicus* effectively invites us to elevate two § 3553(a) factors above all others. We reject that invitation.”).

242. See, e.g., *United States v. Medina*, No. 05-cr-58, 2019 WL 3769598, at *1 n. 1 (D. Conn. July 17, 2019) (“At the plea hearing, Assistant United States Attorney Hal Chen described Count One as ‘conspiracy to possess with intent to distribute 5 kilograms or more of cocaine,’ the penalties for which were a mandatory minimum of ten years’ incarceration up to life. Similarly, in setting out the elements of the crimes charged, Attorney Chen stated that the government would need to first prove ‘that a conspiracy, an unlawful agreement existed to possess with intent to distribute 5 kilograms or more of cocaine.’”) (citations omitted).

243. See, e.g., *United States v. Kramer*, No. 87-cr-40070, 2019 WL 3322374, at *1 (S.D. Ill. July 24, 2019) (vacating a forty-year conspiracy sentence); *United States v. Eidson*, No. 17-cr-00490, 2019 WL 3767570, at *1 (N.D. Cal. Aug. 9, 2019) (denying defendant’s motion for reduction in sentence regarding his 1988 conviction; compassionate release, not section 404(b) motion).

244. See *United States v. Rose*, 379 F. Supp. 3d 223, 226 (S.D.N.Y. 2019) (“The Honorable Shira Scheindlin, who was originally assigned to this case, sentenced both Mr. Robinson and Mr. Rose to the twenty-five year mandatory minimum sentence.”).

parsimonious sentencing,²⁴⁵ renewed public trust, and criminal justice reform recommend a deviation from the collegial tradition. For these reasons, First Step Act “court[s] must consider the totality of the circumstances or [they run] the risk of imposing a sentence that is greater than necessary to serve the purposes of sentencing.”²⁴⁶ Further, plenary resentencing is arguably the best path to just results.

Sixth, plenary resentencing under § 3553(a) is arguably “more predictable to the parties, more straightforward for district courts, and more consistently reviewable on appeal”²⁴⁷ than mere reduction. In fact, a sentence reduction that rests on overturned precedent could require appellate courts “to develop new and untried standards to limit judicial discretion.”²⁴⁸ There is no evidence that Congress intended the appellate courts to develop new procedures for First Step Act cases. Rather, Congress likely desired a logical, defensible, plenary resentencing process.

Seventh, in the absence of a clear limit on judicial authority, the First Step Act should be construed broadly and remedially.²⁴⁹ Congress wanted to ease the harsh cocaine base penalties of the 1980s. Additionally, Congress did not textually limit the power of resentencing judges as it could have done. Absent textual limits or legislative history evidence, appellate judges should not adopt limits that undermine the remedial impact of the First Step Act.

Thus, stronger evidence suggests that the First Step Act does not entitle eligible defendants to plenary resentencings because the Act does not require judges to conduct these specific proceedings. However, it does permit judges to engage in plenary-approximate resentencings. The sole circuit to have settled this issue disagrees, in part.

1. Unsettled Law in the Circuits

As of late May 2020, the circuits that have addressed the plenary resentencing issue agree that the First Step Act does not impose the requirements of an original sentencing on judges (e.g., an in-person

245. See 18 U.S.C. § 3553(a) (obliging the court to craft a sentence that is “sufficient, but not greater than necessary” to achieve the contemporary purposes of punishment); 18 U.S.C. § 3553(a)(3) (obliging the court to consider “the kinds of sentences available,” including “time served” when one more day of punishment is greater than necessary).

246. *Medina*, 2019 WL 3769598, at *6.

247. *Rose*, 379 F. Supp. 3d at 235; *cf.* *United States v. Brookins*, 08-cr-166, 2019 WL 3450991, at *6 (W.D. Pa. July 31, 2019) (finding no authority to conduct a plenary resentencing but finding authority for a full § 3553 analysis at resentencing).

248. *Rose*, 379 F. Supp. 3d at 235.

249. See *Medina*, 2019 WL 3769598, at *6 (“*Medina* should get the full benefit of the First Step Act’s remedial purpose. Accordingly, I hold that he is entitled to a plenary resentencing.”).

hearing).²⁵⁰ However, they disagree on whether courts may engage in plenary-approximate resentencing, procedurally or substantively. The Fifth Circuit has ruled that section 404 does not permit plenary resentencing.²⁵¹ The other circuits are still debating the issue.

The Fifth Circuit issued one of the earliest substantive opinions on the First Step Act in *United States v. Hegwood*. In 2008 Mr. Hegwood “admitted [that] he sold approximately 8 grams of cocaine base to a cooperating witness.”²⁵² In 2010, he was sentenced to 200 months of imprisonment on his conduct and a career offender enhancement.²⁵³ In January 2019, he argued that the First Step Act reduced his overall guidelines range and eliminated his career offender enhancement; with both changes, his new range would be 77–96 months.²⁵⁴ “After a hearing, the district court left the career-offender enhancement in place, holding it was ‘going to resentence [Hegwood] on the congressional change and that alone.’ The court then sentenced Hegwood to 153 months . . . [or] 96 percent of the original top-of-Guidelines range.”²⁵⁵

The court of appeals reviewed the case *de novo*.²⁵⁶ The court rejected Mr. Hegwood’s argument that “because Congress used the word ‘impose,’ the district court is required to calculate his Guidelines offense level anew, which would include recalculating his career-offender enhancement.”²⁵⁷ The court explained that section 404(a) limits courts to considering covered offenses, and section 404(b) “then sets the ground rules: the reduced sentence may be imposed ‘as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.’”²⁵⁸ Focusing on “as if” and “2010,” the court found that “Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense.”²⁵⁹ The court analogized the First Step Act to “Section 3582(c), which opens the door

250. See *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019) (rejecting defendant’s request for *de novo* resentencing hearing); see also *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (holding that Congress did not authorize plenary resentencing under the First Step Act); cf. *United States v. Cooper*, 803 F. App’x 33, 35 (7th Cir. 2020) (finding no plain error in absence of a plenary, in-person hearing where defendant only requested such a hearing on appeal).

251. See *United States v. Jackson*, 945 F.3d 315, 321 (5th Cir. 2019), *cert. denied*, No. 19-8036, 2020 WL 1906710 (U.S. Apr. 20, 2020) (explaining that Hegwood held that district courts could not consider post-sentencing changes in the law).

252. *Hegwood*, 934 F.3d at 415.

253. *Id.*

254. *Id.* at 416.

255. *Id.*

256. *Id.* at 417 (“The underlying facts are not in dispute, leaving us to decide only the meaning of a federal statute. For that interpretive task, we have *de novo* review.”).

257. *Id.*

258. *Hegwood*, 934 F.3d at 418.

259. *Id.*

only slightly for modification of previously imposed sentences for certain specified reasons.”²⁶⁰ The court then prescribed the “mechanics”²⁶¹ of section 404 resentencings:

The district court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act. The district court’s action is better understood as imposing, not modifying, a sentence, because the sentencing is being conducted as if all the conditions for the original sentencing were again in place with the one exception. The new sentence conceptually substitutes for the original sentence, as opposed to modifying that sentence.²⁶²

Accordingly, the *Hegwood* court “committed no error in continuing to apply the career-criminal enhancement.”²⁶³ A few months later, the circuit court sharpened the *Hegwood* holding: “court(s) couldn’t consider other post-sentencing changes in the law.”²⁶⁴

Hegwood has not been adopted by other circuits. The Third and Seventh Circuits acknowledged *Hegwood* without settling the plenary sentencing issue.²⁶⁵ The Fourth Circuit rejected *Hegwood*’s imposition of “the strictures of § 3582(c)(2)”²⁶⁶ without reaching the broader issue²⁶⁷ in a split decision; the dissent cited *Hegwood* favorably.²⁶⁸ The Sixth Circuit cited *Hegwood* favorably and adopted a complementary

260. *Id.* (citing *Dillon v. United States*, 560 U.S. 817, 826 (2010)).

261. *Id.*

262. *Id.* at 418–19.

263. *Id.* at 419.

264. *United States v. Jackson*, 945 F.3d 315, 321–22 (5th Cir. 2019), *cert. denied*, No. 19-8036, 2020 WL 1906710 (U.S. Apr. 20, 2020).

265. *E.g.*, *United States v. Coleman*, 795 F. App’x 90, 91 (3d Cir. 2020) (“Section 404 gives retroactive effect to provisions of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010), that increased the drug quantities necessary to trigger mandatory minimum and maximum penalties for crack-cocaine offenses.” (citing *Hegwood*, 934 F.3d at 417)); *United States v. Cooper*, 803 F. App’x 33, 35 (7th Cir. 2020) (mem.) (acknowledging that other courts have ruled on the plenary resentencing issue).

266. *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020) (citing *United States v. Wirsing*, 943 F.3d 175, 177 (4th Cir. 2019); citing *United States v. Boulding*, 379 F. Supp. 3d 646, 654 (W.D. Mich. 2019)).

267. *Id.* at 673 n.3 (“Chambers does not request a plenary resentencing, and certainly does not need one to correct the Simmons error”).

268. *See Id.* at 680 (Rushing, J., dissenting) (“The district court [must] decide[] on a new sentence by placing itself in the timeframe of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act.”); *see also United States v. Carter*, 792 F. App’x 660, 663–64 (11th Cir. 2019) (adopting the view that the First Step Act provides limited authority under § 3582(c)(1)(B) and not defining the limits of that authority or prescribing procedure as sharply as *Hegwood*). *See also United States v. Venable*, 943 F.3d 187, 194–95 n.11 (4th Cir. 2019) (adopting a § 3582(c)(1)(B) view and acknowledging, but not adopting, *Hegwood*).

approach under § 3582(c)(1)(B) in one case,²⁶⁹ but left the door open for plenary-approximate resentencing in others.²⁷⁰ With arguably the most appellate case law on this issue, the Sixth Circuit illustrates how unsettled this area of law remains.

2. Sixth Circuit as Case Study

The Sixth Circuit's October 2019 decision in *United States v. Alexander*, a per curiam order later designated for publication, settled some of the plenary sentencing issues.²⁷¹ The *Alexander* court rejected the defendant's argument that "the First Step Act requires the district court to conduct a *de novo* resentencing hearing"²⁷² and affirmed the trial court's sentence reduction of 262 months of imprisonment—the amount the defendant had requested.²⁷³ While *Alexander* announced that plenary resentencing was not required under the First Step Act, it did not address what resentencing judges were permitted or required to do. Nor did the *Alexander* court mention the Supreme Court's *Pepper* decision or § 3553; those analyses came later.

In mid-April 2020, the Sixth Circuit adopted a broad reading of procedural authority under the First Step Act in *United States v. Allen*.²⁷⁴ According to the *Allen* court, Congress understood that original defense counsel strategy had been influenced by the mandatory minimums of the 1980s, that significant time had passed between original sentencings and resentencings under the First Step Act, and that new judges presided in many cases.²⁷⁵ For these reasons, "Congress contemplated that district courts may look to § 3553(a)'s familiar framework when deciding

269. *United States v. Smith*, 958 F.3d 494, 498 (6th Cir. 2020) ("We have held that a sentence reduction under the First Step Act is a § 3582(c) modification. We have also explained that "[t]he First Step Act's limited, discretionary authorization to impose a reduced sentence is inconsistent with a plenary resentencing.") (internal citations omitted). *Id.* (quoting *Hegwood*, 934 F.3d at 418).

270. *E.g.*, *United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020) (discussing other information courts may consider in the decision to reduce a defendant's sentence); *United States v. Smith*, 959 F.3d 701, 704 (6th Cir. 2020) (discussing that it is within the district court's discretion to determine an appropriate sentence in accordance with the 3553(a) factors, the First Step Act and the Fair Sentencing Act).

271. *See United States v. Foreman*, 958 F.3d 506, 510 (6th Cir. 2020) (noting that eligible defendants under section 404 are "not entitled to a plenary resentencing" (citing *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019))).

272. *Alexander*, 951 F.3d at 708 (citing *Hegwood*, 934 F.3d at 418); *see also United States v. Boulding*, 379 F. Supp. 3d 646, 653 (W.D. Mich. 2019) (noting that reducing a sentence is not the equivalent of a plenary resentencing).

273. *Alexander*, 951 F.3d at 709.

274. *See Allen*, 956 F.3d at 357–58 ("Section 404's silence regarding the standard the courts should use . . . cannot be read to limit the information courts may consider.").

275. *Id.* at 358 ("The judges considering First Step Act motions will frequently not be the original sentencing judges because of the length of sentences in crack-cocaine and cocaine-base cases.").

whether to reduce a defendant's sentence under the First Step Act."²⁷⁶ The *Allen* court explained that the § 3553(a) framework was not synonymous with the remand resentencing procedure at issue in *Pepper* because "the First Step Act § 404 in contrast only granted courts the power to modify sentences."²⁷⁷ Still, the court found that the distinction "does not logically prevent courts from considering post-sentencing conduct in assessing the § 3553(a) factors during a § 3582(c)(1)(B) sentence-modification proceeding."²⁷⁸ In early May, the court moderated its stance in *United States v. (Lakento) Smith*.²⁷⁹ The *Smith* court cited *Allen* for the proposition that the "First Step Act does not authorize plenary resentencing procedure of the type contemplated in *Pepper*."²⁸⁰ While *Smith* constrained the circuit's courts to less-than-*Pepper* resentencing, two remand opinions suggest that resentencing courts must sufficiently address the § 3553(a) factors.

In numerous decisions, the Sixth Circuit Court of Appeals confirmed that its courts could consider § 3553(a) factors.²⁸¹ But in *United States v. Maxwell* and *United States v. (Marty) Smith*, the court required § 3553(a) findings²⁸² in First Step Act cases.

In *Maxwell*, an unpublished January 2020 opinion, the court suggested that the First Step Act triggers a § 3553(a) duty.²⁸³ Mr. Maxwell, who was serving a thirty-year sentence for cocaine base and heroin convictions, mailed a one-page letter to the district court requesting appointment of counsel for a First Step Act motion.²⁸⁴ The district court treated the letter as a motion on the merits and "determined that Maxwell was not eligible for a sentence reduction."²⁸⁵ Citing the First Step Act's emphasis on motions, the appellate court held that the defendant did "not file a motion seeking relief under section 404 because his letter made no

276. *Id.*

277. *Id.* (noting the difference between plenary resentencing and sentence modification).

278. *Id.*

279. *United States v. Smith*, 958 F.3d 494, 498–99 (6th Cir. 2020).

280. *Id.* (citing *Allen*, 956 F.3d at 357–58).

281. *Allen*, 956 F.3d at 357 ("The First Step Act does not prohibit courts from considering the factors outlined in § 3553(a), which include the applicable sentencing guidelines range and other relevant information about the defendant's history and conduct.").

282. *United States v. Smith*, 959 F.3d 701, 704 (6th Cir. 2020) ("We are confident on remand that the district court can determine whether, in its discretion, a sentence less than 20 years is appropriate after considering the § 3553(a) factors with reference to the purposes of the First Step Act and Fair Sentencing Act."); *United States v. Maxwell*, 800 F. App'x 373, 378 (6th Cir. 2020) ("In the event that Maxwell knocks at the door, we trust that the district court will heed its duty to consider both the factors in § 3553, along with Congress's significant decision to allow prisoners to retroactively benefit from the Fair Sentencing Act.").

283. *Maxwell*, 800 F. App'x at 377.

284. *Id.* at 374.

285. *Id.* at 375.

arguments and sought no relief beyond the appointment of an attorney.”²⁸⁶ The court then remanded the case “so that the district court [could] reconsider its decision about appointed counsel.”²⁸⁷ The court explained that a proper First Step Act motion would open the door to resentencing²⁸⁸ and trigger the district court’s “duty to consider both the factors in § 3553, along with Congress’s significant decision to allow prisoners to retroactively benefit from the Fair Sentencing Act.”²⁸⁹

In (*Marty*) *Smith*, a published May 2020 opinion, the appellate court determined that “district court[s] must consider the factors in § 3553(a)” during First Step Act resentencings.²⁹⁰ Mr. Smith pled guilty to conspiracy to distribute more than fifty grams of crack cocaine in 2006 and was serving a twenty-year sentence.²⁹¹ Like Mr. Maxwell, Mr. Smith sent a letter to the court requesting appointment of counsel for a First Step Act motion.²⁹² The district court construed that letter as a motion on the merits, found Mr. Smith eligible for First Step Act resentencing, and declined to reduce his sentence.²⁹³ The appellate court analyzed the district court’s “explanation for denying Smith’s motion for a reduction” and determined that it “[did] not adequately explain why Smith should not receive at least some sentence reduction.”²⁹⁴ The appellate court found that “the district court failed to provide a sufficiently compelling justification for maintaining a sentence that is now twice the guideline range set by Congress.”²⁹⁵ The court then remanded the case so that the district court could “determine whether, in its discretion, a sentence less than 20 years is appropriate after considering the § 3553(a) factors with reference to the purposes of the First Step Act and Fair Sentencing Act.”²⁹⁶

These Sixth Circuit opinions demonstrate some of the challenges district courts face in determining procedural and substantive requirements under the First Step Act. While the Sixth Circuit Court of Appeals has clearly ruled that de novo resentencings are not required

286. *Id.* at 376.

287. *Id.* at 377.

288. *Id.* at 378 (noting this applies as long as the defendant has met the Act’s eligibility requirements).

289. *Id.*

290. *United States v. Smith*, 959 F.3d 701, 703 (6th Cir. 2020).

291. *Id.* at 702.

292. *Id.*

293. *Id.*

294. *Id.* at 703.

295. *Id.* at 704.

296. *Id.*

under the First Step Act,²⁹⁷ the outer bounds of judicial authority and duty remain gray areas.

Arguably, even if the First Step Act does not authorize *Pepper* plenary resentencings,²⁹⁸ it seems unlikely that the Sixth Circuit would remand for reconsideration on a sparser procedure, leaner law, or lesser record than adopted by a resentencing court. But the appellate court might remand where a district court has considered two or more of the § 3553(a) factors²⁹⁹ but has not sufficiently justified its new sentence.³⁰⁰ As a result, the plenary resentencing issue is insufficiently settled in the Sixth Circuit, as in nearly all others.

C. Hybrid Convictions

The third question courts have had to grapple with is whether judges may adjust only the crack cocaine sentences of First Step Act eligible defendants, or those sentences plus concurrent non-crack sentences.

First Step Act cases can involve convictions for weapons,³⁰¹ racketeering,³⁰² other drugs, and other crimes.³⁰³ District courts have drawn varied conclusions about their authority to resentence section 404 defendants with concurrent non-crack convictions, or hybrid convictions.

Some judges have declined to resentence hybrid defendants on the grounds that (1) non-crack convictions are not covered offenses under

297. See *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019) (“This rule provides further support for the conclusion that a sentence reduction authorized by the First Step Act and § 3582(c)(1)(B) does not require a de novo resentencing hearing.” (citing *Dillon v. United States*, 560 U.S. 817, 827–28 (2010))).

298. *United States v. Smith*, 958 F.3d 494, 498–99 (6th Cir. 2020) (citing *United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020)).

299. See *Smith*, 959 F.3d at 703 (“[T]he court briefly discussed the nature and circumstances of Smith’s offense and the need to protect the public—two of the § 3553(a) factors.”).

300. See *id.* at 704 (“[T]hese considerations are accounted for within the guidelines calculation and therefore do not provide sufficient justification for maintaining a sentence that is twice the maximum of the guideline range set by Congress.”).

301. See, e.g., *United States v. McKinney*, 382 F. Supp. 3d 1163, 1164 (D. Kan. 2019) (“In June 2007, defendant Jason McKinney pled guilty to one count of possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(b)(1)(A)(iii) and one count of use of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). . . . Mr. McKinney now seeks relief under section 404 of the First Step Act of 2018”).

302. See, e.g., *United States v. Maupin*, No. 04-cr-00047, 2019 WL 3752975, at *1 (W.D. Va. June 3, 2019) (“Defendant was adjudicated guilty based on his participation ‘in a racketeering influenced corrupt organization’ in violation of RICO.”); see also *United States v. Powell*, No. 99-cr-264-18, 2019 WL 4889112, at *1–2 (D. Conn. Oct. 3, 2019) (“The jury found Mr. Powell guilty of . . . conspiracy to murder the Trumbull Gardens Terrace . . . crew members and associates On January 4, 2019, Mr. Powell moved for his immediate release or resentencing under Section 404 of the First Step Act.”).

303. See *United States v. Jones*, No. 99-cr-264-6, 2019 WL 4933578, at *12 (D. Conn. Oct. 7, 2019) (addressing the court’s authority to resentence concurrent heroin distribution convictions).

section 404(a);³⁰⁴ or (2) plenary resentencing of the non-crack convictions is not authorized by the First Step Act.³⁰⁵ The section 404(a) argument seems likely to fail given the emerging doctrine of broad, categorical eligibility discussed in Section IV.A. The plenary resentencing argument is not yet supported by circuit court case law, but it seems likely to find favor with the Fifth Circuit for the reasons discussed in Section IV.B.³⁰⁶

Other judges have resentenced hybrid defendants³⁰⁷ on three grounds: (1) a single covered offense satisfies section 404(a)'s low eligibility threshold,³⁰⁸ (2) the crack conviction was the predicate conduct for the non-crack conviction(s), or (3) the original sentencing package is now inseparable into crack and non-crack constituents. The section 404(a) eligibility threshold analysis largely mirrors the discussion in IV.A., whereas the predicate conduct and sentencing package arguments are

304. See, e.g., *Maupin*, 2019 WL 3752975, at *1 (“However, for an offense to be a ‘covered offense’ its statutory penalties must have been ‘modified by section 2 or 3 of the Fair Sentencing Act.’ The statutory penalties associated with RICO simply do not fit that description.”) (internal citations omitted).

305. See, e.g., *McKinney*, 382 F. Supp. 3d at 1168 (“For all of these reasons, the court believes that the Circuit, if faced with the issue, would conclude that Mr. McKinney is not entitled to a full resentencing under the First Step Act and, because retroactive application of the Fair Sentencing Act does not impact Mr. McKinney’s Guidelines calculation, would conclude that his motion for a reduction should be denied.”).

306. Note that the Fifth Circuit’s key plenary resentencing arguments do not address the hybrid conviction issue. *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019); *United States v. Jackson*, 945 F.3d 315, 321–22 (5th Cir. 2019).

307. See, e.g., *United States v. Jones*, No. 96-cr-00399, 2020 WL 886694, at *2 (D. Md. Feb. 24, 2020) (finding that the rule of lenity offers a viable path to eligibility in a case involving crack and heroin); see also *United States v. Medina*, No. 05-cr-58, 2019 WL 3769598, at *3 (D. Conn. July 17, 2019) (“Ignoring the crack cocaine portion of Medina’s conviction in favor of the powder cocaine portion would not serve the purpose of the Act. ‘Both the Fair Sentencing Act and the First Step Act have the remedial purpose of mitigating the unfairness created by the crack-to-powder cocaine ratio, and the statutes should be construed in favor of broader coverage.’” (quoting *United States v. Rose*, 379 F. Supp. 223, 230 (S.D.N.Y. 2019))); see also *Powell*, 2019 WL 4889112, at *3 (“This language does not, on its face, restrict eligibility to defendants who were only convicted of a singular violation of a federal criminal statute whose penalties were modified by section 2 or section 3 of the Fair Sentencing Act. So long as a defendant was convicted of ‘a violation’—i.e., at least one violation—for which the penalties were modified by section 2 or 3 of the Fair Sentencing Act, he or she is eligible for relief under the First Step Act.”).

308. E.g., *Jones*, 2020 WL 886694, at *3 (“Under the plain language of *Wirsing*—and that opinion’s directive that there should not be a ‘complicated and eligibility-limiting determination at the ‘covered offense’ stage of the analysis’—*Jones*’s conviction for conspiracy to distribute crack cocaine and heroin is a ‘covered offense’ under the First Step Act.” (citing *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019))); *Powell*, 2019 WL 4889112, at *4 (“Eligibility for relief under the First Step Act thus turns not on whether a conviction, even if it incorporates several violations of criminal statutes, may be construed as a whole as a “covered offense,” but whether there is a conviction of a violation of a criminal statute for which the statutory penalties were modified by section 2 or 3 of the Fair Sentencing Act.”).

distinct from the plenary resentencing discussion and unique to hybrid cases.³⁰⁹

Drug distribution can serve as the predicate conduct for non-drug convictions.³¹⁰ For instance, a series of organized drug deals can support a conviction under § 1962(c), the Racketeer Influenced and Corrupt Organization (RICO) Act.³¹¹ The RICO Act requires “a pattern of racketeering activity,” of “two acts . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”³¹² These racketeering activities or acts are tethered to the parent RICO count in two ways.³¹³ First, a prosecutor must prove at least two racketeering acts before a jury can find a defendant guilty of a parent RICO count.³¹⁴ Second, the racketeering

309. That is, if an appellate court decides that section 404 eligibility is categorical but full plenary resentencing is not authorized, its courts could still have authority to resentence hybrid convictions where: (1) drug activities served as the predicate for a non-drug conviction, and the resulting sentence was invalidated by the Fair Sentencing Act; or (2) the original sentencing judge imposed a single sentence on combined drug and non-drug counts.

310. *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1961, 84 Stat. 947 (establishing that non-drug convictions include Racketeer Influenced and Corrupt Organization (“RICO”) conspiracy to distribute cocaine base); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., R45075, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES 17 (2018) (“Section 924(c) is triggered when a firearm is used or possessed in furtherance of a predicate offense. The predicate offenses are crimes of violence and certain drug trafficking crimes.”); *United States v. Davis*, 139 S. Ct. 2319, 2331, 2336 (2019) (“Instead, it accepted the categorical approach as given and simply declared that certain drug trafficking crimes automatically trigger § 924 penalties, regardless of the risk of violence that attends them We agree with the court of appeals’ conclusion that § 924(c)(3)(B) is unconstitutionally vague.”).

311. 18 U.S.C. § 1962(c). Such drug deals could also support a concurrent or simultaneous conviction for conspiracy to distribute under 21 U.S.C. § 841(a)(1); *see, e.g.*, *United States v. White*, 413 F. Supp. 3d 15, 46–47 (D.D.C. 2019) (finding that defendants were likely to be eligible for relief for RICO charges predicated on crack distribution activity but declining to reduce their sentences on other grounds); Verdict Form at 1–2, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed June 3, 2005) (containing both RICO and non-RICO drug distribution charges). *See also* *United States v. Grayson*, 795 F.2d 278, 280 (3d Cir. 1986) (holding that a racketeering act is not the same offense as the same non-RICO conduct for double jeopardy purposes, in part because the RICO Act was intended to deter continuous, concerted criminal conduct whereas other criminal acts were intended to deter discrete criminal acts such as narcotics violations).

312. 18 U.S.C. § 1961(5); Jury Instructions at 44, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed June 3, 2005) (“[Section c of] RICO makes it a crime to participate in the conduct of an enterprise’s affairs through a pattern of certain violations known as ‘racketeering acts.’ In this case, the charged racketeering acts include drug conspiracy, conspiracy to murder, attempted murder, murder, and witness tampering.”).

313. Government’s Opposition to Defendant’s Motion for Resentencing under the First Step Act at 20, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed August 9, 2019) (“[T]he statutory maximum penalty on the RICO counts is tethered to racketeering acts 1-A and 1-B”).

314. *See, e.g.*, Verdict Form at 1–2, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed June 3, 2005) (finding racketeering acts 1a and 1b—but not 1c—proven, and finding Mr. Powell guilty of Count One (RICO)).

acts can raise the mandatory statutory RICO penalties from twenty years to life.³¹⁵

Some First Step Act defendants are serving life sentences for RICO counts predicated on the old drug laws.³¹⁶ In 2010, the Fair Sentencing Act raised the minimum drug quantities for a life sentence.³¹⁷ In 2018, the First Step Act made those new threshold quantities retroactive.³¹⁸ As a result, the First Step Act arguably invalidated life imprisonment for RICO convictions tethered to drug quantities below the Fair Sentencing Act's minimum threshold for a life sentence.³¹⁹ This invalidation view is not universal.³²⁰ But better evidence suggests that Congress intended the Fair Sentencing Act to raise the threshold necessary for lengthy terms of incarceration³²¹ and the First Step Act to permit judges to adjust newly

315. See Government's Opposition to Defendant's Motion for Resentencing under the First Step Act at 20, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed August 9, 2019) ("[I]f the Court determines the three crack-cocaine conspiracy convictions (Counts Three, Four and Six) are 'covered offenses,' it follows that the RICO and RICO conspiracy convictions are 'covered offenses,' because the statutory maximum penalty on the RICO counts is tethered to racketeering acts 1-A and 1-B, the crack-cocaine conspiracy counts."); see also 18 U.S.C. § 1963(a) ("Whoever violates any provision of section 1962 . . . shall be . . . imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)").

316. See, e.g., Reply Memo in Further Support of First Step Act at 4, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed August 23, 2019) ("At Mr. Powell's original sentencing, the statutory maximum increased to life on the RICO counts . . . because of Racketeering Acts 1-A and 1-B, two drug conspiracies involving more than 50 grams of crack. At the time, those offenses carried a maximum of life imprisonment.").

317. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 ("COCAINE SENTENCING DISPARITY REDUCTION. (a) . . . Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended . . . (1) in subparagraph (A)(iii), by striking '50 grams' and inserting '280 grams' . . .").

318. See 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein) (explaining that The First Step Act of 2018 made "the Fair Sentencing Act retroactive"); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

319. See *United States v. Powell*, No. 99-cr-264-18, 2019 WL 4889112, at *8 (D. Conn. Oct. 3, 2019) ("The statutory maximum and minimums for the RICO and RICO conspiracies in Counts One and Two are based on the underlying predicate acts. For the drug conspiracy racketeering acts, the modifications under the Fair Sentencing Act would not result in a sentence above the statutory minimum of five years and a statutory maximum of forty years imprisonment Because none of his convictions now provide for a life sentence, Mr. Powell's sentence of life imprisonment must be reduced to no more than the highest sentence now possible: forty years.").

320. See, e.g., *United States v. Maupin*, No. 04-cr-00047, 2019 WL 3752975, at *1 (W.D. Va. June 3, 2019) ("Nonetheless Defendant argues that his conviction is a 'covered offense' because the statutory maximum for his RICO offense was set by a 'crack cocaine offense, with a statutory maximum of life.' However, for an offense to be a 'covered offense' its statutory penalties must have been 'modified by section 2 or 3 of the Fair Sentencing Act.' The statutory penalties associated with RICO simply do not fit that description. Furthermore, it is clear that 'Congress intended that a RICO violation be a discrete offense' separate and apart from any predicate offenses, and this Court will treat it accordingly.") (internal quotation marks and citations omitted).

321. See, e.g., 164 CONG. REC. S7747 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar)

invalidated sentences.³²² As a result, some judges are reducing sentences for non-drug convictions predicated upon drug activity implicated by the Fair Sentencing Act.³²³

Judges are also modifying sentencing packages,³²⁴ or singular sentences for combined drug and non-drug counts, as in *United States v. Powell*.³²⁵ Quinne Powell was sentenced to life in prison for the combined counts of (1) Racketeering in Corrupt Organizations under § 1962(c) (Count One), (2) RICO conspiracy under § 1962(d) (Count Two), and (3) conspiracy to possess with intent to distribute fifty grams or more of cocaine base under 21 U.S.C. § 846.³²⁶ The predicate racketeering acts for Mr. Powell’s § 1962(c) conviction included two drug conspiracies, conspiracy to murder, and obstruction and witness tampering.³²⁷ “Racketeering Act 3, a conspiracy to commit murder conviction [under the] Connecticut General Statutes . . . carri[e]d a maximum penalty of 20 years’ incarceration.”³²⁸

(“The sentencing laws on low-level drug offenders were implemented decades ago This has resulted in prison sentences that actually don’t fit the crime.”); *id.* at S7749 (statement of Sen. Leahy) (“For far too long, the legislative response to any and all public safety concerns was as simple as it was flawed: No matter the perceived ill, we turned to arbitrary and inflexible mandatory minimums to cure it It routinely results in low-level offenders spending far longer in prison than either public safety or common sense requires.”); *cf. Maupin*, 2019 WL 3752975 at *1 (citing *United States v. Crosby*, 20 F.3d 480, 484 (D.C. Cir. 1994)) (holding that Congress intended that RICO offenses could be prosecuted separately from their predicate acts without double jeopardy implications, but not discussing the impact on RICO sentences when their tethered predicates were reformed by retroactive sentencing laws).

322. *See* 164 CONG. REC. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) (supporting the First Step Act on the grounds that some mandatory minimum sentences are unjust); *id.* at S7756 (statement of Sen. Nelson); *id.* at S7762 (statement of Sen. Booker).

323. *See, e.g., Powell*, 2019 WL 4889112, at *8 (“Because none of his convictions now provide for a life sentence, Mr. Powell’s sentence of life imprisonment must be reduced to no more than the highest sentence now possible: forty years.”).

324. *See United States v. Triestman*, 178 F.3d 624, 631 (2d Cir. 1999) (Sotomayor, J.) (explaining the concept and function of a sentencing package).

325. *See, e.g., Powell*, 2019 WL 4889112, at *7 (“Judge Nevas imposed, in the singular, ‘a sentence of life in prison’ (citation omitted) [for the drug distribution and RICO counts.]”); *Wright v. United States*, 425 F. Supp. 3d 588, 598 (E.D. Va. 2019) (“Since Petitioner Wright is eligible for a new sentence for his drug counts, the Court may impose a new sentence on the gun counts as well or else risk ‘unbundl[ing] the entire sentence package.’” (quoting *United States v. Hadden*, 475 F.3d 652, 669 (4th Cir. 2007))).

326. *See Powell*, 2019 WL 4889112, at *7 (discussing Powell’s offenses); Sentencing Transcript at 31, *Powell*, No. 99-cr-264 (D. Conn. filed Feb. 14, 2006) (“The defendant is sentenced to the custody of the Bureau of Prisons for the rest of his life on Counts One, Two, Three, Four, and Six”); Judgment at 1, *Powell*, No. 99-cr-264 (D. Conn. filed Jan. 5, 2006) (“The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for life on Counts 1, 2, 3, 4 and 6”); *see also* 18 U.S.C. § 1962(c)–(d) (enumerating the prohibited activities under the act).

327. These predicate racketeering acts were proved to the jury. Verdict Form at 1–3, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed June 3, 2005).

328. *Powell*, 2019 WL 4889112, at *8.

At resentencing, the *Powell* court found that the conspiracy to murder act was combined with acts carrying life maximums, and “[t]he RICO, RICO Conspiracy, obstruction of justice and witness tampering . . . convictions . . . were all addressed together, with the crack cocaine violation, as part of a single sentencing package, as inextricably related offenses.”³²⁹ Citing Second Circuit precedent in *United States v. Triestman*, the resentencing judge found that he had authority under the First Step Act to resentence Mr. Powell’s package of interdependent, inseparable counts.³³⁰ Thus, when an original judge imposed a sentence on a cluster of factually related but statutorily distinct offenses,³³¹ some of which were affected by the Fair Sentencing Act, sentencing package doctrine may support the reduction of the singular sentence without a plenary resentencing.

Thus, stronger evidence suggests that the First Step Act permits judges to reduce sentences on hybrid convictions for three independent reasons: (1) section 404’s low eligibility threshold and ameliorative purpose, (2) because the convictions rested on predicate acts invalidated by the Fair Sentencing Act, and (3) because the non-crack convictions were sentenced with the crack convictions as a single and inseparable sentencing package.

As of late May 2020, only the Fourth Circuit has held that judges have authority to resentence hybrid convictions under the First Step Act.³³² In *United States v. Gravatt*, the circuit adopted a low eligibility threshold approach to hybrid cases.

329. *Id.* at *7; Sentencing Transcript at 31, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed Feb. 14, 2006) (“The defendant is sentenced to the custody of the Bureau of Prisons for the rest of his life on Counts One, Two, Three, Four, and Six”); Judgment at 1, *Powell*, No. 99-cr-264 (D. Conn. filed Jan. 5, 2006) (“The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for life on Counts 1, 2, 3, 4 and 6.”).

330. *See Powell*, 2019 WL 4889112, at *7 (“The Court thus has the authority to reduce Mr. Powell’s entire sentence under the First Step Act.” (citing *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999))); *see also Dean v. United States*, 137 S. Ct. 1170, 1175–76 (2017) (“As a general matter, the foregoing provisions permit a court imposing a sentence on one count of conviction to consider sentences imposed on other counts.”).

331. *See, e.g., United States v. Jones*, No. 99-cr-264-6, 2019 WL 4933578, at *12 (D. Conn. Oct. 7, 2019) (“The Court therefore finds that the crack cocaine violation was addressed with heroin as part of a single sentencing package, and that these two offenses are inextricably related. The Court thus has the authority to reduce Mr. Jones’s entire drug conspiracy sentence under the First Step Act.”); *id.* at *13 (“The Court further notes that when Judge Dorsey declined to re-sentence Mr. Jones, he titled his decision ‘Order re: Reduction of Sentence re: Crack Cocaine Offense.’ Again, Judge Dorsey did not speak of multiple sentences, but a single sentence.”) (citation omitted).

332. *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020). *United States v. McKenzie*, 805 F. App’x 223, 223 (4th Cir. 2020) (per curiam); *see United States v. Winter*, 803 F. App’x 715, 715 (4th Cir. 2020) (per curiam) (illustrating hybrid cases remanded on *Gravatt* grounds). *See also United States v. Hardwick*, 802 F. App’x 707, 710–11 (3d Cir. 2020) (decided one month before *Gravatt*, finding no binding circuit precedent on the issue and a split among district courts, and declining to decide the issue in the first instance).

Mr. Gravatt pled guilty to conspiracy to distribute fifty grams or more of cocaine base and five kilograms or more of powder cocaine.³³³ In 2003, “[t]he district court sentenced [him] to 292 months in prison and 5 years of supervised release.”³³⁴ In 2019, the district court denied Mr. Gravatt’s motion for relief under the First Step Act on the grounds that his sentence was “independently supported” by the statutory penalty range for powder cocaine, which had not been altered by the Fair Sentencing Act.³³⁵ The circuit court rejected this interpretation on two grounds. First, the court found “nothing in the text of the [First Step] Act requiring that a defendant be convicted of a single violation of a federal criminal statute whose penalties were modified by section 2 or section 3 of the Fair Sentencing Act.”³³⁶ Second, the court of appeals found that the district court’s narrow reading of section 404 eligibility “would, in effect, impose an additional limitation to the Act’s applicability” beyond what Congress had prescribed or intended.³³⁷

The remaining circuits have not resolved this issue, though nonbinding precedents suggest that the Sixth Circuit might adopt the Fourth Circuit’s low eligibility threshold approach³³⁸ while the Eleventh Circuit might reject it.³³⁹ As of May 2020, no circuit court has substantively addressed the predicate act or sentencing package arguments.³⁴⁰

333. *Gravatt*, 953 F.3d at 261; *United States v. Gravatt*, No. 01-736-01, 2019 WL 2366587, at *1 (D.S.C. June 5, 2019).

334. *Gravatt*, 953 F.3d at 261 (“In light of his total offense level of 39, criminal history category of II and the relevant statutory provisions, the district court calculated Gravatt’s advisory guideline range to be 292 to 365 months of imprisonment.”).

335. *Id.* (“Thus, the district court denied the motion because the crack cocaine aspect of the dual-object conspiracy ultimately had no effect on his statutory penalty range. Gravatt faced the same statutory penalty range for having conspired to possess with intent to distribute and to distribute 5 or more kilograms of powder cocaine, the penalties for which were not modified by the Fair Sentencing Act and which independently supported his sentence.”); *see Gravatt*, 2019 WL 2366587, at *2 (“Because he also admitted guilt to conspiracy to distribute 5 kilograms or more of cocaine, his statutory penalty range was 10 years to Life, independent of the penalty on the cocaine base offense. . . . Persons convicted of cocaine base offenses, but whose statutory ranges were not affected, are not eligible for relief. That is what happened here.”).

336. *Gravatt*, 953 F.3d at 264.

337. *Id.*

338. *United States v. Woods*, 949 F.3d 934, 937 (6th Cir. 2020) (finding that a hybrid defendant “has cleared the initial hurdles to eligibility under the First Step Act” without a corresponding discussion of the issue).

339. *United States v. Pubien*, 805 F. App’x 727, 730 (11th Cir. 2020) (per curiam) (holding that the First Step Act does not grant judges the authority to resentence powder cocaine convictions and finding the defendant’s sentencing package arguments factually unsupported).

340. *Id.* at 731 (“The sentencing-package doctrine has no place here, however, where the original sentence imposed was not a package of interconnected sanctions.”).

D. Original Drug Quantity Adoption

The fourth question courts have had to grapple with is whether judges must adopt the operative drug quantities found at the original sentencing.

Since the mid-1980s, federal drug sentences have been driven by statutory and guidelines quantity thresholds.³⁴¹ For instance, 21 U.S.C. § 841 has two penalty ranges triggered by drug type and quantity thresholds.³⁴² Prior to the Fair Sentencing Act, fifty grams of crack cocaine triggered the harsher of the two § 841 penalty ranges, carrying a maximum penalty of life imprisonment.³⁴³ Because of this low quantity threshold for life imprisonment, many juries were not asked to find quantities above “50 grams or more.”³⁴⁴ However, the statutory ranges did not—and do not—match sentencing guidelines ranges. The Sentencing Commission has created more than a dozen quantity-driven categories.³⁴⁵

To resolve the statutory and guidelines mismatch, judges make additional quantity findings at sentencing.³⁴⁶ Most judges, including the original sentencing judges in section 404 cases, adopt quantities from PSRs or stipulated plea agreements.³⁴⁷ In the years since most

341. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (imposing a ten-year mandatory minimum sentence on defendants convicted of manufacturing or distributing 50 grams or more of methamphetamines); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 7171, § 2D1.1(e) (discussing their drug quantity table).

342. 21 U.S.C. § 841.

343. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (“21 U.S.C. 841(b)(1) is amended . . . (1) in subparagraph (A)(iii), by striking ‘50 grams’ and inserting ‘280 grams’”); *see, e.g.*, Verdict Form at 1, *United States v. Boulding*, No. 08-cr-65 (W.D. Mich. filed Oct. 3, 2008) (“As to Count 1 of the indictment, charging the defendants . . . with conspiracy to distribute and to possess with intent to distribute cocaine base (‘crack cocaine’) . . . C. What quantity of crack cocaine do you find beyond a reasonable doubt was involved in the conspiracy? [X mark] 50 grams or more of crack cocaine . . .”); Verdict Form at 4, *United States v. Powell*, No. 99-cr-264 (D. Conn. filed Jan. 5, 2006) (“Count Three (Conspiracy to Possess with Intent to Distribute and to Distribute Narcotics): . . . [Finding the defendant Guilty] . . . [of] 50 grams or more of a mixture or substance containing a detectable amount of ‘crack’ cocaine”).

344. *See, e.g.*, Fair Sentencing Act of 2010 § 2 (listing 280 grams as the minimum quantity for life imprisonment); *see also* *United States v. Stanback*, 377 F. Supp. 3d 618, 621 (W.D. Va. 2019) (“On March 20, 2003, a jury convicted Stanback of one count of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) (Count 1)”).

345. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 7171, § 2D.1.1(a)(5) (explaining offense levels of their drug quantity table).

346. *United States vs. Simmons*, 964 F.2d 763, 775 (8th Cir. 1992).

347. Ellis, *supra* note 72, at 48 (“The federal presentence investigation report (PSR) is crucial . . . it is the document most heavily relied on by the judge in imposing sentence—particularly in those cases where a guilty plea has been entered and the court knows little about the defendant.”); *id.*; *see* Sentencing Transcript at 25, *United States v. Boulding*, No. 08-cr-00065 (W.D. Mich. filed May 13, 2009) (“The drug quantity is admittedly not easy to calculate in a case like this, but my comments when I went through the [presentence] report was that, if anything, it seemed to me that

section 404-eligible defendants were sentenced, however, the Supreme Court has articulated additional safeguards that can affect quantity findings during original sentencings.

In *Apprendi v. New Jersey*, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³⁴⁸ In *Alleyne v. United States*, the Court added that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.”³⁴⁹ The relation of the *Apprendi/Alleyne* doctrine to section 404 cases is an unsettled question.

First Step Act courts have taken three approaches to *Apprendi/Alleyne*. Many have avoided the constitutional question(s). Some have decided that the doctrine has no application to First Step Act cases. Others have found that the *Apprendi/Alleyne* backdrop to the First Step Act permits judicial flexibility regarding drug quantities.

First, some courts have sidestepped the *Apprendi/Alleyne* issue by retaining operative drug quantities from uncontested PSRs or stipulated plea agreements. For instance, the *United States v. Broadway* court declined to resentence a defendant convicted of distributing more than 280 grams of crack³⁵⁰ because he had “filed no objections to the Pre-Sentence Investigation Report, which indicated he was responsible for 487.82 grams of crack cocaine, and he stipulated to the report in his plea agreement.”³⁵¹ Accordingly, the resentencing court avoided the constitutional issue and found that “Mr. Broadway’s sentencing range [was] not changed by the Fair Step Act in that he was found to be responsible for more than 280 grams of crack cocaine.”³⁵²

Second, other courts have analyzed *Apprendi* and *Alleyne* directly and determined that they are not applicable to section 404 cases. The *United States v. Willis* court explained that “a judge may not increase the statutory penalty for crack cocaine under the First Step Act’s retroactivity provisions[, so *Apprendi/Alleyne*] does not apply to a district court’s decision under the First Step Act because ‘[d]eclining to reduce a

the quantity was calculated on the conservative or light side and that the evidence certainly would have supported a more aggressive calculation in the presentence report.”). But some defendants plead to a quantity.

348. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

349. *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

350. *United States v. Broadway*, 437 F. Supp. 3d. 880, 886 (D. Colo. 2020) (“Mr. Broadway argue[d] that the 487.82 grams of crack he was deemed accountable for by the Pre-Sentence Investigation Report was not determined beyond a reasonable doubt by a jury and, as such . . . the quantity cannot be used to ‘increase’ his statutory penalty . . . [or it] would violate the mandates of *Apprendi v. New Jersey* and *Alleyne v. United States*.”)

351. *Id.* at 887.

352. *Id.*

sentence is not tantamount to an increase, nor does [a section 404] proceeding implicate Defendant’s right to a jury trial.”³⁵³ But while the *Willis* court found that section 404 defendants are not entitled to *Apprendi/Alleyne* protections, it did not address how the doctrine might inform judicial fact-finding in a section 404 resentencing.

Third, some courts have found that the *Apprendi/Alleyne* backdrop to the First Step Act permits judges to interrogate—and even depart from—the quantity or quantities that drove the original sentence. In Mr. Boulding’s case, the jury found beyond a reasonable doubt that he had distributed fifty grams or more of cocaine base.³⁵⁴ Judge Jonker originally found “by a probability” that Mr. Boulding had distributed 500 grams or more of crack cocaine,³⁵⁵ and as much as the 650.4 grams listed in the PSR.³⁵⁶ At resentencing, Judge Jonker determined that he did not have to adopt the highest quantity from the original sentencing as the sole resentencing quantity. Instead, he considered both the “50 gram or more” quantity found by the jury³⁵⁷ and the 650.4-gram amount submitted by probation.³⁵⁸ The judge noted that the “only quantity found beyond a reasonable doubt, or otherwise offered to support the factual basis for conviction, was ‘50 grams or more’ of crack.”³⁵⁹ Still, he felt that the

353. *United States v. Willis*, 417 F. Supp. 3d 569, 588–89 (E.D. Pa. 2019) (citing *United States v. Nixon*, No. 93-386-4, 2019 U.S. Dist. LEXIS 166359, at *8 (E.D. Pa. 2019)); see also *United States v. White*, 413 F. Supp. 3d 15, 30–31 (D.D.C. 2019) (“[N]either FSA nor the First Step Act operate to apply retroactively the *Apprendi/Alleyne* line of cases barring reliance on judicial fact-finding to increase the statutory penalty for a crime beyond those facts found by a jury beyond a reasonable doubt or admitted by the defendant (*‘Apprendi/Alleyne rule’*).”).

354. See *United States v. Boulding*, 379 F. Supp. 3d 646, 648 (W.D. Mich. 2019) (“The jury found that the quantity of crack cocaine involved in the conspiracy beyond a reasonable doubt was 50 grams or more of crack cocaine, the highest quantity determination the verdict form asked them to reach.”) (citation omitted).

355. Sentencing Transcript at 25, *Boulding*, No. 1:08-cr-00065 (“I have no problems finding on the record that I saw by a probability that the quantities exceeded the 500-gram level of crack.”).

356. *Id.* at 8.

357. *Boulding*, 379 F. Supp. 3d at 656 n.6.

358. *Id.* at 655 (showing by table that the base level offense of 30 covers distribution of at least 280 grams but less than 840 grams).

359. *Id.* at 656 n.6 (“The defense invocation of *Apprendi* and *Alleyne* has genuine bite here. Under the First Step Act, for any eligible defendant, the Court may choose to impose a reduced sentence ‘as if’ the new thresholds of the Fair Sentencing Act were in effect at the time of the original sentence. If those new thresholds had been in effect for Defendant Boulding, they would only have permitted a Count 1 conviction under Section 841(b)(1)(B)(iii) because quantity is an essential element of the (A)(iii) or (B)(iii) offense. The only quantity found beyond a reasonable doubt, or otherwise offered to support the factual basis for conviction, was ‘50 grams or more’ of crack. *Alleyne* and *Apprendi* have not been extended retroactively on collateral review. But that is different than saying they have no significance in making the ‘as if’ sentencing decision called for under the First Step Act.”); see also *United States v. Williams*, 402 F. Supp. 3d 442, 449 (N.D. Ill. 2019) (“So of course *Alleyne* does not apply retroactively to Williams’ case. But it does provide another clue that Congress intended ‘covered offense’ to refer to the crime of conviction—not the actual conduct determined by the judge at sentencing.”) (citations omitted).

650.4-gram amount was pertinent to the offense conduct that he had to consider at resentencing.³⁶⁰ Using both figures, Judge Jonker found sufficient support for a new guidelines range of 292 months to 365 months,³⁶¹ and a sentence reduction to 324 months.³⁶² A number of courts have similarly exercised their authority to depart from the drug quantity that drove the original sentence.³⁶³

In *Stanback*, the court considered three drug quantity amounts: (1) a jury finding of “50 grams or more” of cocaine base, (2) the Government’s argument that a post-Fair-Sentencing-Act jury would have convicted the defendant guilty on “280 grams or more” of cocaine base, and (3) the original PSR estimate of 1.5 kilograms of cocaine base.³⁶⁴ The court held that it was not permitted to “impose a [statutory] penalty based on the 1.5 kilograms of cocaine base referenced in the PSR.”³⁶⁵ Additionally, the court would not impose a statutory penalty of ten years to life on the

360. *Boulding*, 379 F. Supp. 3d at 656 (positing that Mr. Boulding’s reduced sentence still reflected the severity of his offense conduct).

361. *Id.* at 655.

362. *Id.* at 655–57 (“[D]efendant Boulding’s guideline range calculation is reduced from life to a term of 292 months to 365 months. This is because, first of all, his base offense level has been reduced four levels under intervening guideline amendments. But in addition, it is because § 5G1.2 of the guidelines is no longer implicated. Previously that section mandated a guideline sentence of life because the version of Section 841(b)(1)(A)(iii) in effect at the time of Defendant Boulding’s sentence required it under the factual basis supporting the convictions. Applying the Fair Sentencing Act retroactively to the factual basis that supported the earlier convictions means that section no longer controls Defendant Boulding’s sentence. Rather the factual basis for the Count 1 conviction based on the charges, the jury’s finding, and the prior Section 851 convictions in Count 1 would only trigger the ten-year minimum and life term maximum in Section 841(b)(1)(B)(iii). To be sure, the actual offense conduct quantities determined for sentencing may involve higher quantities—even quantities high enough under the new thresholds. But the actual offense conduct quantities only inform the Court’s discretion on whether to reduce an eligible defendant’s sentence; they do not substitute for a required element of the factual basis for the offense of conviction whether established by jury verdict or guilty plea. . . . [D]efendant Boulding’s term of imprisonment is reduced to 324 months as to each of Counts 1 and 2, to be served concurrently.”) (emphasis omitted).

363. *See* *United States v. Stanback*, 377 F. Supp. 3d 618, 623 (W.D. Va. 2019) (“Under *Alleyne*, this court is not free to ignore that finding and impose a penalty based on the 1.5 kilograms of cocaine base referenced in the PSR. Thus, although *Apprendi* and *Alleyne* are not retroactively applicable on collateral review, this court joins other courts in finding that their holdings are applicable in the context of the First Step Act.”).

364. *Id.* at 621–22 (“Because *Stanback* was found responsible for 1.5 kilograms on the conspiracy charge, which would make him subject to the 21 U.S.C. § 841(a)(1)(A) penalties, the government argues that he is not entitled to relief under the First Step Act.”).

365. *Id.* at 623 (“The jury in *Stanback*’s case found him guilty of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base. ECF No. 214. Under *Alleyne*, this court is not free to ignore that finding and impose a penalty based on the 1.5 kilograms of cocaine base referenced in the PSR. Thus, although *Apprendi* and *Alleyne* are not retroactively applicable on collateral review, this court joins other courts in finding that their holdings are applicable in the context of the First Step Act.”)

speculated 280-gram amount.³⁶⁶ Rather, the court adopted the parties' recommendation of a 188 to 235 months guidelines range and the defendant's argument that contemporary courts routinely depart below the guidelines in instances of "minimal criminal history or to avoid disparities with the other defendants in [that] case."³⁶⁷ As the *Stanback* Court explained, a well-informed Congress intended such judicial discretion:

The government contends that nothing in the First Step Act suggests that Congress intended to . . . change the manner of determining quantity. In essence, the government is asking the court to . . . disregard *Alleyne* when examining *Stanback's* sentence. However, Congress, when drafting the First Step Act in 2018, surely did not intend for courts to disregard the last six years of Supreme Court federal sentencing jurisprudence . . .³⁶⁸

This interpretation squares with the view that resentencing judges must make sufficient § 3553(a) findings³⁶⁹ in First Step Act cases. Thus, though section 404 defendants are likely not entitled to *Apprendi/Alleyne* protections, Congress probably intended that judges could exercise discretion with respect to drug quantities in First Step Act resentencings.

As of late May 2020, no circuit court has ruled on judicial authority to depart from the drug quantities that drove an original sentence. In fact, the circuit courts have barely addressed the *Apprendi/Alleyne* issue.³⁷⁰ In a nonbinding opinion, the Eleventh Circuit held that when a circuit court made an *Apprendi* finding and upheld a drug quantity on direct appeal, that quantity was unassailable under "law of the case" doctrine.³⁷¹ But

366. *Id.* at 624 ("Thus, this court declines to assume that *Stanback* would have been charged and convicted of possessing more than 280 grams of cocaine base if the Fair Sentencing Act had been in effect at the time he was convicted."); *id.* at 625 (explaining that the defendant had served more than ten years without consideration of good time credit).

367. *Id.* at 625.

368. *Stanback*, 377 F. Supp. at 623; see also *Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

369. See *United States v. Smith*, 959 F.3d 701, 704 (6th Cir. 2020) ("Ultimately, the district court failed to provide a sufficiently compelling justification for maintaining a sentence that is now twice the guideline range set by Congress. We are confident on remand that the district court can determine whether, in its discretion, a sentence less than 20 years is appropriate after considering the § 3553(a) factors with reference to the purposes of the First Step Act and Fair Sentencing Act.").

370. A May 28, 2020, Westlaw search of "U.S. Courts of Appeals Cases" for the phrase "First Step Act" followed by a "Search within results" for *Apprendi* yielded 15 cases. Several results did not include *Apprendi*. Several more were direct appeals of recent sentences. Several cases side-stepped the *Apprendi/Alleyne* issue. *E.g.*, *United States v. Wyatt*, 798 F. App'x 595, 596–97 (11th Cir. 2020).

371. *United States v. Brown*, 803 F. App'x 322, 324 (11th Cir. 2020) ("Reading *Brown's* brief liberally, he argues that the district court contravened *Apprendi* when it denied his motion to reduce by attributing a drug quantity to him without the amount being charged in an indictment or proved

the issue in that case was a defendant's right to *Apprendi/Alleyne* protections, not a resentencing judge's authority under section 404. As this Article argues, Congress's purpose in passing section 404 was to grant authority to sitting judges to disturb the "law of the case" for eligible defendants.

V. MODERN SAFEGUARDS AGAINST INDISCRIMINATE SENTENCING

Of course, appellate courts could adopt the foregoing reasoning and still reject increased judicial authority on policy grounds. Theoretically, enhanced authority could foster a return to indiscriminate sentencing.³⁷² But, three modern safeguards preclude a return to 1970s-era sentencing: (1) the Sentencing Guidelines, (2) § 3553, and (3) political attention.

First, credible evidence suggests that the Sentencing Guidelines still exert a normalizing force on judges. Following *Booker*, the Guidelines are advisory.³⁷³ Still, a departure from the Guidelines requires a written justification and can serve as grounds for appeal.³⁷⁴ Recent racial bias studies confirm that key sentencing trends remained constant pre- and post-*Booker*. Starr and Rehavi's analysis of "federal cases from arrest through sentencing"³⁷⁵ found that the Sentencing Guidelines' "harshness" was not blunted by *Booker*.³⁷⁶ Ulmer, Light, and Kramer found similar results using a large sentence outcomes dataset collected

to a jury, but we held on direct appeal that no reversible error under *Apprendi* occurred in sentencing him. That decision is the law of the case and bars Brown's challenge to the denial of his fourth motion to reduce.") (citation omitted).

372. See 119 CONG. REC. 6060 (1973) (reporting that the U.S. Attorney's Office for the Southern District of New York found that certain African American defendants received harsher sentences due to indiscriminate sentencing); see also Morris, *supra* note 94, at 9 (explaining how research has established that "state and federal sentencing systems are characterized by unjust disparities.").

373. *Peugh v. United States*, 569 U.S. 530, 537 (2013) ("We have indicated that 'a district court's decision to vary from the advisory Guidelines may attract greatest respect when' it is based on the particular facts of a case. Overall, this system 'requires a court to give respectful consideration to the Guidelines,' but it 'permits the court to tailor the sentence in light of other statutory concerns as well.'") (internal citations omitted); cf. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 734 (2005) ("For those who believe that the primary purpose animating the Guidelines is uniformity, we probably already have sufficient data to conclude that Justice Breyer's experiment is failing. For those who desire improved uniformity over the pre-1984 days, yet long for some judicial discretion to account for unusual cases, and especially for those who believe prosecutors possessed excessive power under the Guidelines, the experiment is somewhat of a success.").

374. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 80 (2015) ("The government is permitted to appeal a sentence resulting in a departure below the guidelines range, and the defendant can appeal an above-range departure.").

375. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 24 (2013).

376. *Id.* at 2 ("[W]e find no evidence that racial disparity has increased since *Booker*, much less because of *Booker*.").

by the U.S. Sentencing Commission.³⁷⁷

Not everyone agrees with these results.³⁷⁸ Yang's analysis of nearly 400,000 federal prosecutions suggests that judges appointed after *Booker* sentenced African American defendants more harshly than pre-*Booker* appointees.³⁷⁹ But as Yang notes, her findings should "be interpreted cautiously, as they apply predominantly to new Bush appointees."³⁸⁰ Further, these newer judges might eventually regress to Sentencing Guidelines norms. As Starr and Rehavi explain, judges typically conform to the Guidelines to avoid open-ended sentencing, criticism, or reversal, or because they believe that the Guidelines work to reduce disparity.³⁸¹ For now, then, it appears that the Sentencing Guidelines moderate judicial indeterminacy and contribute to some consistency among judges. So too does § 3553.³⁸²

Second, § 3553 requires judges to consider sentence typicality. Under subsection (a)(6), judges must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."³⁸³ "[T]he purpose of § 3553(a)(6)

377. Jeffrey T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity in the Wake of the Booker/Fanfare Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y 1077, 1108 (2011) ("The USSC 2010 report points to greater sentence-length disparity affecting Black males in the post-Booker/Gall periods However, based on our differing results using alternative procedures . . . we question the notion that Booker and Gall have caused increases in race/ethnic and gender sentence-length disparity compared with the full range of years when the Guidelines were mandatory.").

378. *Id.*; see also Yang, *supra* note 374, at 75 (explaining that black defendants received harsher sentences after *Booker* in part due to "increased judicial discretion").

379. See Yang, *supra* note 374, at 75 ("Using data on the universe of federal defendants, I find that black defendants received 2 months more in prison compared with their white counterparts after *Booker*, a 4 percent increase in average sentence length. To identify the sources of racial disparities, I construct a data set linking judges to defendants. Exploiting the random assignment of cases to judges, I find that racial disparities after *Booker* were greater among judges appointed after *Booker*, which suggests acculturation to the guidelines by judges with experience sentencing under a mandatory-guidelines regime."); but see also Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 729 (2012) ("[J]udicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing.").

380. Yang, *supra* note 374, at 108. But note similar cautions in research that reaches the opposite conclusion; see Starr & Rehavi, *supra* note 375, at 70 ("This directly contravenes the conclusion implied by the Sentencing Commission's report. However, the contrary conclusion is only tentative. There is again considerable noise in the sentencing data, and the estimate is only significant in two of the specifications.").

381. Starr & Rehavi, *supra* note 375, at 15 ("Federal judges are still required to calculate the Guidelines sentencing range, and, although they are then free to depart from it, they usually do not. There are many possible reasons for this continued conformity: federal judges might believe that the Guidelines meet the goal of reducing disparity, wish to avoid open-ended, subjective sentencing assessments, seek insulation from criticism or reversal, or simply treat the Guidelines as an 'anchor.'").

382. See 18 U.S.C. § 3553 (explaining how the guidelines apply to imposing a sentence).

383. 18 U.S.C. § 3553(a)(6).

is to promote national uniformity in the sentences imposed by federal courts.”³⁸⁴ A court’s failure to consider typical or comparable federal sentences can be grounds for appeal, particularly when a defendant has argued that his or her sentence departs from federal sentencing norms.³⁸⁵ Of course, § 3553 also urges judges to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.”³⁸⁶ This case-by-case approach can contribute to a judicial myopathy at odds with inter-defendant or interdistrict uniformity.³⁸⁷ Even so, § 3553’s factors facilitate both judicial introspection and defense appeals. As a result, § 3553 mitigates against luck-of-the draw sentencing.

Third, federal punishment is once again a topic of national conversation. The First Step Act demonstrates political attention to this issue, and further legislation is likely.³⁸⁸ While policymaker and public interest should not influence sentencing outcomes, judges understand that their decisions are being scrutinized. This attention is simply one more reason that a return to indiscriminate sentencing is unlikely.

Accordingly, there is no convincing policy rationale for denying judges the authority conferred by Congress through the First Step Act.

384. *United States v. Begin*, 696 F.3d 405, 412 (3d Cir. 2012); *cf. Pepper v. United States*, 562 U.S. 476, 504 (2011) (“Finally, we note that §§ 3553(a)(5) and (a)(6) describe only two of the seven sentencing factors that courts must consider in imposing sentence.”).

385. *Begin*, 696 F.3d at 414 (2-1 decision to vacate and remand because the trial court “did not acknowledge that [the defendant] had also made a federal-federal disparity argument. The Court asked no questions during defense counsel’s oral argument in favor of downward variance on this ground and made no comments about the issue following that presentation . . . [and] we have held that ‘a district court’s failure to analyze § 3553(a)(6) may constitute reversible procedural error, even where . . . the court engages in thorough and thoughtful analysis of several other sentencing factors.’” (quoting *United States v. Merced*, 603 F.3d 203, 224 (3d Cir. 2010))).

386. 18 U.S.C. § 3553(a)(1).

387. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051, 2100 (2015) (“On the contrary, case-by-case adjudication naturally focuses judicial attention on the case-specific details of individual claims, presented by individual litigants, one case at a time. The very process of constitutional criminal adjudication, in other words, inculcates in criminal courts a transactional myopia that frustrates their capacity to recognize, understand, and engage the broader institutional dynamics of the criminal justice system . . . Contemporary criminal courts are major custodians of systemic facts. If those facts are leveraged properly, they can enhance not only judges’ institutional awareness and comprehension of institutional law enforcement practices, but also their ability to regulate and oversee such practices at a systemic level.”).

388. 164 CONG. REC. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson) (“These rigid sentences that do not fit the crimes ought to be turned around, and that is exactly what this legislation does. If we don’t start this first step of turning it around, it will be so wasteful, so unfair, so costly. It is not how our criminal justice system was intended to work.”); *id.* at S7776 (statement of Sen. Cardin) (“Let us take this first step to reform our broken criminal justice system by passing this legislation during this session, and let us pledge to work together to make further improvements in the new Congress.”).

CONCLUSION

Judge Jonker sentenced Walter Boulding to life in prison less than two years after taking the bench.³⁸⁹ At the time, the judge expressed frustration with Congress for depriving him of the discretion to impose a lengthy sentence short of life imprisonment.³⁹⁰ More than a decade passed before Congress restored Judge Jonker's authority.³⁹¹

Less than six months into the First Step Act, Judge Jonker reconsidered Mr. Boulding's sentence and reduced his term of imprisonment to 324 months.³⁹² Under that reduced sentence, Mr. Boulding will be released in his 50s.³⁹³ Judge Jonker explained that the new sentence achieved balance under § 3553:

This sentence reflects the significant custodial sentence that the Court stated it would still have applied at the original sentencing, given the 3553 factors. As the Court at that time noted, Defendant Boulding was not engaged in a simple or light distribution scheme. Indeed, the drug conspiracy was significant, and Defendant Boulding had a leadership role in that conspiracy The trial record also included testimony from multiple people whose lives were hurt by the activity that Defendant Boulding led.

But as the Court stated then, and reiterates now, a sentence of life imprisonment is too much punishment. It is overwhelming on the facts of this case, and indeed undermines some of the § 3553 factors. The First Step Act now permits the Court to impose a reduced sentence that, in the Court's mind, is the more consistent outcome after a consideration of all the 3553 factors.³⁹⁴

Section 3553 instructs sentencing judges to “impose a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.”³⁹⁵ That instruction carries a heavy burden and requires immense care and craft.

Legislative history suggests that the First Step Act permits judges to

389. Sentencing Transcript, *United States v. Boulding*, No. 08-cr-00065 (W.D. Mich. 2009).

390. *Id.* at 3 (“You know, and in the Boulding case, in some senses with the congressional mandate of mandatory life in this situation, in some sense it’s an easy sentencing hearing On the other hand, in the more fundamental way, it’s a very difficult sentencing hearing for me, because life in prison is not the sentence I would impose on Mr. Boulding if I had the full discretion that I normally have in sentencing.”).

391. See First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5222.

392. Opinion & Order at 16, *United States v. Boulding*, No. 08-cr-00065 (W.D. Mich. filed May 16, 2019).

393. *Id.* at 1 (explaining that Mr. Boulding was sentenced in 2009, at the age of 29). In other words, 324 months is 27 years. If Mr. Boulding serves the entire term, he will be released in 2036, at the age of 56. With good conduct credit, he could be released several years before that.

394. *United States v. Boulding*, 379 F. Supp. 3d 646, 657 (W.D. Mich. 2019).

395. 18 U.S.C. § 3553(a).

exercise such discretion to remedy unjust sentences.³⁹⁶ Accordingly, appellate courts should construe judicial authority under the First Step Act as the power to impose just punishment for eligible defendants based upon the judge's reasoned view of the record.³⁹⁷

Though most circuits have adopted categorical eligibility for First Step Act relief, they have yet to determine the reach of judicial authority over complex but common issues such as judge-determined drug quantities and concurrent non-crack convictions. Further, most circuits have not resolved whether judges may acknowledge evolving precedent and defendant rehabilitation. As a result, the law of the First Step Act remains in disarray. This disorder not only leaves long-serving defendants in limbo, it threatens to undermine future efforts at scaffolded criminal justice reform. As demonstrated throughout this Article, a broad reading of the First Step Act is historically and legally correct. Circuit courts should interpret the law as the broad reform Congress intended.

396. On the need for adequate judicial discretion in First Step Act resentencing, *see* 164 CONG. REC. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar); *id.* at S7756 (statement of Sen. Nelson); *id.* at S7762 (statement of Sen. Booker); *see also* *United States v. Boulding*, 379 F. Supp. 3d 646, 653–54 (W.D. Mich. 2019) (discussing how the Act “emphasizes that any reduction in sentence is in the reviewing court’s discretion”).

397. *See United States v. Beamus*, 943 F.3d 789, 792 (6th Cir. 2019) (“That Beamus is eligible for resentencing does not mean he is entitled to it. The First Step Act ultimately leaves the choice whether to resentence to the district court’s sound discretion. In exercising that discretion, a judge may take stock of several considerations, among them the criminal history contained in the presentence report. How do these considerations play out for Beamus? That’s a question only the district court can answer. We reverse and remand to give it the opportunity to do so.”) (internal citations omitted); *United States v. Venable*, 943 F.3d 187, 194–95 (4th Cir. 2019) (“We emphasize that our holding today is limited to the issue of a district court’s *authority* to resentence a defendant serving a term of imprisonment for revocation of supervised release whose original, underlying conviction was for a ‘covered offense.’ . . . For the reasons discussed above, we hold that the district court erred in concluding the First Step Act did not authorize it to provide relief to Venable because he had finished serving his original term of imprisonment and was currently serving a term of imprisonment for revocation of supervised release.”) (emphasizing original).