

5-1-2023

Comment: Instilling Ordered Procedure in Assessing Motions for Reduced Sentences Under Section 404 of the First Step Act

Michael C. Vega

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

Michael C. Vega, Comment, *Instilling Ordered Procedure in Assessing Motions for Reduced Sentences Under Section 404 of the First Step Act*, 43 N. Ill. Univ. L. Rev. 181 (2023).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

Instilling Ordered Procedure in Assessing Motions for Reduced Sentences Under Section 404 of the First Step Act

MICHAEL C. VEGA*

This Comment discusses the lack of ordered procedure in assessing motions brought pursuant to § 404 of the First Step Act of 2018. For nearly a quarter century, federal cocaine sentencing subjected crack-cocaine offenses dealing in one-hundredth the quantity of drug to the same statutory penalty as powder-cocaine offenses. This disparate treatment of drug offenses impacted primarily African Americans. The Fair Sentencing Act of 2010 reduced the disparity but applied only prospectively. Section 404 of the First Step Act made certain provisions of the Fair Sentencing Act retroactive. In the ensuing years, the federal courts have disagreed on the precise scope of a district court’s authority in assessing § 404 motions. This is to say that federal courts do not apply consistent procedure in assessing § 404 motions which presents an issue that the Sentencing Reform Act of 1984 sought to eliminate—disparate differences in federal sentencing between similarly situated defendants. This Comment endorses an approach to assessing § 404 motions for reduced sentences which would require district courts to follow the familiar analytical framework of 18 U.S.C. § 3553(a).

I. INTRODUCTION	182
II. FUNDAMENTAL PRINCIPLES IN FEDERAL SENTENCING POLICY AND PROCEDURE	184
III. HISTORICAL BACKGROUND CULMINATING IN THE ENACTMENT OF THE FIRST STEP ACT	187
IV. AN APPROACH REQUIRING THE USE OF §3553(A)’S FRAMEWORK IN ASSESSING § 404 MOTIONS IS CONSISTENT WITH A FAIR CONSTRUCTION OF § 404 OF THE FIRST STEP ACT	193

* J.D. Candidate, December 2023, Northern Illinois University College of Law. I would like to thank my faculty advisor, Sandra Kupelian, an expert in legal writing, for her guidance and counsel and my Notes & Comments Editor, Shannon Cervantes, for her expertise and feedback. Thank you to the NIU Law Review Volume 43 staff editors for their keen eye in the editing of this Comment and Robert Kudlicki III for managing the journal. A very special thanks to Joseph Gabris, Sandra Kupelian, and Shannon Cervantes, without whose encouragement this Comment would not be published. Many thanks to my family for their endless support and encouragement. A special thanks to my father, Inocencio Vega, and in loving memory of my mother, Grace Vega, without whom I would never have had a chance to be here.

A.	“MAY” SIGNALS THAT CONGRESS GRANTED THE DISTRICT COURTS BROAD DISCRETION TO EFFECTUATE § 404’S PURPOSES – NAMELY, TO GRANT RELIEF FROM PAST DISCRIMINATORY IMPACT AND TO REDUCE THE FEDERAL PRISON POPULATION.	195
B.	“IMPOSE A ... SENTENCE” INDICATES THAT CONGRESS INTENDED DISTRICT COURTS TO FOLLOW THE FAMILIAR FRAMEWORK OF § 3553(A) TO DETERMINE WHETHER AND TO WHAT EXTENT TO GRANT A DEFENDANT’S § 404 MOTION.	196
C.	“IMPOS[ING] A ... SENTENCE” IN THE ORDINARY SENSE OF FEDERAL SENTENCING PROCEDURE COULD RESULT IN A LONGER SENTENCE FOR THE DEFENDANT; “REDUCED” BARS SUCH A RESULT.	199
D.	THE “AS IF” CLAUSE ABROGATES 1 U.S.C. § 109 FOR PURPOSES OF § 404 OF THE FIRST STEP ACT.	200
V.	AN OVERVIEW OF THE THREE-WAY FEDERAL CIRCUIT SPLIT	203
A.	THE BROAD APPROACH TO § 404 RESENTENCING.	204
B.	THE MODERATE APPROACH TO § 404 RESENTENCING.	208
C.	THE NARROW APPROACH TO § 404 RESENTENCING.	211
VI.	CONCLUSION	213
	ADDENDUM	216

I. INTRODUCTION

In the 1980s, Congress’s role in the War on Drugs was a “craz[y] political poker game”: the 100-to-1 quantity ratio has been called its “most notorious outcome.”¹ Under the 1986 Anti-Drug Abuse Act’s (the ADAA) quantity ratio, drug offenses involving crack or powder cocaine incurred the same harsh statutory penalty if the crack offense dealt with one-hundredth the quantity of drug as the powder cocaine offense.² Science did not support the quantity ratio, rather it was based on a racialized fear.³ Congressional debate, which itself was frenzied and panicked, was concerned with the idea that a black drug sold by black men was finding its way into white communities.⁴ The quantity ratio’s lack of any appreciable justification together with the fact that African Americans were more likely to be involved with crack made the quantity ratio “one of the most grotesque examples of racial discrimination in the criminal justice system.”⁵ Even though the 100-to-1 quantity ratio was fundamentally unfair, it impacted thousands of federal defendants since crack cocaine offenses totaled anywhere from 2,300 in 1992 to 5,397 in 2006.⁶

1. JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 164 (2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See U.S. SENT’G COMM’N, *REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 12* (2007) [hereinafter 2007 Commission Report].

Among those impacted by the 100-to-1 quantity ratio was Wendell Johnson.⁷ Johnson pleaded guilty to three counts of drug offenses involving either crack or powder cocaine.⁸ Count One involved crack and powder cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)-(iii), and 846: conspiracy to distribute fifty grams or more of cocaine base (i.e., crack) and more than five thousand grams of powder cocaine.⁹ Each offense under Count One incurred a minimum of ten years imprisonment up to life.¹⁰ Under the United States Sentencing Guidelines (the Guidelines or U.S.S.G.), Johnson's drug quantities resulted in a base offense level of 32.¹¹ Additionally, Johnson was a career-offender under U.S.S.G. § 4B1.1.¹² Thus, Johnson's total offense level and criminal history category were 34 and VI, respectively, resulting in a recommended Guidelines sentencing range of 262-327 months.¹³ The district court sentenced Johnson to 300 months on Count One (also, 300 months on Count Eight and 240 months on Count Seven, to all run concurrently).¹⁴

Johnson was sentenced in 2005.¹⁵ By then, the United States Sentencing Commission (the Commission) had repeatedly reported to Congress that the 100-to-1 quantity ratio was ill-advised and should be lowered.¹⁶ Nevertheless, Congress did nothing, and Johnson's sentence was unfairly influenced by the 100-to-1 quantity ratio. But Congress did eventually recognize the unfairness in the 100-to-1 quantity ratio when it passed the Fair Sentencing Act of 2010 (the FSA).¹⁷ The Commission then amended the Guidelines to reflect the new 18-to-1 quantity ratio and made those amendments retroactive.¹⁸ The retroactive application of the amended Guidelines, however, permitted only limited relief to those impacted by the 100-to-1 quantity ratio in that the

7. United States v. Johnson, No. 7:04-CR-128-1, 2020 WL 2563541 (W.D. Va. May 19, 2020).

8. *Id.* at *2.

9. *Id.*

10. *Id.* at *4.

11. *Id.* at *5.

12. United States v. Johnson, No. 7:04-CR-128-1, 2020 WL 2563541, at *5 (W.D. Va. May 19, 2020).

13. *Id.*

14. *Id.*

15. *Id.* *1-*6.

16. See U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v-ix (2002) [hereinafter 2002 Commission Report]; U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1-2 (1997) [hereinafter 1997 Commission Report]; U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) xiv-xvi [hereinafter 1995 Commission Report].

17. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

18. U.S. SENT'G COMM'N, FINAL CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT 1-2 (2014).

retroactivity excluded, for example, career offenders.¹⁹ Johnson—sentenced as a career offender—was therefore excluded from the possibility of relief.

To fill in these gaps left behind by the FSA, Congress made the Fair Sentencing Act retroactive under § 404 of the First Step Act of 2018.²⁰ Johnson could and did seek a reduced sentence under § 404.²¹ While § 404(b) permits district courts to “impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed[,]”²² there is nothing in § 404 which tells a district court how to determine if a reduced sentence is warranted, and if so, to what extent.²³ The federal circuits have not agreed on what a § 404 proceeding looks like, which is to say that the federal courts are not following identical procedure.

This Comment endorses an approach to assessing the merits of a defendant’s § 404 motion for a reduced sentence which requires utilizing § 3553(a)’s sentencing framework. To justify the approach, Part II provides an overview of key concepts in federal sentencing procedure. Part III discusses the historical background leading to the enactment of the First Step Act. The approach is set forth in the outset of Part IV, followed by statutory construction of § 404 to show how the approach flows from the statute’s text. Part V examines key reasoning leading to a circuit split. This Comment concludes in Part VI by showing the application of the approach to Wendell Johnson.

II. FUNDAMENTAL PRINCIPLES IN FEDERAL SENTENCING POLICY AND PROCEDURE

Federal sentencing underwent extensive reform in 1984 with passage of the Sentencing Reform Act (the SRA).²⁴ The disparity in federal sentences

19. See U.S. SENT’G GUIDELINES MANUAL APP. C, Amend. 750, pt. A (U.S. SENT’G COMM’N 2021).

20. See *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020).

21. *United States v. Johnson*, No. 7:04-CR-128-1, 2020 WL 2563541, at *1 (W.D. Va. May 19, 2020).

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

23. Oral Argument of Justice Kagan at 10:24-11:14, *Concepcion v. United States*, 142 S. Ct. 2389 (2022) (noting that § 404 of the First Step Act says nothing of what a district court must consider in deciding to impose a reduced sentence or not; only that the district may or may not impose a reduced sentence), <https://www.oyez.org/cases/2021/20-1650> [<https://perma.cc/HZ8N-MLKB>].

24. Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 211-38, 98 Stat. 1837, 1987-2040. Before federal sentencing reform, sentencing was based primarily on a rehabilitation model. S. REP. NO. 98-225, at 38 (1983).

In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is “rehabilitated.” Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be

pre-dating the SRA was attributed to “the lack of any statutory guidance or review procedures to which courts and parole boards might look”²⁵ and the tendency of judges and the parole board to second-guess each other.²⁶ Among the primary goals of the reform were as follows: comprehensive and consistent statements of federal sentencing law including sentencing purposes and kinds and lengths of sentences available; assuring fair sentences for the offender and society; assuring the certainty of and reasons for sentences; assuring proportionality of sentences; and assuring that each stage of sentencing and corrections kept in eye’s view the same goals for the offender and society.²⁷ The SRA abolished parole,²⁸ created the Commission,²⁹ and gave statutory authority for the promulgation of the U.S.S.G.³⁰

Under reformed federal sentencing law, the principal purposes of imposing a sentence are the need “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”;³¹ as well as to deter crime;³² to protect society from the defendant;³³ and to provide educational or vocational training, medical care, or other treatment effectively.³⁴ With these purposes in mind, a district court’s overarching goal is to impose a sentence that is “sufficient, but not greater than necessary”³⁵ to comply with the sentencing purposes.³⁶ To this end, § 3553(a) requires district courts to consider a host of factors: “the nature and circumstances of the offense,”³⁷ “the history and characteristics of the defendant,”³⁸ the defendant’s Guidelines sentencing range³⁹ under the Guidelines in effect

induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

Id.

25. S. REP. NO. 98-225, at 38 (1983).

26. *Id.* at 38-39.

27. *See id.* at 39.

28. Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 229-36, 98 Stat. 1837, 2031-33.

29. *Id.* at sec. 217, 98 Stat. at 2017-26 (codified at 28 U.S.C. §§ 991-98).

30. *Id.* at sec. 217, 98 Stat. at 2019-24 (codified at 28 U.S.C. § 994).

31. 18 U.S.C. § 3553(a)(2)(A).

32. 18 U.S.C. § 3553(a)(2)(B).

33. 18 U.S.C. § 3553(a)(2)(C).

34. 18 U.S.C. § 3553(a)(2)(D).

35. 18 U.S.C. § 3553(a).

36. *Id.*

37. 18 U.S.C. § 3553(a)(1).

38. *Id.*

39. 18 U.S.C. § 3553(a)(4)(A)(i).

on the date of sentencing,⁴⁰ policy statements from the Commission in effect on the date of sentencing,⁴¹ among other factors.⁴²

Once a sentence is imposed, the general rule is that the sentence is final.⁴³ There are, however, exceptions to finality under § 3582(c), titled “Modification of an Imposed Term of Imprisonment.”⁴⁴ Under § 3582(c)(2), a district court (after an appropriate motion) may “modify a term of imprisonment” if the Commission has lowered the defendant’s Guidelines sentencing range and the reduction is consistent with the Commission’s applicable policy statements—namely U.S.S.G. § 1B1.10.⁴⁵ Section 1B1.10(b)(1) of the Guidelines authorizes a district court to determine what the defendant’s sentencing range would have been if the applicable amendment had been in effect at the time of sentencing and requires all other Guidelines determinations to remain unchanged.⁴⁶ Accordingly, “§ 3582(c)(2) does not authorize a re-sentencing. Instead, it permits a sentence reduction within the narrow bounds established by the Commission.”⁴⁷

Whereas under § 3582(c)(1)(B), a district court “may modify an imposed term of imprisonment to the extent otherwise expressly permitted by

40. 18 U.S.C. § 3553(a)(4)(A)(ii).

41. 18 U.S.C. § 3553(a)(5).

42. 18 U.S.C. § 3553(a).

43. 18 U.S.C. § 3582(b).

44. 18 U.S.C. § 3582(c).

45. 18 U.S.C. § 3582(c)(2).

The court may not modify a term of imprisonment once it has been imposed except that in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . , the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Id.

46. U.S. SENT’G GUIDELINES MANUAL § 1B1.10(B)(1) (U.S. SENT’G COMM’N 2021).

In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

Id.

47. *Dillon v. United States*, 560 U.S. 817, 831 (2010).

statute or by Rule 35 of the Federal Rules of Criminal Procedure.”⁴⁸ To the extent that a statute—external to § 3582—disrupts sentence finality, modifications to the eligible sentence are not subject to the strictures of § 3582(c)(2).⁴⁹ It is the text of the underlying external statute which informs resentencing proceedings brought pursuant to § 3582(c)(1)(B).⁵⁰ Section 404 motions under the First Step Act are brought under § 3582(c)(1)(b); accordingly, § 404’s text shapes resentencing proceedings, which are not subject to § 3582(c)(2)’s strictures.⁵¹

III. HISTORICAL BACKGROUND CULMINATING IN THE ENACTMENT OF THE FIRST STEP ACT

With the ADAA, Congress established a statutory penalty scheme for drug-related offenses with the resulting statutory penalty depending on the type and quantity of drug involved in the offense.⁵² Generally, the three statutory penalties are (1) a mandatory minimum of ten years up to life imprisonment, (2) a mandatory minimum of five years up to forty years imprisonment, or (3) imprisonment not to exceed twenty years.⁵³ Fueled in part by public outcry following the untimely death of prospective NBA star, Len Bias,⁵⁴ the ADAA treated offenses involving crack cocaine more harshly from their powder cocaine counterparts.⁵⁵ For example, an offense involving fifty grams or more of crack cocaine incurred the most severe penalty (i.e., ten years to life) whereas five thousand grams or more of powder cocaine incurred the same.⁵⁶ Thus, the ADAA established a 100-to-1 quantity ratio where crack and powder cocaine offenders incurred the same statutory

48. 18 U.S.C. § 3582(c)(1)(B).

49. *See* *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019).

50. *Id.*

51. *See* *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 743 (7th Cir. 2020); *United States v. Boulding*, 960 F.3d 774, 783 (6th Cir. 2020); *United States v. Concepcion*, 991 F.3d 279, 287 (1st Cir. 2021); *United States v. Murphy*, 998 F.3d 549, 558 (3d Cir. 2021). *But see* *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (applying § 3582(c)(2) to motions brought under § 404 of the First Step Act).

52. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1002, 100 Stat. 3207, 3207-2.

53. *Id.*

54. *See* *United States v. Walls*, 841 F. Supp. 24, 29-30 (D.D.C. 1994) (discussing generally the omnibus drug bill in the wake of the untimely death of Len Bias); *United States v. Reyes*, 9 F. Supp. 3d 1196, 1222-23 (D.N.M. 2014) (generally noting that public outcry following the death of Len Bias catalyzed enactment of the ADAA).

55. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1002, 100 Stat. 3207, 3207-2.

56. *Id.*

penalty if the powder cocaine offense involved one hundred times more quantity of drug.⁵⁷

In several reports to Congress, the Commission criticized the 100-to-1 quantity ratio and urged Congress to reduce the disparity.⁵⁸ The 2007 Commission Report reaffirmed its four earlier made core findings.⁵⁹ First, the 100-to-1 quantity ratio exaggerated the relative harmfulness of crack and powder cocaine.⁶⁰ Second, it swept too broadly affecting most often lower-level offenders,⁶¹ contrary to the ADAA's intent of punishing most harshly mid-level or serious level drug traffickers.⁶² Third, the quantity ratio did not reflect the seriousness of the crack cocaine offense in many cases and prevented adequate proportionality of sentences,⁶³ contravening purposes of the SRA.⁶⁴ Fourth, minorities were primarily impacted by the quantity ratio.⁶⁵

Although the Commission stated that there was no evidence of discriminatory intent when enacting the 100-to-1 quantity ratio,⁶⁶ Vice Chairman Michael Gelacak expressed two points: (1) the discriminatory impact is the same regardless of discriminatory intent⁶⁷ and (2) the crack/powder cocaine sentencing disparity violates the United States' international pledge to

57. See *Dorsey v. United States*, 567 U.S. 260, 263 (2012).

58. See 2007 Commission Report, *supra* note 6; 2002 Commission Report, *supra* note 16; 1997 Commission Report, *supra* note 16; 1995 Commission Report, *supra* note 16.

59. 2007 Commission Report, *supra* note 6, at 7-8.

60. *Id.* at 8.

61. *Id.*

62. 1997 Commission Report, *supra* note 16, at 5. With the ADAA, the quantity of drug involved in drug-related offenses was viewed as significantly reflecting the offender's culpability and the harm to society. See *id.* The general idea was that mid-level or serious drug traffickers should receive at least five years imprisonment. *Id.* After consulting with various drug-related law enforcement and research organizations, the Sentencing Commission concluded that the five-gram crack cocaine trigger for five years imprisonment was overinclusive because five grams of crack-cocaine tended to be more indicative of street-level dealers. *Id.*

63. 2007 Commission Report, *supra* note 6, at 8.

64. See 1997 Commission Report, *supra* note 16, at 5-6. Sentencing schemes based primarily on the quantity of drug involved contravenes congressional intent in passing the Sentencing Reform Act of 1994. See *id.* Federal cocaine sentencing should rely less on drug quantities alone and rely more on guideline enhancements. *Id.* at 6. This approach allows for better refined and individualized sentencing, while taking into account the relative harms of specific crack and powder offenses. *Id.*

65. 2007 Commission Report, *supra* note 6, at 8. African Americans constituted the majority of crack cocaine offenders in 1992 (91.4%), 2000 (84.7%), and 2006 (81.8%). *Id.* at 16. The 100-to-1 quantity ratio impacted Hispanics to a lesser extent: 1992 (5.3%), 2000 (9.0%), and 2006 (8.4%). *Id.* Nevertheless, this data shows that racial minorities (approximately 90% or more of crack offenders) bore the brunt of a fundamentally unfair sentencing scheme.

66. See 1997 Commission Report, *supra* note 16, at 8.

67. MICHAEL S. GELACAK, *Concurring Opinion* to U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997).

eliminate racial discrimination wherever it exists.⁶⁸ In the 1970s, African American leaders supported tough-on-crime laws while also urging for federal aid to fund education, welfare, and job training initiatives in order to address the root causes of the societal issues.⁶⁹ But no such help ever came, leaving the black communities with only the harsh criminal laws.⁷⁰ The introduction of crack into black communities, and the increase in violence therefrom, contributed to the sentiment that crack could be the most serious threat to African Americans since slavery.⁷¹ Furthermore, the United States' War on Drugs intensified in the 1980s, coinciding with the crack problems permeating the African American community.⁷² Congress's processes in establishing longer sentences and higher mandatory minimums were hurried, dispensing with public hearings and expert testimony.⁷³ From the congressional poker game emerged the 100-to-1 quantity ratio; a ratio "based on racialized fear, not science."⁷⁴

Still, the Commission maintained consistently that the 100-to-1 quantity ratio contravened several congressional objectives in the Sentencing Reform

68. *Id.* at 2-3. In signing the International Convention on the Elimination of All Forms of Racial Discrimination, the United States pledged to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." International Convention on the Elimination of All Forms of Racial Discrimination art. 2, § (1)(c), Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969; for the U.S. Nov. 20, 1994).

69. FORMAN, *supra* note 1, at 157.

70. *Id.*

71. *Id.* at 158. *See also*, FORMAN, *supra* note 1, at 158-64 (discussing the introduction of crack to the black community and its effects in the D.C. area); Tracie Reddick, *Communities Move Against Drug Dealers*, THE WASH. TIMES, Mar. 1, 1988, at A1 (discussing generally root causes of the crack problems permeating the black community including lack of role models, weak parental discipline, loss of respect for the church, peer pressure, and making fast money; quoting Richard Brown of the NAACP comparing crack to slavery); Mary F. Hall, *The "War on Drugs": A Continuation of the War on the African American Family*, 67 SMITH COLL. STUD. IN SOC. WORK 609 (1997) (discussing how the "War on Drugs" continued the attack on African Americans begun under chattel slavery); Michael Isikoff, *Anti-Drug Ad Campaign Directed at Blacks*, THE WASH. POST (Nov. 3, 1989), <https://www.washingtonpost.com/archive/politics/1989/11/03/anti-drug-ad-campaign-directed-at-blacks/28f7fc81-6373-41e6-a4df-05c5a4332d53/> [<https://perma.cc/Y2SA-6Y84>]; *\$365-Million Anti-Drug Media Campaign Is Aimed at Influencing Black Americans*, EDUC. WK. (Nov. 15, 1989), <https://www.edweek.org/education/365-million-anti-drug-media-campaign-is-aimed-at-influencing-black-americans/1989/11> [<https://perma.cc/WJ6C-GVQT>].

72. FORMAN, *supra* note 1, at 164.

73. *Id.* ("The way these sentences were arrived at—it was like an auction, . . . 'It was this frenzied, panicked atmosphere—I'll see your five years and I'll raise you five years. It was the craziest political poker game.'").

74. *Id.* *See also*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290-97 (1995) (discussing the political environment culminating in the crack/powder disparity).

Act and should be reduced.⁷⁵ Congress did nothing until 2010. Eventually recognizing these problems, Congress passed the FSA which aspired “[t]o restore fairness to [f]ederal cocaine sentencing.”⁷⁶ The FSA reduced the quantity ratio from 100-to-1 to 18-to-1 by increasing the quantity of crack cocaine required to trigger the mandatory statutory penalties.⁷⁷ Specifically, ten years to life is incurred with 280 grams or more (previously fifty grams or more) and five to forty years is incurred with twenty-eight grams or more (previously five grams or more).⁷⁸ The problem, however, was that the FSA applied only prospectively to crack cocaine sentencing occurring on or after August 3, 2010.⁷⁹

In addition to increasing the amount of crack needed to trigger mandatory statutory penalties, the FSA also gave the Commission emergency authority to promulgate amended Guidelines to account for the FSA’s changes.⁸⁰ Amendment 750 accounted for the changes made by the FSA.⁸¹ The Commission then added Amendment 750 (Parts A and C) to § 1B1.10 of the Guidelines with an effective date of November 1, 2011.⁸² Since § 1B1.10 authorizes retroactive application of the included amendments,⁸³

75. 2007 Commission Report, *supra* note 6, at 7-8.

76. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

77. *See id.* at sec. 2, 124 Stat. at 2372.

78. *Id.*

Crack cocaine quantities triggering statutory penalties under the ADAA.

21 U.S.C § 841	Quantity of Crack Cocaine (grams)	No prior offense	One prior offense	Two prior offenses
(b)(1)(A)	> 50	10 years – life	20 years – life	life
(b)(1)(B)	> 5	5 – 40 years	10 years – life	10 years - life
(b)(1)(C)	any	0 – 20 years	0 – 30 years	0 – 30 years

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1002, 100 Stat. 3207, 3207-2 to 3207-4.

Crack cocaine quantities triggering statutory penalties under the Fair Sentencing Act.

21 U.S.C § 841	Quantity of Crack Cocaine (grams)	No prior offense	One prior offense	Two prior offenses
(b)(1)(A)	> 280	10 years – life	20 years – life	life
(b)(1)(B)	> 28	5 – 40 years	10 years – life	10 years - life
(b)(1)(C)	any	0 – 20 years	0 – 30 years	0 – 30 years

Fair Sentencing Act of 2010, Pub. L. No. 111-220, sec. 2, 124 Stat. 2372, 2372.

79. *See Dorsey v. United States*, 567 U.S. 260, 281 (2012).

80. Fair Sentencing Act of 2010, Pub. L. No. 111-220, sec. 8, 124 Stat. 2372, 2374.

81. *See U.S. SENT’G GUIDELINES MANUAL APP. C, Amend. 750 (U.S. SENT’G COMM’N 2021).*

82. U.S. SENT’G COMM’N, FINAL CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT 1-2 (2014).

83. *See U.S. SENT’G GUIDELINES MANUAL § 1B1.10(B)(1) (U.S. SENT’G COMM’N 2021).*

crack offenders sentenced before enactment of the FSA could seek reduced sentences.⁸⁴

But recall that § 1B1.10 operates in conjunction with § 3582(c)(2), which together form a very narrow exception to the rule of finality.⁸⁵ In particular, § 1B1.10 applies only if the offender's Guidelines range was actually lowered by accounting for only the FSA changes.⁸⁶ This requirement excluded, for example, crack offenders also designated as career offenders.⁸⁷ Therefore, the FSA's prospective application, coupled with Amendment 750's narrow retrospective application, left many crack offenders no relief from the fundamentally unfair and discriminatory 100-to-1 quantity ratio. The Seventh Circuit succinctly summarized these deficiencies of the FSA:

These changes reflected a recognition that the tremendous disparities in punishment of powder-cocaine and crack-cocaine offenses disparately impacted African Americans.

But the Fair Sentencing Act's changes to the sentencing scheme applied only to defendants who were sentenced after the law's enactment on August 3, 2010, leading us to comment that the Act might more accurately be known as "The Not Quite as Fair as it could be Sentencing Act of 2010."⁸⁸

Against the backdrop of these deficiencies, Congress eventually acted to fill in the holes left behind by the FSA when it passed the First Step Act of 2018 (the Act).⁸⁹ The Act was a first step towards criminal justice reform in the federal system,⁹⁰ and garnered significant bipartisan support: 87 senators and 358 representatives voted in favor of the Act.⁹¹ Its primary ends are to reduce the federal prison population and to create mechanisms to ensure public safety.⁹² Among its means, the Act calls for a risk and needs

84. See 18 U.S.C. § 3582(c)(2).

85. *Dillon v. United States*, 560 U.S. 817, 831 (2010).

86. U.S. SENT'G GUIDELINES MANUAL § 1B1.10(B)(1) (U.S. SENT'G COMM'N 2021).

87. See U.S. SENT'G GUIDELINES MANUAL APP. C, Amend. 750, pt. A (U.S. SENT'G COMM'N 2021).

88. *United States v. Shaw*, 957 F.3d 734, 737 (7th Cir. 2020) (citations omitted).

89. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. The full name of the Act is "Formerly Incarcerated Reenter Society Transformed Safely Transition Every Person Act." H.R. REP. NO. 115-699, at 1 (2018).

90. Jonathan Feniak, Article, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENV. L. REV. ONLINE 166, 174 (2019).

91. S. 756, 115th Cong. (2018) (passed by 87 senators on Dec. 18, 2018); *id.* (passed by 358 representatives on Dec. 20, 2018).

92. NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

assessment system for reducing recidivism;⁹³ providing incentives to prisoners for successfully completing recidivism programs;⁹⁴ changes in confinement;⁹⁵ various correctional reforms;⁹⁶ and sentencing reforms.⁹⁷

Relevant here is § 404 of the First Step Act – “Application of Fair Sentencing Act.”⁹⁸ Section 404 permits federal prisoners serving sentences for a “covered offense” to petition the district court to “impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed[,]” subject to certain specific limitations.⁹⁹ In essence, section 404 poses two basic questions: (1) Is the defendant eligible for relief? and (2) If so, whether, and to what extent, the defendant’s sentence should be reduced?

The former question is well agreed upon. A “covered offense” is “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.”¹⁰⁰ The Court held that “§ 2(a) of the Fair Sentencing Act modified the statutory penalties only for [21 U.S.C. § 841(b)(1)(A)] and [21 U.S.C. § 841(b)(1)(B)] crack offenses”¹⁰¹ Thus, it is the statute of conviction which determines a defendant’s eligibility for relief under § 404 of the Act, not the defendant’s underlying quantity of crack cocaine.¹⁰² In other words, every federal prisoner convicted under § 841(b)(1)(A) or § 841(b)(1)(B) prior to August 3, 2010, is eligible for relief under § 404,¹⁰³ subject to the specified limitations in § 404(c).¹⁰⁴

93. First Step Act of 2018, Pub. L. No. 115-391, sec. 102-07, 132 Stat. 5194, 5195-5216.

94. *Id.* at sec. 502-08, 132 Stat. at 5222-37.

95. *Id.* at sec. 601-02, 132 Stat. at 5237-38.

96. *Id.* at sec. 202, 301, 132 Stat. at 5216-17; *id.* at sec. 606, 132 Stat. at 5244; First Step Act of 2018, Pub. L. No. 115-391, sec. 613, 132 Stat. 5194, 5247-49.

97. *Id.* at sec. 401-03, § 404, 132 Stat. at 5220-22.

98. *Id.* § 404, 132 Stat. at 5222.

99. *Id.* § 404(b), 132 Stat. at 5222 (citation omitted).

100. *Id.* § 404(a), 132 Stat. at 5222.

101. *Terry v. United States*, 141 S. Ct. 1858, 1864 (2021).

102. *Terry*, 141 S. Ct. at 1863 (“The statutory penalties thus changed for all subparagraph (A) and (B) offenders.”); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019) (statute of conviction determines § 404(a) eligibility); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019) (same); *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020) (same); *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) (same); *United States v. White*, 984 F.3d 76, 86 (D.C. Cir. 2020) (same).

103. *See Terry*, 141 S. Ct. at 1864.

104. First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222. Section 2(b) of the FSA modified 21 U.S.C. § 960(b)(1)(C) and 21 U.S.C. § 960(b)(2)(C). Fair Sentencing Act of 2010, Pub. L. No. 111-220, sec. 2(b), 124 Stat. 2372, 2372. Section 3 of the FSA modified 21 U.S.C. § 844(a). *Id.* at sec. 3, 124 Stat. at 2372. It follows logically that all federal prisoners convicted under 21 U.S.C. §§ 960(b)(1)(C), 960(b)(2)(C), and 844(a) are also eligible for relief under § 404 of the First Step Act, subject of course to the specified limitations in § 404(c).

The latter question—if so, whether and to what extent, the defendant’s sentence should be reduced—is a more challenging question to answer. While § 404(a) is clear on who is eligible for relief, § 404(b) is more cryptic as to when relief should be granted. The circuit courts are not unanimous on the precise scope of a district court’s authority in assessing a defendant’s § 404 motion for relief or a particular set of procedure in assessing the motion. A fundamental issue with this non-unanimity is that by viewing the merits of defendants’ § 404 motions through the lens of differing procedure, unwarranted and disparate relief among the eligible crack cocaine offenders could result. But unwarranted disparities in federal sentencing were a key issue that the Sentencing Reform Act sought to eliminate. Accordingly, there is need to instill ordered procedure consistent with a fair construction of § 404 of the Act.

IV. AN APPROACH REQUIRING THE USE OF §3553(A)’S FRAMEWORK IN ASSESSING § 404 MOTIONS IS CONSISTENT WITH A FAIR CONSTRUCTION OF § 404 OF THE FIRST STEP ACT

This Comment endorses an approach that requires utilization of § 3553(a)’s framework in assessing § 404 motions. Under this approach, the district court shall determine the defendant’s eligibility for relief pursuant to § 404(a), and, if eligible, the district court shall: (1) determine the defendant’s amended Guidelines range, making only the change(s) mandated by section 2 or section 3 of the FSA; (2) determine the defendant’s Guidelines range under the Guidelines in effect at the time of the § 404 motion; (3) gather any other relevant information pertinent to assessing the factors set forth in § 3553(a); (4) exercise its discretion in weighing the items under steps 1-3 with the goal of imposing a sentence that is “sufficient, but not greater than necessary” to comply with the federal sentencing purposes set out in § 3553(a)(2) with an eye towards fashioning the most complete relief possible in light of § 404’s remedial character. A fair construction of § 404 of the Act comports with this approach.

The full text of § 404 of the First Step Act provides as follows:

- (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 (Public Law 111-220; 124 Stat. 2372), 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 (Public Law 111-220; 124 Stat. 2372) 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 (Public Law 111-120; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the 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.¹⁰⁵

The offending text is found in § 404(b): a district court “may ... impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed.”¹⁰⁶

On the one hand, circuit courts have interpreted this text broadly, relying heavily on the verb, “impose.”¹⁰⁷ The basic rationale is that “impos[ing]” a sentence connotes a particular term-of-art meaning in the federal sentencing context, hence § 404(b) contemplates assessing § 404 motions under that broader regime.¹⁰⁸ On the other hand, some circuit courts have more narrowly construed the offending text, arguing two basic points: (1) imposing a reduced sentence is akin to modifying a sentence – the latter carrying its own term-of-art meaning and (2) the “as if” clause limits a district court to looking at only the effect of sections 2 or 3 of the FSA.¹⁰⁹ In any case, a fair construction of the offending text would advance congressional intent in giving meaning to the offending text’s four basic “elements”: a district court (1) may ... (2) impose a (3) reduced (2) sentence (4) as if sections 2 or 3 of the Fair

105. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

106. *Id.* § 404(b), 132 Stat. at 5222 (citation omitted).

107. See *United States v. Murphy*, 998 F.3d 549, 557-58 (3d Cir. 2021) (discussing Congress’ use of a federal sentencing term-of-art: “impose”); *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020) (discussing that § 404(b) allows courts to “impose” a reduced sentence, not just “reduce” the sentence).

108. See *Murphy*, 998 F.3d at 557-58 (discussing Congress’ use of a federal sentencing term-of-art: “impose”); *Chambers*, 956 F.3d at 673 (discussing that § 404(b) allows courts to “impose” a reduced sentence, not just “reduce” the sentence).

109. See *United States v. Hegwood*, 934 F.3d 414, 418-19 (5th Cir. 2019); *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020).

Sentencing Act ... were in effect at the time the cover offense was committed.

- A. “MAY” SIGNALS THAT CONGRESS GRANTED THE DISTRICT COURTS BROAD DISCRETION TO EFFECTUATE § 404’S PURPOSES – NAMELY, TO GRANT RELIEF FROM PAST DISCRIMINATORY IMPACT AND TO REDUCE THE FEDERAL PRISON POPULATION.

Section 404(b) states that a district court “may” impose a reduced sentence.¹¹⁰ The use of “may” in a statute ordinarily confers discretionary authority on the subject.¹¹¹ When district courts are granted broad discretion by statute, the discretion is informed by congressional intent underscoring the grant of discretion.¹¹² When the Court considered a denial of backpay under Title VII, it explained that broad remedial discretion allows “fashion[ing] [of] the most complete relief possible” which should only be withheld if doing so would not generally frustrate legislative intent.¹¹³ Edwards & Elliott’s succinct summary of the Court’s view of broad remedial discretion in *Albemarle* is enlightening:

Looking to the overall scheme of Title VII, its legislative history, and analogous statutes, the Supreme Court rejected the defendants’ argument. It concluded that “[t]he power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions.” And the equitable nature of the remedial power did not excuse the district court from exercising it “in light of the large objectives of the Act.” “Congress’ purpose in vesting a variety of [remedial] discretionary powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the fashioning of the most complete relief possible.” “It follows,” the Court reasoned, “that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy

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

111. See *Lopez v. Davis*, 531 U.S. 230, 240 (2001) (construing Congress’ use of the term “may” in 18 U.S.C. § 3621(e)(2)(B) as granting the Bureau of Prisons discretion to determine early release).

112. HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW V.B* (3d ed. 2018) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)).

113. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

and making persons whole for injuries suffered through past discrimination.”¹¹⁴

Congress plainly granted discretionary authority to district courts by use of the term “may” in § 404(b), which is also supported by text in § 404(c): “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”¹¹⁵ Section 404 is remedial in character because it makes retroactive the FSA which itself recognized fundamentally unfair statutory penalties that long impacted African Americans.¹¹⁶ Furthermore, § 404 was not enacted as a free-floating statute, but rather it was included among the several provisions of the Act as a whole.¹¹⁷ Accordingly, § 404 motions should be assessed with an eye towards the larger objectives of the Act—namely, to reduce the federal prison population while promoting public safety.¹¹⁸ In construing § 404 and in exercising the grant of discretion, a district court must not frustrate the Act’s central purposes, but rather keep in mind the goal of “fashioning of the most complete relief possible”¹¹⁹ and the goal of reducing the federal prison population.¹²⁰

- B. “IMPOSE A ... SENTENCE” INDICATES THAT CONGRESS INTENDED DISTRICT COURTS TO FOLLOW THE FAMILIAR FRAMEWORK OF § 3553(A) TO DETERMINE WHETHER AND TO WHAT EXTENT TO GRANT A DEFENDANT’S § 404 MOTION.

Courts generally presume that Congress knows the law.¹²¹ When Congress changes the phraseology used in different statutes dealing in the same subject matter, the presumption is that the change signals change in intent.¹²² Congress’s disparate inclusion or exclusion of terms in closely related statutes is generally presumed to carry significance.¹²³ “Congress is not legislating on a blank slate, [so] the scope of the district court’s discretion must be defined against the backdrop of existing sentencing statutes.”¹²⁴ “Generally,

114. EDWARDS & ELLIOTT, *supra* note 112 (citations omitted).

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

116. *See* United States v. White, 984 F.3d 76, 89-90 (D.C. Cir. 2020).

117. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

118. JAMES, *supra* note 92.

119. EDWARDS & ELLIOTT, *supra* note 112.

120. JAMES, *supra* note 92.

121. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696-99 (1979).

122. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 578 U.S. 374, 398-99 (2015) (Thomas, J., concurring).

123. *See* Burlington N. Santa Fe Ry. v. Loos, 139 S. Ct. 893, 907 (2019) (Gorsuch, J., dissenting).

124. United States v. Easter, 975 F.3d 318, 324-25 (3d Cir. 2020) (quoting United States v. Rose, 379 F. Supp. 3d 223, 233 (S.D.N.Y. 2019)).

‘identical words used in different parts of the same statute are ... presumed to have the same meaning.’”¹²⁵

“Impose” a sentence appears repeatedly in the United States Code in the context of first sentencing a defendant.¹²⁶ Section 3553 governs the “[i]mposition of a sentence.”¹²⁷ Namely, “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with [federal sentencing purposes].”¹²⁸ A presentence investigation report is required before the “imposition of sentence.”¹²⁹ In discussing notifying victims, § 3555 states, “[t]he court, in imposing a sentence ..., may order, in addition to the sentence that is imposed”¹³⁰ Accordingly, § 404(b) contemplates procedure substantially similar to that defined in § 3553.

Furthermore, Congress used the verb “impose” twice in § 404(b) when Congress wrote, “[a] court that imposed a sentence” may “impose a reduced sentence.”¹³¹ When the court imposed the original sentence, the court would have been guided by § 3553.¹³² In particular, § 3553(a) sets forth the factors a district court must consider when imposing a sentence.¹³³ Furthermore, § 3582(a) provides that “[t]he court, in determining whether to impose a term of imprisonment, and, ... in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable”¹³⁴ Since Congress chose to use an identical term—namely “impose”—to describe both the original sentencing and the § 404 motion for resentencing, it should be presumed that “impose a ... sentence” carries substantially the same meaning in § 404 proceedings as under § 3553(a). It follows logically that the court should be guided at minimum by the factors set forth in § 3553(a).¹³⁵

On the other hand, it has been said that Congress’s use of the term “reduced” transforms the phrase “impose a reduced sentence”¹³⁶ into something more akin to modifying a sentence, rather than imposing a sentence.¹³⁷

125. *Robers v. United States*, 572 U.S. 639, 643 (2014) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006)).

126. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 211-12, 98 Stat. 1837, 1987-92.

127. 18 U.S.C. § 3553.

128. 18 U.S.C. § 3553(a).

129. 18 U.S.C. § 3552(a).

130. 18 U.S.C. § 3555.

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

132. 18 U.S.C. § 3553.

133. 18 U.S.C. § 3553(a).

134. 18 U.S.C. § 3582(a).

135. *See United States v. Easter*, 975 F.3d 318, 324-25 (3d Cir. 2020).

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

137. *See United States v. Hegwood*, 934 F.3d 414, 418-19 (5th Cir. 2019) (“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.”).

Although it is true that general federal sentencing procedures are different for imposing sentences compared to modifying sentences,¹³⁸ this proposition bears little significance to § 404. In the first instance, § 3482(c) states that a court “may not modify a term of imprisonment once it has been imposed” except in a few narrow instances.¹³⁹ Section 3482(c) does not say that a court may not “impose a reduced sentence,”¹⁴⁰ rather it does say the court “may not modify a term of imprisonment.”¹⁴¹ Since differing language in closely related statutes generally signifies alternate meaning,¹⁴² “imposed a reduced sentence”¹⁴³ as used in § 404(b) carries different meaning than “modify[ing] a term of imprisonment”¹⁴⁴ in § 3482(c).

In the second instance, in the phrase “impose a reduced sentence,”¹⁴⁵ “reduced” modifies the noun “sentence.” Thus, it is inappropriate to conclude that “reduced” modifies the verb “impose.” Rather, the appropriate inquiry is whether imposing a “reduced sentence” entails substantially similar or substantially different procedures as imposing a “sentence.” As noted above, Congress’s use of the term “impose” is telling because the presumption is that Congress intends identical words used in a statute to bear the same meaning.¹⁴⁶

Accordingly, the best interpretation of “reduced” is found by considering the whole of the phrase, “[a] court that imposed a sentence for a covered offense may ... impose a reduced sentence,”¹⁴⁷ and the legislative intent underscoring § 404 of the First Step Act. Section 404(b) defines both the defendant’s original sentencing and the defendant’s § 404 resentencing as the district court “impos[ing]” a sentence. Since the former “imposition” would have been guided by § 3553, the latter “imposition” should also be guided by § 3553. The term “reduced” means that the new sentence cannot be equal to or greater than the defendant’s current sentence. This interpretation aligns with the legislative intent of lowering the statutory floors against which crack cocaine defendants were originally sentenced in light of the evidence that the 100-to-1 racially disparate quantity ratio was unfounded even from its

138. Compare 18 U.S.C. § 3553 (“Imposition of a sentence”), and 18 U.S.C. § 3582(a) (“Imposition of a sentence of imprisonment”), with 18 U.S.C. § 3582(c) (“Modification of an imposed term of imprisonment”).

139. 18 U.S.C. § 3582(c).

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

141. 18 U.S.C. § 3582(c).

142. See *Burlington N. Santa Fe Ry. v. Loos*, 139 S. Ct. 893, 907 (2019) (Gorsuch, J., dissenting).

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

144. 18 U.S.C. § 3582(c).

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

146. *Robers v. United States*, 134 S. Ct. 1854, 1857 (2014) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503, 1513 (2006)).

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

inception.¹⁴⁸ Read in this manner, a district court “impose[s]” a sentence at the time of the § 404(b) motion following the general procedures outlined in § 3553(a) as the district court did at the defendant’s initial sentencing.

C. “IMPOS[ING] A ... SENTENCE” IN THE ORDINARY SENSE OF FEDERAL SENTENCING PROCEDURE COULD RESULT IN A LONGER SENTENCE FOR THE DEFENDANT; “REDUCED” BARS SUCH A RESULT.

Following enactment of the FSA, the Commission amended the Guidelines to reflect the FSA’s changes and then made the amendment retroactive.¹⁴⁹ A defendant could seek a reduced sentence if the amendment actually lowered the defendant’s Guidelines range.¹⁵⁰ Amendment 750 noted situations where the amendment would not lower a defendant’s Guidelines range (e.g., the offense involved 280-500 grams of crack or the defendant was classified as a career offender).¹⁵¹

Consider a hypothetical crack-cocaine offender—sentenced in 2005—who was not eligible for relief under Amendment 750—in 2010—but has filed a § 404 motion in 2021. His Guidelines range is the same in 2021 as it was in 2005. But now, his prison record reflects multiple infractions spanning sixteen years and no good marks for education, completion of recidivism programs, and the like.

No change in the hypothetical offender’s Guidelines range might suggest that his § 404 motion should be denied. His infractions in prison might suggest that the offender has not developed a respect for the law, and such lack of respect might suggest that he may be a danger to society.¹⁵² It is therefore conceivable that considered holistically, the hypothetical offender ought to serve a longer prison sentence to promote the factors set forth in § 3553(a)(2).

Congress’s inclusion of the term “reduced” in § 404(b) is a check on the district’s court broad discretion under “impos[ing] a ... sentence”¹⁵³ to bar such a result. To be clear, congressional intent underscoring § 404 is to retroactively “restore fairness to [f]ederal cocaine sentencing”¹⁵⁴ and to

148. See *Terry v. United States*, 141 S. Ct. 1858, 1864 n.1 (2021) (Sotomayor, J., concurring in part and concurring in the judgment) (generally discussing the not-so-benign history of the racially disparate 100-to-1 crack-to-powder cocaine sentencing ratio).

149. U.S. SENT’G COMM’N, FINAL CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT 2 (2014).

150. U.S. SENT’G GUIDELINES MANUAL § 1B1.10(B)(1) (U.S. SENT’G COMM’N 2021).

151. See U.S. SENT’G GUIDELINES MANUAL APP. C, Amendment 750, pt. A (U.S. SENT’G COMM’N 2021).

152. See 18 U.S.C. § 3553(a)(2) (outlining the purposes of federal sentencing).

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

154. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (applying the Fair Sentencing Act of 2010); Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (restoring fairness in federal cocaine sentencing).

decrease the federal prison population while promoting societal safety.¹⁵⁵ Re-sentencing defendants under § 404 to longer sentences would eviscerate congressional intent by making more unfair an already discredited sentencing scheme and keep offenders in prison.¹⁵⁶

Nevertheless, Congress was doubly explicit that such a result is unacceptable when it included the term, “reduced.” Thus, construing “reduced” in a manner to convert “impose a reduced sentence” into a more narrow “modification of a term of imprisonment” inquiry is erroneous. Accordingly, with regards to the term “reduced,” § 404(b) would carry the same meaning if it instead stated, “[a] court that imposed a sentence for a covered offense may ... impose a ... 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 [provided that the imposed sentence is not equal to or greater than the defendant’s current sentence].”

D. THE “AS IF” CLAUSE ABROGATES 1 U.S.C. § 109 FOR PURPOSES OF § 404 OF THE FIRST STEP ACT.

To date, no federal circuit court or district court has directly examined the relationship between § 404(b) of the Act and 1 U.S.C. § 109. It is curious though because the relationship between the FSA and 1 U.S.C. § 109 was examined in *Dorsey*.¹⁵⁷

Section 404(b) permits a district court to impose a 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.”¹⁵⁸ In *Dorsey*, the Court held that pre-FSA offenders who were sentenced after August 3, 2010, could reap the benefit of the new, respective statutory penalties.¹⁵⁹ The dissenting opinion in *Dorsey* took the position that pre-FSA crimes “incurred” the statutory penalties under the ADA, not the FSA, because 1 U.S.C. § 109 called for that result.¹⁶⁰ Section 109 provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or

155. JAMES, *supra* note 92.

156. It is also worth noting that imposing a longer sentence on a crack-offender for negative post-sentencing conduct may pose constitutional problems. Oral Argument of Justice Alito at 12:02-12:57, *Concepcion v. United States*, 142 S. Ct. 2389 (2022), <https://www.oyez.org/cases/2021/20-1650> [<https://perma.cc/HZ8N-MLKB>].

157. See *Dorsey v. United States*, 567 U.S. 260, 281 (2012) (5-to-4 decision).

158. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (citation omitted).

159. See *Dorsey*, 567 U.S. at 281.

160. See *Dorsey*, 567 U.S. at 288-89 (Scalia, J., dissenting) (Pre-Act offenders “incurred” the penalties of the 1986 Drug Act and the saving statute—1 U.S.C. § 109—directs that the 1986 Drug Act “shall be treated as still remaining in force.”).

liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.¹⁶¹

The most natural reading of the “as if” clause in § 404(b) is that the “as if” clause serves only to abrogate 1 U.S.C. § 109 for purposes of “covered offenses” as “covered offenses” are defined in § 404(a) of the First Step Act. In other words, the “as if” clause says that (1) when the ADAA was enacted, drug-related crimes involving crack cocaine “incurred” the statutory penalty outlined in the FSA, and (2) now the district court may impose a sentence accordingly.

Under this interpretation of the “as if” clause, a district court is acting in the now and looking prospectively with an eye towards congressional intent. This prospective view comports with ordinary understanding of the term “as if.” Congress did not define “as if,” and in such a situation, courts ordinarily interpret the term according to its plain, ordinary meaning.¹⁶² Definitions of “as if” include “as it would be if”¹⁶³ and “as the case would be if.”¹⁶⁴ The Oxford English Dictionary (OED) also provides two helpful examples of the use of “as if.” First, “[y]ou can lie as snug here as if you were in a moss-hole.”¹⁶⁵ Second, “[h]e laughed as if I had said something annihilatingly funny.”¹⁶⁶

In the first example, the noun/verb pair of “you can lie” indicates an action which the noun can take proceeding from this time forward given the “as if” counter fact of being in a moss-hole. In the second example, the noun/verb pair of “he laughed” indicates something that actually happened but perhaps only makes sense if the “as if” counter fact had been true at the time. In § 404(b), the noun/verb pair is “[the] court ... may ... impose” a sentence given some “as if” counter fact.¹⁶⁷ This coincides with the former OED example where the noun acts in some way in the present time proceeding forward. In other words, a § 404(b) proceeding properly asks what an eligible defendant’s sentence looks like from this point forward if

161. 1 U.S.C. § 109.

162. *See, e.g.,* Perrin v. United States, 444 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975)) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

163. *As if*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/as%20if> [https://perma.cc/9QTU-BFZ3].

164. *As if*, OXFORD ENG. DICTIONARY (3d ed. 2011).

165. *Id.*

166. *Id.*

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

defendant's violation of the "covered offense" "incurred" the statutory penalty set out in section 2 or section 3 of the FSA.

It has also been argued that the "as if" clause limits a district court to considering only the changes mandated by sections 2 and 3 of the FSA,¹⁶⁸ but a district court's limitations are set out in § 404(c). Since courts interpret statutes as a whole,¹⁶⁹ it is important to construe the "as if" clause in conjunction with the § 404(c) limitations. The first limitation is that no § 404 relief can be had "if the sentence was previously imposed or previously reduced" according to sections 2 and 3 of the FSA.¹⁷⁰ A sentence that was "previously imposed" refers to post-FSA crack offenses. While a sentence "previously reduced" refers to defendants who were able to and did take advantage of the Guidelines' retroactive amendment. Thus, the first limitation makes clear that a defendant seeking relief under § 404 must be serving a sentence impacted by the ADAA's crack penalty scheme. The latter limitation is more telling of why the "as if" clause does not limit a district court as envisioned by some circuit courts.

The latter limitation states that relief may not be had if a previous § 404 motion was "denied after a complete review of the motion on the merits."¹⁷¹ The statute contemplates a "complete review" of the "merits." Since it is generally presumed that material changes in phraseology carry alternate meaning,¹⁷² the "merits" of a defendant's § 404 motion encompass something more than sections 2 or 3 of the FSA. If it were, otherwise, Congress would have said so (e.g., by cross referencing § 1B1.10 of the Guidelines).¹⁷³ Furthermore, § 404 contemplates a "complete review" (i.e., a thorough, detailed

168. See *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) ("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."). *But see* Oral Argument of Justice Sotomayor at 22:53-24:15, *Concepcion v. United States*, 142 S. Ct. 2389 (2022), <https://www.oyez.org/cases/2021/20-1650> [<https://perma.cc/HZ8N-MLKB>] (implying that the "as if" clause being a limitation on the district court's discretion is incorrect and "feels illogical").

169. *United States v. Morton*, 467 U.S. 822, 828 (1984). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hosp. Assn. v. Bowen*, 485 U.S. 399, 403-05 (1988)).

170. First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222.

171. *Id.*

172. See *Russello v. United States*, 464 U.S. 16, 23 (2022).

173. Oral Argument of Justice Sotomayor at 22:53-23:32, *Concepcion v. United States*, 142 S. Ct. 2389 (2022), <https://www.oyez.org/cases/2021/20-1650> [<https://perma.cc/HZ8N-MLKB>] (recognizing that Congress explicitly limits a district court's discretion when it wants to).

analysis), rather than a mere mechanical substitution of one value for another.¹⁷⁴

Thus, the text of § 404(b) is properly interpreted as allowing specific federal felons—those having committed violations of 21 U.S.C. § 841(b)(1)(A) or § 841(b)(1)(B) involving crack cocaine—to ask the district court to impose a sentence that is commensurate with “today’s understanding of the lesser severity of [the felon’s] crime.”¹⁷⁵ The defendant’s Guidelines range amended to reflect the FSA’s changes might provide a sense of how society might have viewed the severity of the defendant’s crime(s) at the time. The defendant’s Guidelines range based upon the current Guidelines may reflect today’s view of the seriousness of defendant’s criminal conduct.¹⁷⁶ In deciding whether to grant the motion, the district court in turn considers the § 3553(a) factors as those factors are relevant to the defendant at the time of the § 404 motion.¹⁷⁷ Finally, based on that review, if the district court grants the defendant’s motion, the district court imposes a sentence “sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)].”¹⁷⁸

V. AN OVERVIEW OF THE THREE-WAY FEDERAL CIRCUIT SPLIT

The Circuit Courts of Appeals are divided on the scope of the district courts’ discretion in § 404 resentencing.¹⁷⁹ Most fundamentally, the circuit split centers on the question of whether a district court must calculate a defendant’s Guidelines range anew in a § 404 resentencing. More specifically, the key split is whether a defendant’s career-offender enhancement must, may, or may not be removed based on intervening caselaw that if applied today would remove the defendant’s career-offender status.

For purposes of this Comment, the three approaches to § 404 resentencing are loosely classified as the broad approach, the moderate approach, and the narrow approach. Under the broad approach, district courts are required

174. See *United States v. Brown*, 974 F.3d 1137, 1142 n.1 (10th Cir. 2020) (reasoning that discretion in choosing to grant relief at all suggests something more than a mere “mechanical substitution of one number for another”); *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (reasoning that to “modify” or “reduce” a sentence would suggest a mechanical application of the Fair Sentencing Act, but to “impose” a sentence does not).

175. See *Terry v. United States*, 141 S. Ct. 1858, 1865 (2021) (Sotomayor, J., concurring in part and concurring in the judgment).

176. *United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020)

177. *Id.* (reasoning that analyzing a § 404 motion via the familiar framework of § 3553(a) “makes good sense”).

178. See 18 U.S.C. § 3553(a).

179. *United States v. Murphy*, 998 F.3d 549, 561 (3d Cir. 2021) (Bibas, J., dissenting) (“We are late to the circuit split. All eleven other circuits have taken sides in a three-way conflict.”).

to recalculate a defendant's Guidelines range anew.¹⁸⁰ District courts following the moderate approach are permitted—but not required—to calculate the defendant's Guidelines range anew.¹⁸¹ In the narrow approach, district courts may only consider the impact of the changes made by sections 2 or 3 of the FSA in assessing whether to grant a defendant's § 404 motion for resentencing.¹⁸² Part V examines key reasoning the circuit courts have relied on to hold as they did. It is important to note at the outset that each approach suffers from flaw(s), and that this approach seeks to mitigate such flaw(s).

A. THE BROAD APPROACH TO § 404 RESENTENCING

Under the broad approach, district courts are required to calculate a defendant's Guidelines range anew, which might include removing a career-offender status if intervening caselaw—external to the FSA—would negate the career-offender status if applied at the time of the § 404 motion. These circuit courts rely heavily on two baseline considerations. First, Congress's use of “impose” in § 404(b). To “impose” a sentence carries a term-of-art meaning in federal sentencing, and when “imposing” a new sentence, district courts must consider the factors in § 3553(a) which includes a correct calculation of the defendant's applicable Guidelines range.¹⁸³ Second, a motion for sentence modification under § 3582(c)(2) is a limited remedy which permits district courts to consider only the effect of a retroactive Guidelines change on a defendant's Guidelines range and forbids considering any other changes.¹⁸⁴ The circuit courts following the broad approach recognize that § 404 motions are brought under § 3582(c)(1)(B) which permit sentence modifications otherwise expressly permitted by statute.¹⁸⁵ In other words, these

180. See *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020); *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020); *United States v. Brown*, 974 F.3d 1137 (10th Cir. 2020); *United States v. Murphy*, 998 F.3d 549 (3d Cir. 2021).

181. See *United States v. Harris*, 960 F.3d 1103 (8th Cir. 2020); *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020); *United States v. Moore*, 975 F.3d 84 (2d Cir. 2020); *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020); *United States v. Concepcion*, 991 F.3d 279 (1st Cir. 2021), *rev'd*, 142 S. Ct. 2389 (2022).

182. See *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019); *United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020); *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020).

183. See *Chambers*, 956 F.3d at 672 (relying on the Court's decision in *Gall*); *Brown*, 974 F.3d at 1144; *Murphy*, 998 F.3d at 556 (reasoning that “imposing a sentence” requires renewed consideration of the § 3553(a) which in turn requires an accurate calculation of the applicable Guidelines range). “[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Chambers*, 956 F.3d at 672 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

184. See *Dillon v. United States*, 560 U.S. 817 (2010).

185. See *Chambers*, 956 F.3d at 673 (explaining that the strictures of § 3582(c)(2) are irrelevant to § 404 resentencing); *Brown*, 974 F.3d at 1144 (holding that § 404 motions for resentencing are brought under § 3582(c)(1)(B)); *Murphy*, 998 F.3d at 558-59 (holding that motions under § 3582(c)(2) are grounded in the text of that statute which permit a very limited

circuit courts recognize that Congress excised § 404 resentencing from the strictures of § 3582(c)(2), hence district courts should not introduce those strictures on their own volition.

Beyond these two baseline considerations, the Fourth, Tenth, and Third Circuits diverge on when intervening caselaw can be applied to remove a defendant's career-offender status. In *Chambers*, the Fourth Circuit held that if intervening circuit caselaw had been declared retroactive, a defendant's Guidelines range calculated with the career-offender enhancement amounts to a typo.¹⁸⁶ Furthermore, district courts are not required to perpetuate Guidelines miscalculations that are mere typos.¹⁸⁷

The Tenth Circuit in *Brown* held that the applicable Guidelines in § 404 proceedings are those which were in effect at the time of the defendant's original sentencing.¹⁸⁸ Thus, intervening caselaw which was not otherwise retroactive could not be considered to remove a defendant's career-offender status.¹⁸⁹ But, if the intervening caselaw merely clarified what the law had always been rather than changing the law, a district court effectively erred at the original sentencing and is not required to err again.¹⁹⁰

In yet a third approach to applying intervening caselaw to remove a career-offender status, the Third Circuit in *Murphy* held that a district court must base its decision to grant or deny a defendant's § 404 motion on an accurate calculation of the defendant's Guidelines range at the time of the § 404 motion—which includes a correct determination of whether a defendant is a career offender.¹⁹¹ The Third Circuit expressly rejected the Fourth Circuit's approach of applying only retroactive caselaw because the § 3553(a) factors make no distinction between retroactive or non-retroactive changes in Guidelines calculations.¹⁹² Furthermore, *Murphy* rejected the Tenth Circuit's distinction of intervening caselaw clarifying what the law always was rather than changing the law.¹⁹³ The intervening caselaw in *Murphy* had changed the law, not clarified it.¹⁹⁴ The Third Circuit nevertheless held that the district court was obligated to reconsider *Murphy*'s career-offender enhancement.¹⁹⁵

The foregoing synopsis summarizes that even among the circuit courts following a broader approach, § 404 motions for resentencing brought by

sentence modification; but § 404 motions are brought under § 35282(c)(1)(B) which contains no such textual limitations).

186. *Chambers*, 956 F.3d at 674.

187. *Id.*

188. *Brown*, 974 F.3d at 1144.

189. *Id.*

190. *See id.* at 1145.

191. *See United States v. Murphy*, 998 F.3d 549, 557 (3d Cir. 2021).

192. *See Murphy*, 998 F.3d at 549 n.7.

193. *Id.*

194. *Id.*

195. *Murphy*, 998 F.3d at 560.

similarly situated crack-cocaine offenders—those who were originally classified as career offenders—are subject to review under differing procedure. The Sentencing Reform Act recognized that similarly situated defendants were subject to vastly different sentences for similar conduct in part because the federal courts viewed the defendants’ records through the lens of varying procedure.¹⁹⁶ It was these unwarranted disparities which the Sentencing Reform Act sought to eliminate.¹⁹⁷ It strains credulity to suppose that § 404 of the First Step Act ought to apply via differing procedure when federal sentencing underwent reform in the 1980s with express intent to eliminate this reality.

Furthermore, § 404(c) expressly provides, “[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”¹⁹⁸ District courts are not required to impose a reduced sentence.¹⁹⁹ Yet, for example, erroneous application of a career-offender enhancement can have the impact of increasing a defendant’s Guidelines range four times over.²⁰⁰ Consider Murphy’s situation in this context. In 2009, Murphy’s Guidelines calculation accounted for 595 grams of crack cocaine and a career-offender enhancement, resulting in a recommended sentencing range of 360 months to life.²⁰¹ When Murphy moved for relief under § 404 in 2019, Murphy’s recommended Guidelines range was recalculated incorporating the FSA’s changes, the 595 grams of crack, and the career-offender enhancement, resulting in a new recommended range of 262-327 months.²⁰² Murphy argued that intervening caselaw removed his Maryland second-degree assault convictions as predicates for the career-offender status.²⁰³ Accordingly, without the career-offender enhancement, Murphy’s recommended sentencing range would be 168-210 months.²⁰⁴ The difference between 360 months and 210 months is 150 months (approximately 12.5 years). The 262- and 210-month difference is 52 months (approximately 4.3 years).

If district courts must remove a career-offender enhancement based on any intervening caselaw (as the Third Circuit in *Murphy* held) and can still deny relief, the net effect is that the district court imposes a sentence substantially higher than recommended by the Guidelines. Such a result could of itself amount to a finding that the sentence is substantively unfair, which is

196. See *supra* notes 24-25 and accompanying text.

197. *Id.*

198. First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222.

199. *Id.*

200. See *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020).

201. *United States v. Murphy*, 998 F.3d 549, 552 (3d Cir. 2021).

202. *Id.* at 553.

203. *Id.*

204. *Id.* at 560.

reversible on appeal.²⁰⁵ In other words, this approach can have the effect of turning the “may” impose a reduced sentence into “must” impose a reduced sentence. This is contrary to § 404(c)’s plain text.

These problems are alleviated by this approach. There, the district court determines both the Guidelines range with only the changes mandated by the FSA and obtains a supplemental presentence investigation report indicating the defendant’s Guidelines range if the defendant were sentenced today. These two Guidelines ranges are then factors that must be considered under § 3553(a)’s framework. The former Guidelines range provides a sense of society’s view of the defendant’s conduct at the time of original sentencing, updated to reflect the 18-to-1 quantity ratio; while the latter Guidelines range may reflect how society’s views of the defendant’s conduct have changed holistically over time—if at all.²⁰⁶ In this way, the district court’s refusal to remove Murphy’s career-offender enhancement is not an error (or abuse of discretion) per se. Rather, the effect of the removal must be given thorough consideration and if relief is to be denied, the district court must be required to explain why an approximate 12.5-year difference (or an approximate 4.3-year difference) nevertheless does not warrant relief. In other words, these considerations are paramount to determining what sentence is “sufficient, but not greater than necessary.”²⁰⁷

This approach is consistent with *Albemarle*. Recall that remedial discretion is not meant to “invite inconsistency and caprice.”²⁰⁸ Its purpose is to make possible the “fashion[ing] [of] the most complete relief possible” to the advancement of the large objectives of the act granting the discretion.²⁰⁹ Here, upon a proper motion, § 404 opens the door to district courts to take a second look at qualified federal sentences that are likely to be inordinately long due to a fundamentally unfair, now rescinded statutory scheme, partly in recognition of past discriminatory impact and partly in light of the Act’s goals of reducing the federal prison population. Even if district courts are not required to apply a 12.5-year difference (or even a 4.3-year difference), the mere fact that such a difference would apply in *de novo* sentencing is strong evidence that relief should be granted because it speaks to “the circumstances of the particular case,”²¹⁰ namely, “the nature and circumstances of the

205. See *United States v. Brown*, 974 F.3d 1137, 1145 (10th Cir. 2020) (stating that “[a] correct Guideline range calculation is paramount”).

206. See *United States v. Shaw*, 957 F.3d 734, 742 (7th Cir. 2020) (“[T]oday’s Guidelines may reflect updated views about the seriousness of a defendant’s offense or criminal history.”).

207. See 18 U.S.C. § 3553(a).

208. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)

209. *Id.*

210. See *Shaw*, 957 F.3d at 740 (recognizing that the district court originally downwardly departed from the defendant’s Guidelines range because the career-offender status “overrepresented the seriousness of [Robinson’s] criminal history”).

offense.”²¹¹ Accordingly, Guidelines range differences such as in *Murphy* should be factors that district courts are required to consider under § 3553(a) in § 404 proceedings.

B. THE MODERATE APPROACH TO § 404 RESENTENCING

District courts are not obligated by § 404 to recalculate an eligible defendant’s Guidelines range except to include sections 2 or 3 of the FSA,²¹² however, district courts retain wide discretion in determining which factors are relevant to granting (and to what extent to grant) a defendant’s § 404 resentencing motion, including post-sentencing developments.²¹³ The Second Circuit in *Moore* reasoned that the “as if” clause of § 404(b) instructs a district court to “take into account Guidelines range changes that result directly from the retroactive application of Sections 2 and 3 [of the Fair Sentencing Act].”²¹⁴ *Moore* rejected the contention that “impose a reduced sentence” requires calculating a defendant’s Guidelines range *de novo* because that interpretation reads “impose” in isolation without taking account of the “as if” clause.²¹⁵ *Moore* further reasoned that requiring district courts to consider legal changes not mandated by the “as if” clause would amount to *de facto* plenary resentencing, but rejected this contention because § 404—a procedural vehicle—should not be read to require revisiting all aspects of an otherwise final federal sentence.²¹⁶

Moore is not persuasive for three primary reasons. First, permitting district courts to consider post-sentencing developments not mandated by the “as if” clause effectively amounts to permitting review of defendants’ § 404 motions through the lens of different procedure depending upon whether the district court chooses to consider such developments or not. It follows logically that if different procedure is followed by different district courts, then similarly situated defendants might be subject to unwarranted disparate sentences.²¹⁷ This is the very result—unwarranted disparate federal sentences for similarly situated defendants—that the Sentencing Reform Act of 1984 sought to eliminate.²¹⁸ As a general proposition, statutes should be interpreted such that they function as a harmonious whole.²¹⁹ Thus, district courts should

211. 18 U.S.C. § 3553(a)(1); 18 U.S.C. § 3553 (a)(2)(A).

212. *See* United States v. Moore, 975 F.3d 84, 92 (2d Cir. 2020).

213. *Id.* at 92 n.36.

214. *Id.* at 90-91.

215. *Id.* at 91.

216. *Id.* at 92.

217. *See supra* notes 24-25 and accompanying text.

218. *Id.*

219. *See* United States v. Brown, 974 F.3d 1137, 1143 (10th Cir. 2020); *id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts are obligated to “interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a [] harmonious whole”).

be mandated to follow a consistent procedure consistent within the text of § 404.

Second, *Moore*'s conclusion that “impose a reduced sentence” requires *de novo* Guidelines calculation erroneously reads “impose” in isolation suffers the inverse flaw—that conclusion reads the “as if” clause in isolation without giving due consideration to the term of art meaning of “impose” in the federal sentencing context. “Impos[ing]” a sentence is a multifaceted process which takes into account—among other things—statutory minimum and maximum,²²⁰ the history and characteristics of the defendant,²²¹ the accurately calculated Guidelines range²²² as of the date of sentencing,²²³ and pertinent policy statements.²²⁴ Congress used a term of art—namely, impose—which should be interpreted to import the legal meaning of that federal sentencing term of art.²²⁵ Federal defendants incur the statutory minimum and maximum in effect at the time the offense was committed.²²⁶ The “as if” clause can be interpreted to abrogate 1 U.S.C. § 109 for purposes of § 404 resentencing while leaving intact all other facets of “imposing” a sentence.²²⁷

Third, *Moore*'s conclusion that a *de novo* Guidelines calculation amounts to plenary resentencing is a “false dichotomy.”²²⁸ In a plenary resentencing, the defendant could relitigate substantive factual issues (e.g., the amount of crack cocaine attributed to the defendant).²²⁹ A mere recalculation of the defendant's Guidelines range would only need to utilize the current version of the Guidelines to examine the impact of the substantive factual issues on a defendant's Guidelines range.²³⁰

While *Moore*'s reasoning suffers significant flaws, the reasoning of the Seventh and D.C. Circuits come close to the approach advocated here. The Seventh Circuit in *Hudson* stated that:

the First Step Act authorizes a court to consider a range of factors to determine whether a sentence imposed is sufficient, but not greater than necessary, to fulfill the purposes of § 3553(a). These include new statutory minimum or maximum penalties; current

220. 18 U.S.C. § 3553(a)(4).

221. 18 U.S.C. § 3553(a)(1).

222. *See Brown*, 974 F.3d at 1145 (stating that “[a] correct Guideline range calculation is paramount”).

223. 18 U.S.C. § 3553(a)(4)(A)(ii).

224. 18 U.S.C. § 3553(a)(5).

225. *See United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020).

226. *See* 1 U.S.C. § 109.

227. *See* Oral Argument at 17:34-19:32, *Concepcion v. United States*, 142 S. Ct. 2389 (2022), <https://www.oyez.org/cases/2021/20-1650> [<https://perma.cc/HZ8N-MLKB>].

228. *See United States v. Murphy*, 998 F.3d 549, 559 (3d Cir. 2021).

229. *Id.* at 559-60.

230. *See id.*

Guidelines; post-sentencing conduct; and other relevant information about a defendant's history and conduct.²³¹

Hudson's tethering of § 404 motions for resentencing to § 3553(a) is consistent with Congress's use of "imposed a reduced sentence"²³² in the First Step Act because § 3553 is the statute discussing "imposition of a sentence."²³³

However, *Hudson* declined to mandate a particular set of procedures and only noted relevant factors a district court could consider in effectuating the purposes of § 3553(a).²³⁴ *Hudson's* permissive language is inconsistent with § 3553 which states that, "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . ." ²³⁵ Section 3553(a) requires district courts to consider the factors *Hudson* endorses through the use of the term "shall."²³⁶ *Hudson* also noted that considering § 404 motions via the familiar framework of § 3553(a) "makes good sense."²³⁷ It then follows logically that district courts should be required to follow § 3553(a)'s familiar framework, and not merely permitted to, in order to maintain consistency in reviewing § 404 resentencing motions. This would of course include renewed calculations of the defendant's applicable Guidelines ranges.²³⁸

The D.C. Circuit found *Hudson* persuasive and strongly agreed with its conclusion that a district court may consider a range of factors in assessing a defendant's § 404 motion for resentencing.²³⁹ The *White* court reasoned that § 404(a) is clear when relief is permitted, but §§ 404(b)-(c) are unclear as to when the district court should grant relief.²⁴⁰ This uncertainty leaves the district courts with broad discretion to assess § 404 motions, but that discretion should be guided by sound legal principles.²⁴¹ Congress determined that defendants eligible for relief under § 404(a) were likely victims of discriminatory treatment.²⁴² Thus, "[t]he First Step Act 'make[s] possible the

231. *United States v. Hudson*, 967 F.3d 605, 609 (7th Cir. 2020).

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

233. 18 U.S.C. § 3553 ("Imposition of a sentence").

234. *Hudson*, 967 F.3d at 612.

235. 18 U.S.C. § 3553(a) (emphasis added).

236. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 871 (2018) (Breyer, J., dissenting) (discussing that "shall" signals action that is mandatory; "may" confers discretionary action).

237. *Hudson*, 967 F.3d at 612.

238. *See United States v. Brown*, 974 F.3d 1137, 1145 (10th Cir. 2020) (stating that "[a] correct Guideline range calculation is paramount"); 18 U.S.C. § 3553(a)(4).

239. *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020)

240. *Id.* at 88.

241. *Id.*

242. *Id.*

fashion[ing] [of] the most complete relief possible.”²⁴³ *White* falls just short of the text of § 404 in that *White* heavily relied on the Seventh Circuit’s permissive language, which as discussed above, is inconsistent with § 3553(a). District courts should be required to consider the factors *White* and *Hudson* endorse, not merely permitted to consider them.

Finally, the First Circuit adopted a bifurcated approach.²⁴⁴ There, a district court first determines a defendant’s Guidelines range by placing itself in the time frame of the original sentencing and making only the change mandated by sections 2 or 3 of the FSA.²⁴⁵ If this determination reveals that the defendant’s Guidelines range is unchanged, the motion for relief must be denied.²⁴⁶ But, if the Guidelines range is lowered, then a district court may, but need not, consider other relevant factors under § 3553.²⁴⁷

The First Circuit’s approach in *Concepcion* suffers two principal problems. First, it creates an “availability” step where relief is available if the changes made by sections 2 or 3 of the FSA actually lowered a defendant’s Guidelines range. But, such an “availability” requirement is a limitation on motions for sentence modifications under § 3582(c)(2) via § 1B1.10 of the Guidelines.²⁴⁸ Congress excised resentencing proceedings pursuant to § 404 from § 3582(c)(2) altogether²⁴⁹ and included no language in § 404 to import the strictures of § 3582(c)(2).²⁵⁰ In essence, *Concepcion* created an “availability” requirement which Congress intentionally removed because Amendment 750 of the Guidelines excluded, for example, career offenders. Second, that a district court may, but need not, examine relevant § 3553 factors creates a situation where § 404 motions are viewed through the lens of different procedure. There is nothing discernible in the First Circuit’s opinion in *Concepcion* to justify why one district court should consider § 3553 factors while another need not. This approach ameliorates this problem because it requires renewed consideration of the § 3553(a) factors but leaves to the district courts the discretionary determination of the weight of those factors on whether to, and what extent to, grant the § 404 motion for a reduced sentence.

C. THE NARROW APPROACH TO § 404 RESENTENCING

Under the narrow approach, districts courts time travel to the date of the original sentencing, change the legal landscape according to the mandate of

243. *Id.* at 90 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

244. *See* *United States v. Concepcion*, 991 F.3d 279, 289 (1st Cir. 2021), *rev’d*, 142 S. Ct. 2389 (2022).

245. *Id.*

246. *Id.*

247. *Id.* at 289-90.

248. *Id.* at 291.

249. *See* *United States v. Concepcion*, 991 F.3d 279, 291 (1st Cir. 2021), *rev’d*, 142 S. Ct. 2389 (2022).

250. *See* *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020).

sections 2 or 3 of the FSA only, and calculate the defendant's Guidelines range accordingly.²⁵¹ These circuit courts rely heavily on the "as if" clause. First, in applying the canon of *expressio unius*, the Fifth Circuit in *Hegwood* reasoned:

The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 — saying the new sentencing will be conducted "as if" those two sections were in effect "at the time the covered offense was committed" — supports 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.²⁵²

The "as if" clause, however, backdates the statutory penalties in the FSA to the time the covered offense was committed, but the Guidelines used at an original sentencing are never the Guidelines in effect when the offense was committed.²⁵³ Accordingly, the "as if" clause says nothing of which Guidelines are to be used in a § 404 resentencing. Thus, the "as if" clause is better interpreted in the context of 1 U.S.C. § 109—that is, the "as if" clause says that the covered offense "incurred" the statutory penalty set forth in the FSA, and now the district may impose a sentence accordingly.

In *Kelley*, the Ninth Circuit concluded that the "as if" clause is "limiting language" which restricts a district court to consider only the counterfactual situation set out in the "as if" clause.²⁵⁴ It does not. As noted above, the "as if" clause changes the statutory penalties "incurred" by the offense and says nothing of the other facets of federal sentencing. Additionally, the limitations on § 404 resentencing are set out in § 404(c). There, a district court may not impose a reduced sentence "if a previous motion ... was ... denied after a complete review of the motion on the merits."²⁵⁵ Material changes in phraseology are presumed to carry significance.²⁵⁶ If the "merits" of a § 404 resentencing include only the changes mandated by sections 2 or 3 of the FSA, Congress surely would not have altered the statutory language between § 404(b) and (c).

251. See *United States v. Hegwood*, 934 F.3d 414, 418-19 (5th Cir. 2019); *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020).

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

253. 18 U.S.C. § 3553(a)(4)(A)(ii) ("the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that ... are in effect on the date the defendant is sentenced").

254. *Kelley*, 962 F.3d at 476.

255. First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222.

256. See *Russello v. United States*, 464 U.S. 16, 23 (2022).

It is worth noting here that *Hegwood* and *Kelley* would apply the Guidelines in effect at the time of the offense but doing so would only partially relieve the defendant of the racially disparate 100-to-1 quantity ratio.²⁵⁷ This is so because Drug Quantity Tables of pre-FSA Guidelines recommended offense levels commensurate with the statutory penalty under the 100-to-1 quantity ratio.²⁵⁸ Thus, applying those Guidelines would impart, at least partially, remnants of the 100-to-1 quantity ratio. This is error because the FSA sought to eliminate the effect of the racially disparate 100-to-1 quantity ratio on crack cocaine offenders' sentences.²⁵⁹

VI. CONCLUSION

Wendell Johnson moved for a reduced sentence under § 404.²⁶⁰ The district court granted Johnson's motion and imposed a sentence of 215 months, an eighty-five month (or about seven years) lower sentence.²⁶¹ The court's opinion illustrates this approach. Part IV set out this approach as: (1) determining the defendant's amended Guidelines range, making only the change(s) mandated by section 2 or 3 of the FSA; (2) determining the defendant's Guidelines range under the Guidelines in effect at the time of the § 404 motion; (3) gathering any other relevant information pertinent to assessing the factors set forth in § 3553(a); (4) exercising discretion in weighing the items under steps 1-3 with the goal of imposing a sentence that is "sufficient, but not greater than necessary" to comply with the federal sentencing purposes set out in § 3553(a)(2) with an eye towards fashioning the most complete relief possible in light of § 404's remedial character.

In making only the change(s) mandated by section 2 or 3 of the FSA (step 1 of this approach), the government argued that Johnson's Guidelines

257. See *Hegwood*, 934 F.3d at 418-19; *Kelley*, 962 F.3d at 475.

258. See *Dorsey v. United States*, 567 U.S. 260, 265-66 (2012). The Guidelines include a Drug Quantity Table which provides base offense levels based on the type and quantity of drug attributed to the defendant. See *id.* The Commission incorporated the statutory penalties (i.e., the 100-to-1 ratio) of the 1986 Drug Act into the Drug Quantity Table. *Id.* at 267. First, the Commission assigned base offense levels which corresponded to the lowest Guidelines range above the statutory minimum for the crack cocaine quantities which triggered the respective statutory minimums. *Id.* Then, the Commission extrapolated out so that smaller crack cocaine quantities were proportionate to the amount of crack cocaine which did trigger the respective statutory minimum. *Id.* Thus, if district courts use the Guidelines in effect at the time of the defendant's original sentencing, the 100-to-1 ratio plays an implicit role because those Drug Quantity Tables were created by incorporating the now rescinded ratio. This result is in stark contrast to the intent—eradicating the racially disparate 100-to-1 ratio—of the 2010 Fair Sentencing Act, made retroactive by § 404 of the First Step Act.

259. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372.

260. *United States v. Johnson*, No. 7:04-CR-128-1, 2020 WL 2563541, at *1 (W.D. Va. May 19, 2020).

261. *Id.*

range was unaffected: it was still 262-327 months.²⁶² Relying on intervening caselaw, Johnson argued that his conspiracy conviction under Count One no longer qualified for a career-offender status.²⁶³ Therefore, under the Guidelines in effect at the time of his § 404 motion (step 2 of this approach), Johnson argued his new Guidelines range was 188-235 months.²⁶⁴ Relying on the Fourth Circuit's decision in *Chambers*,²⁶⁵ the district court noted that *Norman* had not been made retroactive and declined to remove Johnson's career-offender status on Count One, thus leaving Johnson's Guidelines range at 262-327 months.²⁶⁶

In gathering any other relevant information pertinent to assessing the factors set forth in § 3553(a) (step 3 of this approach), the district court turned first to the nature and circumstances of the offense.²⁶⁷ The district court noted that Johnson would not be a career offender on Count One if sentenced today and could consider the impact of this on Johnson's sentence even though his Guidelines range was unchanged.²⁶⁸ Turning next to Johnson's history and characteristics, the district court noted several post-sentencing facts reflecting positively on Johnson: earning his GED and an associate's degree, taking several courses offered by the Bureau of Prisons and receiving several certifications, and no disciplinary infractions in thirteen years.²⁶⁹ Furthermore, Johnson was forty-eight years old at the time of his § 404 motion with a plan for release involving reuniting with his family, including his father, sister, children, and the mother of his children.²⁷⁰ In concluding this portion of Johnson's motion, the district court stated that these facts weigh in favor of granting Johnson's motion.²⁷¹

The district court next considered the principal goal of federal sentencing: to impose a sentence "sufficient, but not greater than necessary"²⁷² to comply with purposes set forth in § 3553(a)(2).²⁷³ The § 404 court noted that at Johnson's original sentencing, the sentencing court had recited Johnson's long criminal history culminating in his serious drug offense in 2005 and sentenced Johnson to 300 months over the government's recommendation of

262. *Id.* at *5.

263. *Id.*

264. *Id.*

265. *See* United States v. Chambers, 956 F.3d 667, 674 (4th Cir. 2020) (concluding that retroactive caselaw that would remove a defendant's career-offender applies in § 404 resentencing).

266. United States v. Johnson, No. 7:04-CR-128-1, 2020 WL 2563541, at *5 (W.D. Va. May 19, 2020).

267. *Id.* at *6.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Johnson*, 2020 WL 2563541, at *6.

272. 18 U.S.C. § 3553(a).

273. *See Johnson*, 2020 WL 2563541, at *7.

262 months. Even so, the § 404 court reasoned that fifteen years have passed and Johnson’s lack of disciplinary infractions and his academic achievements—putting him in a better position to earn a living—show that Johnson has learned to respect the rules.²⁷⁴ Accordingly, Johnson’s behavior and achievements in the last fifteen years show that he is not the threat to the public that he once was.²⁷⁵

Lastly, the district court looked at the kinds of sentences available.²⁷⁶ In 2005, Johnson’s 300-month sentence was based primarily on his powder cocaine offenses, but the FSA did not modify the statutory penalty for powder cocaine offenses.²⁷⁷ Relying on *Dean*,²⁷⁸ the district court determined it could modify Johnson’s aggregate sentence based on his powder cocaine convictions.²⁷⁹

While Johnson’s Guidelines range remained 262-327 months, the district court concluded that a sentence below the Guidelines range was warranted.²⁸⁰ Johnson’s original sentence of three hundred months was 91 percent of the high end of the Guidelines range at that time.²⁸¹ If Johnson were sentenced today, his Guidelines range would be 188-235 months.²⁸² The district court imposed a sentence of 215 months because that length was 91 percent of the high end of the range.²⁸³

Johnson’s § 404 motion was considered by District Judge Michael Urbanski of the United States District Court for the Western District of Virginia.²⁸⁴ While Judge Urbanski did not consider the motion under the framework advocated for here, Judge Urbanski’s opinion is nevertheless demonstrative of what this approach envisions. The Government updated Johnson’s Guidelines range to reflect the FSA’s changes, resulting in 262-327

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Dean v. United States*, 581 U.S. 62 (2017). “Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence.” *Id.* at 67. (citing *Pepper v. United States*, 562 U.S. 476, 487-89 (2011)). “The § 3553(a) factors are used to set both the length of separate prison terms and an aggregate prison term comprising separate sentences for multiple counts of conviction.” *Id.* “[A] court imposing a sentence on one count of conviction [is permitted] to consider sentences imposed on other counts.” *Id.*

279. *Johnson*, 2020 WL 2563541, at *7.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Johnson*, 2020 WL 2563541, at *7.

284. *United States v. Johnson*, No. 7:04-CR-128-1, 2020 WL 2563541 (W.D. Va. May 19, 2020). The United States Court of Appeals for the Fourth Circuit has jurisdiction over district courts in West Virginia, Virginia, North Carolina, and South Carolina. *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, UNITED STATES COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [<https://perma.cc/UTS5-DFYJ>].

months.²⁸⁵ Whereas Johnson argued that sans career-offender status, his Guidelines range would be 188-235 months.²⁸⁶ Although Judge Urbanski applied the range of 262-327 months, Judge Urbanski notably recognized that he could consider the effect of removing Johnson's career offender status when assessing the § 3553(a) factors because that effect is pertinent to the nature and circumstances of the offense.²⁸⁷ Judge Urbanski also considered other relevant facts that spoke to Johnson's history and characteristics, including his education in prison and lack of disciplinary infractions for most of his incarceration.²⁸⁸ Weighing these factors holistically as the district court must do pursuant to § 3553(a), Judge Urbanski departed downwards from Johnson's Guidelines range, imposing a sentence of 215 months.²⁸⁹

The bottom line: § 404 singles out a specific subclass of federal felons—crack cocaine offenders who themselves were victims to a harsh, discriminatory statutory penalty scheme—and permits district courts to take a second look at their sentences. The overarching goal of federal sentencing at the time of the defendant's original sentencing, which remains true today, is to impose a sentence “sufficient, but not greater than necessary” to comply with federal sentencing purposes.²⁹⁰ This is no small matter. Congress has already prescribed the factors that a district court must consider in making that determination.²⁹¹ District courts should be required to seize all the aid § 3553 can give. In so doing, the district court's endeavor to impose a sentence “sufficient, but not greater than necessary”²⁹² would consequently serve the purposes of the FSA and the Act—namely, to atone for inordinately long federal drug sentences that long impacted African Americans and to reduce the federal prison population.

ADDENDUM

While this Comment was pending publication, the Supreme Court considered “whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion.”²⁹³ A five-justice majority, in an opinion authored by Justice Sonia Sotomayor, answered—yes.²⁹⁴ In reaching this

285. *Johnson*, 2020 WL 2563541, at *5.

286. *Id.*

287. *Id.* at *5-*6.

288. *Id.* at *6.

289. *Id.* at *7.

290. 18 U.S.C. § 3553(a).

291. *Id.*

292. *Id.*

293. *Concepcion v. United States*, 142 S. Ct. 2389, 2396 (2022).

294. *Id.* (“The Court holds that they may.”).

conclusion, the Court did not engage in any appreciable statutory construction. Indeed, the Court breezed past several important conclusions: (1) that § 404 includes only two limitations²⁹⁵ and neither limits the arguments district courts can consider,²⁹⁶ (2) the “as if” clause effectuates the goal of making the FSA retroactive,²⁹⁷ thus getting around 1 U.S.C. § 109,²⁹⁸ and (3) that district courts are required to consider legal and factual developments as of the § 404 motion because Congress backdated the FSA to the time the offense was committed rather than the time of the original sentencing.²⁹⁹ The Court held that “the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act.”³⁰⁰ District courts need not be persuaded by the parties’ arguments³⁰¹ and may dismiss unpersuasive arguments without significant explanation³⁰²: “All that is required is for a district court to demonstrate that it has considered the arguments before it.”³⁰³

Notably, there is no mention of 18 U.S.C. § 3553(a) in the preceding paragraph, due exclusively to the fact that that section of the United States Code appears nowhere in the majority opinion, save for the reference to § 3553(a) in modification proceedings under § 3582(c)(2).³⁰⁴ Why no mention is surprising. After all, § 3553(a) governs the procedure a district court must follow to “impose a sentence”³⁰⁵ and § 404(b) permits a district court to “impose a . . . sentence.”³⁰⁶ For purposes of a § 404 motion to consider imposing a reduced sentence, it “makes good sense” that a district court should follow the familiar framework of § 3553(a).³⁰⁷ Time will tell whether the Court’s lack of expressly linking § 404 proceedings to the mandates of § 3553(a), as advocated for here, will permit a continued lack of ordered procedure in adjudicating § 404 motions.

The dissent, in an opinion authored by Justice Brett Kavanaugh, intimated as much:

295. *Id.* at 2401; *see* discussion *supra* Section IV.D with notes 152-58.
 296. *Id.* at 2402; *see* discussion *supra* Section IV.D with notes 152-58.
 297. *Concepcion*, 142 S. Ct. at 2402; *see* discussion *supra* Section IV.D with notes 141-46.
 298. *Id.*; *see* discussion *supra* Section IV.D with notes 141-46.
 299. *Id.*
 300. *Id.* at 2404.
 301. *Id.*
 302. *Concepcion*, 142 S. Ct. at 2404.
 303. *Id.* at 2405.
 304. *Id.* at 2401.
 305. 18 U.S.C. § 3553(a). “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider” *Id.*
 306. *Concepcion*, 142 S. Ct. at 2401.
 307. *United States v. Shaw*, 957 F.3d 734, 741-42 (7th Cir. 2020) (reasoning that following § 3553(a)’s familiar framework “makes good sense”); *United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020).

To be sure, the Court properly notes that district courts must begin a First Step Act proceeding by calculating the new Guidelines range based solely on the changes to the crack-cocaine sentencing ranges. ... But district courts then have free rein either to take into account—or to completely disregard—other intervening changes since the original sentencing.³⁰⁸

Unlike the dissent, however, the Court was correct in rejecting the narrow approach adopted by the Fifth Circuit in *Hegwood*³⁰⁹ for the reasons based on statutory construction set forth in Part IV.³¹⁰ More interestingly though, the majority only briefly addresses some of the dissent's concerns in footnotes.³¹¹ A few additional words bear mentioning.

Notably, the dissent postulated that “significant and inexplicable sentencing inequities” will ensue.³¹² It pointed out in particular that crack-cocaine offenders sentenced after August 3, 2010, but before the career-offender guideline was changed cannot take advantage of the non-retroactive career-offender guideline change, but § 404 eligible crack-cocaine offenders can.³¹³ This, according to Justice Kavanaugh, gives pre-FSA crack offenders a “haphazard windfall.”³¹⁴ This postulate is significantly flawed.

Take, for example, Wendell Johnson's situation.³¹⁵ Johnson argued that by removing his career-offender status, his new Guidelines range was 188-235 months, whereas the government argued it was 262-327 months by making only the relevant FSA changes.³¹⁶ The district court refused to apply the 188-235-month Guidelines range,³¹⁷ but nevertheless reasoned that the fact that Johnson would not be a career-offender today was relevant to “the nature and circumstances of the offense”³¹⁸ that it could consider in deciding whether to impose a reduced sentence.³¹⁹ Contrary to Justice Kavanaugh's

308. *Concepcion*, 142 S. Ct. at 2407 (Kavanaugh, J., dissenting) (citation omitted).

309. *Concepcion*, 142 S. Ct. at 2406 (Kavanaugh, J., dissenting); *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019).

310. *See supra* notes 101-62 and accompanying text.

311. *Concepcion*, 142 S. Ct. at 2398 n.3, 2401 n.4, 2402 n.5, 2403 n.7, 2403 n.8.

312. *Concepcion*, 142 S. Ct. at 2406 (Kavanaugh, J. dissenting).

313. *Id.* (Kavanaugh, J., dissenting).

314. *Id.* (Kavanaugh, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Lancaster*, 997 F.3d 171, 180 (4th Cir. 2021) (Wilkinson, J., concurring in judgment)).

315. *United States v. Johnson*, No. 7:04-CR-128-1, 2020 WL 2563541 (W.D. Va. May 19, 2020).

316. *Id.* at *5.

317. *Id.*

318. 18 U.S.C. § 3553(a)(1).

319. *Johnson*, 2020 WL 2563541, at *6.

postulate, the district court did not “make the 2016 amendment to the career-offender guideline retroactive [absent consent of Congress or the Sentencing Commission],”³²⁰ but rather considered it among the § 3553(a) factors in deciding what sentence was “sufficient, but not greater than necessary.”³²¹

Critically, the district court was able to consider the impact of the career-offender guideline change because Wendell Johnson had a jurisdictional hook to get him into court.³²² It follows then that district courts can consider the impact of the career-offender guideline change for any crack offender (or any federal defendant) who is serving a sentence as a career offender and who has a jurisdictional hook to petition the district court to reconsider the sentence. Justice Kavanaugh’s issue on this score is one of policy, not statutory construction. Congress deliberated and concluded under § 404(a) that post-Fair Sentencing Act but pre-First Step Act crack offenders are not eligible for a § 404 resentencing.³²³ The answer to Congress’s policy decision is not to withhold relief otherwise available by statute simply because some judges think the better policy was to include all crack offenders (or even all federal defendants). In other words, the answer is to petition Congress to extend relief, not deny relief to all.

While expressly mandating district courts to follow § 3553(a)’s framework would have been consistent with § 404’s text and the best approach among the approaches considered, the Court nevertheless substantially moved § 404 proceedings in the right direction by rejecting the narrow approach.

320. *Concepcion v. United States*, 142 S. Ct. 2389, 2407 (2022) (Kavanaugh, J., dissenting).

321. 18 U.S.C. § 3553(a).

322. First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222.

323. *Id.*