

## NOTES

### **THE FIRST STEP ACT AND INDIVIDUALIZED REVIEW: MUST JUDGES APPLY THE 18 U.S.C. § 3553(A) FACTORS TO SECTION 404 PETITIONERS?**

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*In 2010, the U.S. Congress amended the notorious mandatory minimum sentencing structure for crack cocaine offenses in response to the decades of harm it had caused. As the amendment was not retroactive, Congress passed the First Step Act of 2018 to allow prisoners incarcerated before 2010 to petition their original sentencing court for discretionary relief based on the new penalties. However, what exactly these courts must do when deciding whether to grant relief has divided the circuits. Some circuits require an up-to-date consideration of defendants' individual mitigating circumstances and whether their sentences are the minimum necessary to satisfy the purposes of sentencing, as courts must do at initial sentencing under 18 U.S.C. § 3553(a). Other circuits permit such consideration but refuse to require it, finding a mandatory approach at odds with the discretionary nature of the First Step Act itself.*

*This Note discusses the text and intent of the First Step Act, including the historical context reflected by the legislation, as well as the importance of 18 U.S.C. § 3553(a). It then examines the reasoning employed by each side in deciding whether to require consideration of 18 U.S.C. § 3553(a) in First Step Act proceedings. Ultimately, this Note concludes that the First Step Act should be read to require consideration of § 3553(a) because that approach better promotes the purpose of the Act without contravening its text and provides considerable benefits in practice.*

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INTRODUCTION.....	1666
I. CRACK COCAINE SENTENCING BACKGROUND.....	1670
A. <i>The First Step Act and Fair Sentencing Act as Responses to the Anti-Drug Abuse Act</i> .....	1670
1. The Anti-Drug Abuse Act.....	1671
2. The Fair Sentencing Act .....	1673
3. The First Step Act .....	1673
B. <i>The 18 U.S.C. § 3553(a) Factors</i> .....	1677
C. <i>The U.S. Sentencing Commission and the Federal Sentencing Guidelines Today</i> .....	1680
II. IS CONSIDERATION OF § 3553(A) MANDATORY OR DISCRETIONARY UNDER THE FIRST STEP ACT? .....	1684
A. <i>The Mandatory Approach: The Third, Fourth, Sixth, and D.C. Circuits</i> .....	1684
1. “Impose” Implicates § 3553(a) .....	1684
2. Legislative History Supports a Broader Reading of Section 404.....	1686
3. Pragmatic Advantages to Requiring Consideration of the § 3553(a) Factors.....	1687
B. <i>The Discretionary Approach: The First, Second, Eighth, Tenth, and Eleventh Circuits</i> .....	1688
1. The Inherent Textual Limitations of Section 404 ....	1688
2. Pragmatic and Fairness Concerns with Reading Section 404 Too Broadly .....	1690
III. THE FIRST STEP ACT SHOULD BE READ TO REQUIRE CONSIDERATION OF THE § 3553(A) FACTORS.....	1691
A. <i>The Mandatory Approach Aligns with the Text of the First Step Act</i> .....	1691
B. <i>The Mandatory Approach Promotes Congress’s Intent in Passing the First Step Act</i> .....	1693
C. <i>The Mandatory Approach Does Not Undermine Practicality or Fairness in Section 404 Proceedings</i> .....	1695
D. <i>The Mandatory Approach Provides Greater Clarity</i> .....	1696
CONCLUSION .....	1697

#### INTRODUCTION

On July 13, 2000, Jose Moyhernandez was sentenced to thirty years in prison for conspiracy to distribute over fifty grams of crack cocaine and for unlawful possession of a firearm and ammunition.<sup>1</sup> At sentencing, Judge

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1. See *United States v. Moyhernandez*, No. 97-CR-197, 2020 WL 728780, at \*1 (S.D.N.Y. Feb. 13, 2020), *aff’d*, 5 F.4th 195 (2d Cir. 2021).

Michael Mukasey stated that he would have sentenced Moyhernandez to twenty-five years in prison had he not been bound by the then mandatory Federal Sentencing Guidelines<sup>2</sup> (“Guidelines”). In 2018, the U.S. Congress passed the First Step Act of 2018,<sup>3</sup> which, under section 404, made retroactive the Fair Sentencing Act of 2010’s<sup>4</sup> reduction of penalties for certain crack cocaine offenses.<sup>5</sup> Moyhernandez soon after filed a motion for relief pursuant to the statutory penalty reduction for the first count of his conviction.<sup>6</sup> With Moyhernandez’s motion before Judge Loretta Preska,<sup>7</sup> the district court denied relief because the First Step Act did not change his status as a career offender and so his (now advisory)<sup>8</sup> Guidelines range remained unchanged from his initial sentencing.<sup>9</sup>

On July 15, 2021, the Second Circuit upheld the district court’s denial of Moyhernandez’s motion,<sup>10</sup> despite there being no consideration therein of Judge Mukasey’s reluctant dependence on Guidelines that were—but no longer are—mandatory.<sup>11</sup> Affirming Judge Preska’s 2020 decision, the Second Circuit held that a court deciding a motion under section 404 of the First Step Act may, but need not, consider the factors outlined in 18 U.S.C. § 3553(a)<sup>12</sup> (“§ 3553(a) factors”), which all federal courts must now consider before imposing an initial sentence.<sup>13</sup> These factors require sentencing courts to reflect on, among other things, the “nature and circumstances of the offense,” the defendant’s personal history and characteristics, the extent to which the sentence will promote deterrence or rehabilitation, and the need to avoid sentencing disparity between similarly situated defendants.<sup>14</sup> Moyhernandez was denied the opportunity to have his sentence reconsidered in light of these factors.<sup>15</sup>

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2. See Appendix of Defendant-Appellant at 39, *United States v. Moyhernandez*, 5 F.4th 195 (2021) (No. 20-625) (transcript of original sentencing). In the original sentencing hearing, Judge Mukasey stated, “If I were operating outside the guidelines regime I agree [that twenty-five years is a fair sentence] and if I were operating outside the guidelines regime I could carry that agreement into effect but I am not.” *Id.*

3. Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

4. Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

5. First Step Act § 404, 21 U.S.C. § 841 note.

6. See *Moyhernandez*, 2020 WL 728780, at \*1.

7. Judge Mukasey retired from the federal bench in 2006. See *Michael Mukasey Confirmed as Attorney General*, CNN (Nov. 8, 2007, 11:26 PM), <http://www.cnn.com/2007/POLITICS/11/08/mukasey/> [<https://perma.cc/E76Z-J9WN>].

8. See *infra* Part I.B (explaining why the Guidelines are no longer mandatory).

9. See *Moyhernandez*, 2020 WL 728780, at \*2.

10. *United States v. Moyhernandez*, 5 F.4th 195, 198 (2d Cir. 2021), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021).

11. See *id.* at 209 (Pooler, J., dissenting).

12. See *id.* at 203–05 (majority opinion).

13. See 18 U.S.C. § 3553(a)(1)–(7).

14. U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 2 (2015).

15. See *Moyhernandez*, 5 F.4th at 209 (Pooler, J., dissenting).

In so doing, the court deepened a circuit split, joining the First,<sup>16</sup> Eighth,<sup>17</sup> Tenth,<sup>18</sup> and Eleventh<sup>19</sup> Circuits by merely permitting consideration of the § 3553(a) factors (“the discretionary approach”) in contrast to the Third,<sup>20</sup> Fourth,<sup>21</sup> Sixth,<sup>22</sup> and D.C.<sup>23</sup> Circuits, which have all required it (“the mandatory approach”).

The D.C. Circuit’s opinion in *United States v. White*<sup>24</sup> highlights the effect of adopting the latter approach. Antone White and Eric Hicks had been sentenced to life imprisonment for selling and conspiring to distribute crack cocaine as part of a large-scale drug organization.<sup>25</sup> At the time, White and Hicks were twenty-one and twenty-four years old, respectively.<sup>26</sup> After the two filed for sentence reductions under the First Step Act, a federal district court in the District of Columbia denied White’s motion and granted partial relief to Hicks.<sup>27</sup> The court first ruled that, barring one count for Hicks, relief was not “available” because the First Step Act did not alter the Guidelines range for the quantities for which they were sentenced.<sup>28</sup> It then noted that relief would not be warranted for either defendant even if it were possible.<sup>29</sup> For White, his leadership role in the drug-trafficking organization, his (uncharged) murder of two witnesses in connection to his original trial, and his history of violent infractions while incarcerated<sup>30</sup> all counseled against reducing his sentence.<sup>31</sup> Hicks shared leadership in the organization with White, bribed a witness to not testify during his original trial, and caused a high-speed car accident in attempting to escape arrest.<sup>32</sup> This disregard for the law persuaded the district court that, like White, Hicks deserved to remain imprisoned under the other counts of his sentence.<sup>33</sup>

In reversing, the D.C. Circuit found the district court’s analysis incorrect and incomplete.<sup>34</sup> The circuit court first held that the First Step Act allows

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16. See *United States v. Concepcion*, 991 F.3d 279, 289 (1st Cir. 2021), *cert. granted*, 142 S. Ct. 54 (2021) (No. 20-1650) (mem.).

17. See *United States v. Moore*, 963 F.3d 725, 727–28 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1118 (2021) (mem.).

18. See *United States v. Mannie*, 971 F.3d 1145, 1157 (10th Cir. 2020).

19. See *United States v. Stevens*, 997 F.3d 1307, 1315–17 (11th Cir. 2021).

20. See *United States v. Easter*, 975 F.3d 318, 323–24 (3d Cir. 2020).

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

22. See *United States v. Boulding*, 960 F.3d 774, 784–85 (6th Cir. 2020).

23. See *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020).

24. 984 F.3d 76 (D.C. Cir. 2020).

25. See *id.* at 82–84.

26. Brief for Appellants at 13–15, *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020) (No. 19-3058).

27. *United States v. White*, 413 F. Supp. 3d 15, 19 (D.D.C. 2019), *rev’d and remanded*, 984 F.3d 76 (D.C. Cir. 2020).

28. *Id.* at 50–52.

29. *Id.* at 51–52.

30. *Id.* at 52. The most recent infraction occurred ten years prior to the district court’s opinion. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *United States v. White*, 984 F.3d 76, 92 (D.C. Cir. 2020).

judges to reduce petitioners' sentences even if their Guidelines ranges remained the same.<sup>35</sup> Turning to the district court's assessment of White's and Hicks's individual records, the D.C. Circuit highlighted important § 3553(a) factors concerning the petitioners that the district court had ignored.<sup>36</sup>

White's father was in and out of prison all his life, and his mother, who was also incarcerated when White was a teenager, suffered from drug addiction.<sup>37</sup> He was sentenced at twenty-one years old.<sup>38</sup> While he was imprisoned, White earned his GED and completed over eighty-five classes, mentored numerous young prisoners, had no violent infractions in the ten years prior to the district court's opinion, and had no infractions at all in the last four-and-a-half years.<sup>39</sup> Similarly, Hicks had a difficult upbringing, as his parents disappeared when he was five years old, he was only twenty-four years old when sentenced, and he had a relatively clean disciplinary record while in prison (with even fewer infractions than White).<sup>40</sup> Further, while incarcerated, he obtained a paralegal certificate, tutored and mentored other prisoners, and cofounded an organization that raised money from other prisoners to donate to the outside community.<sup>41</sup> He also maintained strong relationships with his wife and children.<sup>42</sup> The district court's failure to consider these factors merited reversal, and the case was remanded with instructions to consider the mitigating evidence presented under § 3553(a).<sup>43</sup>

Part I of this Note discusses the Anti-Drug Abuse Act of 1986<sup>44</sup> and how it created the context in which the Fair Sentencing Act and First Step Act arose. It next discusses the § 3553(a) factors, including how their importance changed after the U.S. Supreme Court's decision in *United States v. Booker*,<sup>45</sup> before explaining how the Guidelines operate today post-*Booker*. Part II describes the current circuit split regarding the interplay between 28 U.S.C. § 3553(a) and section 404 of the First Step Act, first discussing the circuits following the mandatory approach before turning to those that have adopted the discretionary approach. Finally, Part III argues that the mandatory approach is preferable in light of the First Step Act's text and purpose, as well as other practical considerations.

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35. *Id.* at 87–88.

36. *Id.* at 92–93.

37. *Id.* at 91.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 91–92.

42. *Id.* at 92.

43. *Id.* at 92–93.

44. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

45. 543 U.S. 220 (2005).

## I. CRACK COCAINE SENTENCING BACKGROUND

Federal sentencing underwent a major shift in the 1980s, when the traditional, judicially managed “indeterminate” form of sentencing was replaced by penalties mandated by statute or the Guidelines.<sup>46</sup> The Sentencing Reform Act of 1984<sup>47</sup> established the U.S. Sentencing Commission (“Commission”) and charged it with creating guidelines that would bind federal judges to predetermined ranges based on, among other things, the type of crime committed and the defendant’s prior record;<sup>48</sup> the Guidelines became active in 1987.<sup>49</sup> The Supreme Court in *Booker* later deemed the mandatory aspect of these Guidelines to be unconstitutional.<sup>50</sup>

In 1986, Congress passed the first Anti-Drug Abuse Act, which, among other things, set severe mandatory minimum sentences for crack cocaine offenses compared to powder cocaine offenses.<sup>51</sup> The particular focus on crack cocaine resulted in increased racial disparity in federal sentencing.<sup>52</sup> Congress responded in 2010 by enacting the Fair Sentencing Act, which reduced the discrepancy in penalties between crack and powder cocaine.<sup>53</sup> It then made this change retroactive to defendants sentenced prior to 2010 by passing the First Step Act of 2018.<sup>54</sup>

Part I.A provides an overview of the Anti-Drug Abuse Act, the Fair Sentencing Act, and the First Step Act. It details the injuries that the Fair Sentencing Act and First Step Act sought to remedy and the way in which defendants may obtain relief under the First Step Act. Part I.B discusses the role of the § 3553(a) factors in federal sentencing, and Part I.C describes the Guidelines and how they operate in conjunction with the § 3553(a) factors post-*Booker*.

*A. The First Step Act and Fair Sentencing Act as Responses to the Anti-Drug Abuse Act*

The following section proceeds by describing in Part I.A.1 the damage wrought by the Anti-Drug Abuse Act before explaining in Part I.A.2 how the Fair Sentencing Act responded to it by adjusting the sentencing penalties for crack cocaine. Part I.A.3 then discusses how the First Step Act applies the

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46. See LISA M. SEGHELLI, CONG. RSCH. SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 2–4 (2009); U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 2–3 (2020).

47. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of the U.S.C.).

48. See SEGHELLI, *supra* note 46, at 4.

49. See U.S. SENT’G COMM’N, *supra* note 46, at 3.

50. See *Booker*, 543 U.S. at 259–64.

51. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-3 (setting the punishment for possession of five grams of crack cocaine at the same level as the punishment for possession of 500 grams of powder cocaine).

52. See *infra* notes 64–70 and accompanying text.

53. Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)(1)).

54. Pub. L. No. 115–391, § 404, 132 Stat. 5222, 5222 (codified as amended in scattered section of 18, 21, and 34 U.S.C.).

Fair Sentencing Act retroactively and how this may implicate the § 3553(a) factors.

### 1. The Anti-Drug Abuse Act

Enacted to combat the “crack epidemic” said to be spreading across the United States during the 1980s,<sup>55</sup> the Anti-Drug Abuse Act required a minimum sentence of five years for defendants convicted of possession of five grams of “cocaine base”<sup>56</sup> with intent to distribute and a minimum sentence of ten years for defendants convicted of possession of fifty grams.<sup>57</sup> The corresponding penalties for powder cocaine are triggered at 500 grams and 5000 grams, respectively,<sup>58</sup> effectively creating a 100:1 sentencing ratio between the two forms of cocaine.<sup>59</sup> These mandatory minimum provisions were intended to target leaders of drug organizations.<sup>60</sup> However, by 2007, the majority of convicted crack cocaine offenders were street-level dealers.<sup>61</sup>

Compounding the problem, defendants with prior drug convictions could see their penalties easily skyrocket, as prosecutors could seek double the mandatory minimum sentence for crack cocaine offenses if the defendant had one prior conviction for a felony drug offense, and prosecutors could seek mandatory life imprisonment if the defendant had two.<sup>62</sup> This often led to crack cocaine offenders serving over twenty years—or even life terms—in prison for committing only nonviolent offenses.<sup>63</sup>

The racially discriminatory impact of the Anti-Drug Abuse Act was severe. Its penalty scheme for crack cocaine offenses resulted in the

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55. See 132 CONG. REC. 22675 (1986) (statement of Rep. Barbara Mikulski).

56. While the term “crack cocaine” does not appear in the Anti-Drug Abuse Act, “cocaine base” includes crack cocaine. See *DePierre v. United States*, 564 U.S. 70, 74 (2011); see also *id.* at 79–83 (holding that “cocaine base” includes all substances that could be described as cocaine in its chemically basic form, not just crack cocaine).

57. 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii).

58. *Id.* § 841(b)(1)(A)(ii), (B)(ii).

59. The Anti-Drug Abuse Act was amended in 1988 to impose a mandatory minimum of five years for simple possession of crack cocaine. See DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2 (2006), [http://www.aclu.org/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf) [<https://perma.cc/ZSC9-4ZAM>]. There is no corresponding minimum for simple possession of powder cocaine. *Id.*

60. See 132 CONG. REC. 27193 (1986) (statement of Sen. Robert Byrd) (stating that the Anti-Drug Abuse Act targets “kingpins,” who “can be identified by the amount of drugs with which they are involved”).

61. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (2007).

62. See DEF. SERVS. OFF., HOW A PERSON WHOSE SENTENCE WAS PREVIOUSLY ENHANCED ON A “FELONY DRUG OFFENSE” UNDER 21 U.S.C. § 851 WOULD RECEIVE A LOWER SENTENCE TODAY 1 (2019), [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/clemency/clemency-how-a-person-who-received-851-enhancement-would-receive-a-lower-sentence-today.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/clemency-how-a-person-who-received-851-enhancement-would-receive-a-lower-sentence-today.pdf) [<https://perma.cc/H8KC-P2EM>].

63. See Statement of Reasons at 27–29, 37–38, *United States v. Kupa*, No. 11-CR-345 (E.D.N.Y. Oct. 9, 2013) (Gleeson, J.) (citing cases involving defendants who were convicted of crack cocaine offenses and who served mandatory twenty-year or life sentences without ever having committed a violent crime).

imprisonment of Black Americans at a disproportionately high rate and for disproportionately long periods of time.<sup>64</sup> One reason the racial disparity arose is because crack cocaine is disproportionately consumed in large cities.<sup>65</sup> Crack cocaine is significantly cheaper than powder cocaine and is thus more prevalent in low-income urban neighborhoods, many of which have predominantly Black populations.<sup>66</sup> Accordingly, the new policy immediately increased the sentence lengths of Black defendants relative to white defendants in cocaine-related cases.<sup>67</sup> Not only were Black crack cocaine offenders imprisoned at a higher rate than users of powder cocaine, a nearly identical drug, but they were also convicted more often than white or Hispanic crack cocaine users.<sup>68</sup> By 2000, there were more Black men imprisoned than enrolled in higher education.<sup>69</sup> By 2014, 83.4 percent of convicted crack cocaine trafficking offenders were Black.<sup>70</sup>

Further, a rational basis for the 100:1 ratio had been punctured by subsequent scientific research.<sup>71</sup> Crack cocaine and powder cocaine are pharmacologically similar<sup>72</sup> and equally likely to cause violent reactions in

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64. See VAGINS & MCCURDY, *supra* note 59, at 7; see also Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 263–69 (2002) (questioning whether there is a legitimate explanation for the disproportionate punishments between white and Black offenders).

65. See Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2549 (2010).

66. See Joseph J. Palamar et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015); see also *id.* (finding that socioeconomic status may be a better predictor of crack cocaine use than race).

67. See BARBARA S. MEIERHOEFER, *THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED 20 (1992)* (explaining that in 1984 and 1986, Black defendants on average received 28 percent and 11 percent longer sentences and that four years after the passage of the Anti-Drug Abuse Act of 1986, this number jumped to 49 percent).

68. See THE SENTENCING PROJECT, *CRACK COCAINE SENTENCING POLICY: UNJUSTIFIED AND UNREASONABLE 2 (2000)* <https://www.prisonpolicy.org/scans/sp/1003.pdf> [<https://perma.cc/5PAL-37T3>] (noting that despite approximately two-thirds of crack users being white or Hispanic, in 1994, 84.5 percent of defendants convicted of crack cocaine possession were Black, as were 88.3 percent of defendants convicted for trafficking); Dan Weikel, *War on Crack Targets Minorities over Whites*, L.A. TIMES (May 21, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-05-21-mn-4468-story.html> [<https://perma.cc/UL69-K87Y>] (“No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.”).

69. See VAGINS & MCCURDY, *supra* note 59, at 3 tbl.3.

70. U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 12 fig.2 (2015).

71. See Gabby Birenbaum, *The EQUAL Act Would Finally Close the Cocaine Sentencing Disparity*, VOX (Mar. 19, 2021, 2:10 PM), <https://www.vox.com/2021/3/19/22336224/equal-act-cocaine-sentencing-disparity-war-on-drugs> [<https://perma.cc/896E-V59Q>].

72. See CARL L. HART ET AL., METHAMPHETAMINE: FACT VS. FICTION AND LESSONS FROM THE CRACK HYSTERIA 2 (2014).

users.<sup>73</sup> The Commission had repeatedly instructed Congress that the 100:1 lacked an empirical basis.<sup>74</sup> However, Congress took no action until 2010.<sup>75</sup>

## 2. The Fair Sentencing Act

In light of the discriminatory and unreasonable nature of this policy, Congress passed the Fair Sentencing Act in 2010 and reduced the sentencing disparity between crack cocaine and powder cocaine offenses.<sup>76</sup> The Fair Sentencing Act increased the amount of crack cocaine necessary to trigger the mandatory minimum sentences for offenses involving distribution<sup>77</sup> and eliminated the mandatory minimum altogether for simple possession.<sup>78</sup> The new ratio is approximately 18:1.<sup>79</sup> However, this legislation did not provide relief to the many defendants sentenced prior to the enactment of the Fair Sentencing Act.<sup>80</sup>

## 3. The First Step Act

As the Fair Sentencing Act did not provide relief to defendants sentenced before 2010,<sup>81</sup> Congress passed the First Step Act in 2018 in part to apply the Fair Sentencing Act retroactively.<sup>82</sup> Incarcerated defendants convicted

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73. See Michael G. Vaughn et al., *Is Crack Cocaine Use Associated with Greater Violence than Powdered Cocaine Use? Results From a National Sample*, 36 AM. J. DRUG & ALCOHOL ABUSE 181, 183 (2010).

74. See U.S. SENT'G COMM'N, *supra* note 61, at 7–8 (reaffirming its 2002 report to Congress, which found that the sentencing disparity did not reflect the relative harmfulness of crack cocaine compared to powder cocaine); see *infra* Part I.C (explaining the Commission's role in federal sentencing policy).

75. See KARA GOTSCH, AM. CONST. SOC'Y, "AFTER" THE WAR ON DRUGS: THE FAIR SENTENCING ACT AND THE UNFINISHED POLICY REFORM AGENDA 4–6 (2011).

76. See 156 CONG. REC. 3658 (2010) (statement of Sen. Richard Durbin) (noting that the Anti-Drug Abuse Act "singled out [Black people] for much more severe and heavy sentences."); *id.* at 3660 (statement of Sen. Patrick Leahy) ("The racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution's promise of equal treatment for all Americans.").

77. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (amending 21 U.S.C. § 841(b) to decrease the ratio between the amount of powder cocaine needed to trigger mandatory minimums from 100:1 to approximately 18:1).

78. Fair Sentencing Act § 3.

79. See U.S. SENT'G COMM'N, *supra* note 70, at 3. Of note, the U.S. Department of Justice now believes that this law does not go far enough, arguing that any discrepancy in punishment between the two drugs reflects a misconception about the effects of powder and crack cocaine. See Sarah N. Lynch, *U.S. Justice Department Backs Bill to End Disparities in Crack Cocaine Sentences*, REUTERS (June 22, 2021 6:05 AM), <https://www.reuters.com/world/us/us-justice-department-backs-bill-end-disparities-crack-cocaine-sentences-2021-06-22/> [<https://perma.cc/RU52-JGGQ>].

80. See Charlotte Resing, *How the First Step Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018, 4:00 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward> [<https://perma.cc/9Z9P-TFDD>].

81. *Id.*

82. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222. The text of section 404, the retroactive provision, reads in its entirety:

of one of the “covered offenses” under the Fair Sentencing Act and sentenced prior to 2010 are now eligible for resentencing under section 404 of the First Step Act.<sup>83</sup> This requires that defendants had been sentenced for a crack cocaine offense that triggered a mandatory minimum sentence.<sup>84</sup> To get relief, eligible defendants must submit a petition to the court that originally sentenced them,<sup>85</sup> which may then “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.”<sup>86</sup> However, sentence reduction is not guaranteed, as the First Step Act gives the sentencing court “broad discretion” to deny the petition.<sup>87</sup>

Following the failure of the Anti-Drug Abuse Act to accomplish its stated goals,<sup>88</sup> the First Step Act was a bipartisan<sup>89</sup> bill intended to address the racially disparate impact that was produced by the Anti-Drug Abuse Act and that was unremedied by the Fair Sentencing Act.<sup>90</sup> Senator Cory Booker,

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(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 111–220; 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.

83. *Id.*

84. *See Terry v. United States*, 141 S. Ct. 1858, 1862–64 (2021).

85. *See* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019).

86. First Step Act § 404(b).

87. *See United States v. Mannie*, 971 F.3d 1145, 1155 (10th Cir. 2020).

88. *See VAGINS & MCCURDY*, *supra* note 59, at ii.

89. Final Vote Results for Roll Call 448: First Step Act of 2018, S. 756 (Dec. 20, 2018), <https://clerk.house.gov/evs/2018/roll448.xml> [<https://perma.cc/NEZ6-NSHW>] (passing the House of Representatives by a vote of 358–36); Roll Call Vote: First Step Act of 2018, S. 756, 115th Cong. (Dec. 18, 2018), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=2&vote=00271](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00271) [<https://perma.cc/99P8-YXW5>] (passing the Senate by a vote of 87–12); *see also* Brief of Senators Richard J. Durbin, Charles E. Grassley, Cory A. Booker & Mike Lee as Amici Curiae in Support of Petitioner at 7–8, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904) (noting support for the First Step Act from independent organizations across the political spectrum, including the American Civil Liberties Union and the American Conservative Union).

90. *See* 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker) (stating that the First Step Act “addresses some of the racial disparities in our system because 90 percent of the people who will benefit from [the Act] are African Americans; 96 percent are Black and Latino.”); *id.* at S7644 (statement of Sen. Richard Durbin) (“We also have to consider the racially disparate impact of these laws . . . . [T]he majority of illegal drug users and dealers in America are White, but three-quarters of the people serving time in prison for drug offenses are African American or Latino . . . and the large majority of those subject to

one of the original cosponsors of the First Step Act,<sup>91</sup> noted an unfairness in allowing certain prisoners to continue serving out sentences no longer recognized as valid by law while more serious crack cocaine offenders could benefit from shorter sentences under the then current framework.<sup>92</sup> The act was also motivated by a rehabilitative attitude toward sentencing.<sup>93</sup> Yet, it is clear from the *Congressional Record* that the Act intended to give judges the discretion to deny otherwise eligible motions if warranted by the facts of the individual defendant's case.<sup>94</sup>

The most current data on First Step Act petitions indicate that the Act is having its intended effect.<sup>95</sup> The *Congressional Record* shows that only approximately 2600 inmates were thought to be affected;<sup>96</sup> however, as of May 2021, there have been 3705 sentence reductions granted under section 404,<sup>97</sup> with defendants sentenced as far back as 1990 obtaining relief.<sup>98</sup> The average age of petitioners at original sentencing has been thirty-two years, and the average age at resentencing has been forty-six years.<sup>99</sup> Approximately 92 percent of successful petitioners have been Black.<sup>100</sup> The average reduction in a defendant's prison term has been seventy-two months, which represents an approximately 25 percent decrease from the original sentence.<sup>101</sup>

Motions for sentence reductions under section 404 are now typically filed under 18 U.S.C. § 3582(c)(1)(B),<sup>102</sup> which permits the court to “modify an imposed term of imprisonment to the extent otherwise expressly permitted

Federal mandatory minimum penalties fall into that same group of African Americans and Latinos.”).

91. See S.3649, 115th Cong. (2018).

92. See 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker) (“[T]here are people sitting in jail right now for selling an amount of drugs equal to the size of a candy bar who have watched people come in and leave jail for selling enough drugs to fill a suitcase. We never made [the Fair Sentencing Act] retroactive. That is not justice.”).

93. See *id.* at S7745 (statement of Sen. Richard Blumenthal) (stating that sentence reductions under the First Step Act will incentivize prisoners to prepare for reentry into society).

94. See *id.* at S7739 (statement of Sen. Charles Schumer) (“[T]he legislation is certainly not a ‘get out of jail free’ card . . . .”); *id.* at S7748 (statement of Sen. Amy Klobuchar) (“Significantly, this bill will not automatically reduce any one person’s prison sentence . . . . [Rather,] it allows judges and prosecutors to look at an individualized case and decide . . . what is best for the community.”).

95. See generally U.S. SENT’G COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf> [<https://perma.cc/6SRA-DTXN>].

96. See 164 CONG. REC. S7745 (daily ed. Dec. 18, 2018) (statement of Sen. Richard Blumenthal).

97. See U.S. SENT’G COMM’N, *supra* note 95, tbl.1.

98. *Id.* tbl.2.

99. *Id.* tbl.4

100. *Id.*

101. *Id.* tbl.6.

102. See, e.g., *United States v. Concepcion*, 991 F.3d 279, 287 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021) (No. 20-1650) (mem.); *United States v. Easter*, 975 F.3d 318, 323–24 (3d Cir. 2020); *United States v. Moore*, 963 F. 3d 725, 728 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1118 (2021) (mem.); *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020).

by statute . . .”<sup>103</sup> This refers judges to the text of the First Step Act to determine the scope of their authority.<sup>104</sup> Early on, the Fifth Circuit had analyzed section 404 motions under the framework of 18 U.S.C. § 3582(c)(2),<sup>105</sup> which permits judges to “modify a term of imprisonment” for defendants who were sentenced based on Guidelines that were later lowered by the Commission.<sup>106</sup> The Supreme Court held in *Dillon v. United States*<sup>107</sup> that § 3582(c)(2) authorizes only “a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.”<sup>108</sup> Further, it noted that § 3582(c)(2) requires consideration of the § 3553(a) factors only “to the extent that they are applicable”<sup>109</sup> and cannot be used to reduce a defendant’s sentence.<sup>110</sup>

Other circuits, however, have not strictly followed this approach, with most analyzing section 404 motions under § 3582(c)(1)(B).<sup>111</sup> The distinction between § 3582(c)(2) and § 3582(c)(1)(B) is relevant because while the former only allows limited consideration of § 3553(a), the latter is silent on it and directs courts to other congressional statutes for instruction.<sup>112</sup> Here, the First Step Act allows judges to “impose a reduced sentence,”<sup>113</sup> which certain courts interpret as requiring consideration of the § 3553(a) factors because judges must consider these factors when they “impose” a sentence.<sup>114</sup>

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103. 18 U.S.C. § 3582(c)(1)(B).

104. See Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 LOY. U. CHI. L.J. 67, 94 (2020).

105. See *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019).

106. *Id.* at 417 (quoting 18 U.S.C. § 3582(c)).

107. 560 U.S. 817 (2010).

108. *Id.* at 826.

109. *Id.*

110. See *id.* at 827 (“Consistent with the limited nature of § 3582(c)(2) proceedings, § 1B1.10(b)(2) also confines the extent of the reduction authorized.”).

111. See, e.g., *United States v. Concepcion*, 991 F.3d 279, 290 (1st Cir.) (“[W]e have determined . . . that section 3582(c)(1)(B), not section 3582(c)(2), governs section 404(b) proceedings.”), *cert. granted*, 142 S. Ct. 54 (2021) (No. 20-1650) (mem.); *United States v. Holloway*, 956 F.3d 660, 665–66 (2d Cir. 2020) (holding that a First Step Act motion is properly evaluated under § 3582(c)(1)(B) rather than § 3582(c)(2) because “a First Step Act motion is based on the Act’s own explicit statutory authorization, rather than on any action of the Sentencing Commission”); *United States v. Easter*, 975 F.3d 318, 323 (3d Cir. 2020) (“First Step Act Motions fall under § 3582(c)(1)(B).”); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019) (“[T]he distinct language of the First Step Act compels the interpretation that motions for relief under that statute are appropriately brought under § 3582(c)(1)(B).”). The Eleventh Circuit has gone so far as to hold that section 404 is “its own procedural vehicle” that need not be filed under § 3582(c)(1)(B) or any other statute. See *United States v. Edwards*, 997 F.3d 1115, 1119 (11th Cir.), *cert. denied*, 142 S. Ct. 509 (2021).

112. See 18 U.S.C. § 3582(c)(1)(B).

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

114. See, e.g., *Easter*, 975 F.3d at 323–24; *United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020); see also Ryan, *supra* note 104, at 98 (discussing the potential effect of analyzing First Step Act motions under § 3582(c)(2) as opposed to § 3582(c)(1)(B)).

*B. The 18 U.S.C. § 3553(a) Factors*

In imposing all criminal sentences, Congress and the Supreme Court require that district courts consider the § 3553(a) factors to ensure that a defendant receives an individualized sentence.<sup>115</sup> These factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) 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 . . . ;
- (5) any pertinent policy statement issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by act of Congress . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.<sup>116</sup>

As former federal judge Mark W. Bennett observed, only through “super careful analysis and very thoughtful consideration of the § 3553(a) factors” can a judge impose a balanced sentence.<sup>117</sup> These factors provide the sentencing judge with broad discretion to consider defendant-specific characteristics that the Guidelines fail to account for.<sup>118</sup> Further, the statute requires that judges limit sentences to terms that are the minimum necessary to accomplish the purposes of sentencing as set out in the second § 3553(a) factor.<sup>119</sup>

Prior to the Supreme Court’s decision in *United States v. Booker*, the § 3553(a) factors were “all but irrelevant”<sup>120</sup> because the Guidelines were

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115. See Mark W. Bennett, *A Judge’s Attempt at Sentencing Inconsistency After Booker: Judge (Ret.) Mark W. Bennett’s Guidelines for Sentencing*, 41 CARDOZO L. REV. 243, 254–55 (2019).

116. 18 U.S.C. § 3553(a)(1)–(7).

117. Bennett, *supra* note 115, at 261.

118. See *id.* at 273 (citing drug addiction, childhood trauma, mental disorder, and military service as examples of individual mitigating circumstances that the Guidelines do not mention).

119. See 18 U.S.C. § 3553(a).

120. Erica Zunkel, *18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “the Most Effective Manner,”* 9 NOTRE DAME J. INT’L & COMP. L. 49, 54 (2019).

essentially mandatory.<sup>121</sup> The Supreme Court later found in *Booker*, however, that the mandatory element of the Guidelines was unconstitutional.<sup>122</sup> After *Booker*, the Guidelines became advisory<sup>123</sup> and the § 3553(a) factors became the “touchstone” of federal sentencing.<sup>124</sup> Indeed, failure to explicitly consider these factors on the record is grounds for remand.<sup>125</sup> However, the thoroughness of these considerations depends on the complexity of the case and the context provided by the record.<sup>126</sup> For example, where the same court conducted the defendant’s original sentencing hearing and adequately considered the § 3553(a) factors, a court at resentencing may satisfy § 3553(a) by signing a form certifying that it had considered the § 3553(a) factors in determining the new sentence.<sup>127</sup>

Following this watershed change in the sentencing process, the Commission has questioned the impact of *Booker* on racial sentencing disparity in three reports to Congress in 2010,<sup>128</sup> 2012,<sup>129</sup> and 2017.<sup>130</sup> In a 2010 report on the demographic differences in federal sentencing practices, the Commission found that the disparity between white and Black defendants had actually increased post-*Booker*.<sup>131</sup> The Commission in 2017 reported a continuation of this trend.<sup>132</sup> Judge William Pryor, Jr., the former head of the Commission,<sup>133</sup> has supported reducing judicial discretion in light of this data.<sup>134</sup>

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121. See *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (noting that the Guidelines as they were written required a court to sentence within the Guidelines range); Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENT’G REP. 14, 16 (1996) (stating that a district court’s divergence from the Guidelines would be subject to appeal unless based on an “atypicality” not already considered by the Guidelines themselves).

122. See *Booker*, 543 U.S. at 233–36 (finding that the Guidelines, if mandatory, violated the Sixth Amendment right to a jury trial because they required judges to impose sentences based on facts that were not found by a jury beyond a reasonable doubt).

123. See *id.* at 245; see also *Kimbrough v. United States*, 552 U.S. 85, 101, 104–05 (2007) (applying the “effectively advisory” language from *Booker* to crack cocaine sentencing).

124. See Zunkel, *supra* note 120, at 54.

125. See *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018) (explaining that sentencing judges must at least show that they have “considered the parties’ arguments and taken account of the § 3553(a) factors, among others”).

126. See *Rita v. United States*, 551 U.S. 338, 359 (2007) (holding that when a case is “conceptually simple” and the “context and the record” indicate that the judge has considered the parties’ arguments and the § 3553(a) factors, the judge need not analyze each factor in depth).

127. See *Chavez-Meza*, 138 S. Ct. at 1965–67.

128. See U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER* REPORT’S MULTIVARIATE REGRESSION ANALYSIS 23 (2010) [hereinafter 2010 *BOOKER* REPORT].

129. See U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 4–6 (2012) [hereinafter 2012 *BOOKER* REPORT].

130. See U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2, 4 (2017) [hereinafter 2017 *BOOKER* REPORT].

131. See 2010 *BOOKER* REPORT, *supra* note 128, at 23.

132. See 2017 *BOOKER* REPORT, *supra* note 130, at 2.

133. See Hon. William H. Pryor, Jr., FEDERALIST SOC’Y, <https://fedsoc.org/contributors/william-pryor> [<https://perma.cc/M9X9-XTKQ>] (last visited Feb. 2, 2022).

134. See William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 FED. SENT’G REP. 95, 97–98 (2017) (arguing that the racial disparity in

These findings, however, have been criticized,<sup>135</sup> and there is research from outside the Commission suggesting that judicial discretion may in fact decrease racial disparity with respect to sentencing for drug offenses.<sup>136</sup> Indeed, the Commission's own report also noted an increase in the rate of defendants being sentenced below the Guidelines range since *Booker*, including for drug trafficking and firearms offenses, specifically.<sup>137</sup>

The importance of the § 3553(a) factors post-*Booker* has clear implications for defendants like Jose Moyhernandez, whose sentencing is discussed above and who was essentially denied individualized consideration of his case under § 3553(a) at his original (pre-*Booker*) sentencing due to the then mandatory nature of the Guidelines.<sup>138</sup> But mandatory reconsideration of

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sentencing found by the 2012 *BOOKER* REPORT is an “inevitabl[e]” result of judicial discretion post-*Booker* to consider defendants’ history and characteristics); *see also* WILLIAM RHODES ET AL., BUREAU OF JUST. STAT., FEDERAL SENTENCING DISPARITY: 2005–2012, at 40–41 (2015) (attributing the increased sentencing disparity to white defendants receiving more lenient sentences post-*Booker* rather than to Black defendants receiving more severe ones).

135. *See* FED. DEFS. GUIDELINES & LEGIS. COMMS., U.S. SENTENCING COMMISSION REPORT SUGGESTING THAT INCREASED JUDICIAL DISCRETION LEADS TO GREATER RACIAL DISPARITY IS BASED ON A FLAWED ANALYSIS AND IS BEING MISUSED TO SUPPORT CALLS FOR A MANDATORY SENTENCING SYSTEM THAT WOULD INCREASE RACIAL INJUSTICE (2018), <https://blog.federaldefendersny.org/wp-content/uploads/2018/01/Fact-Sheet-USSC-Report-on-Racial-Disparity-Is-Flawed-and-Being-Misused-January-2018-final-1.pdf> [<https://perma.cc/KJL4-LZBZ>].

136. *See, e.g.*, Rodney Engen, *Racial Disparity in the Wake of Booker/Fanfan: Making Sense of “Messy” Results and Other Challenges for Sentencing Research*, 10 CRIMINOLOGY & PUB. POL’Y 1139, 1141 (2011) (“[T]he findings suggest that disparity overall *declined*.”); *id.* at 1146 (“[S]teps taken in recent years to reduce the ‘crack versus powder cocaine’ differential have probably done more to reduce racial disproportionality in incarceration than any other policy changes adopted since the guidelines were introduced.”); Joshua B. Fischman & Max M. Schazenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 757–761 (2012) (concluding that mandatory minimums substantially increase sentencing disparity between white and Black defendants and that “judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing”); Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 161–62 (2019) (“The gap in average sentences between black and white defendants has shrunk in recent years, from a combination of commission actions, congressional reform of the crack statutes, and decisions of many judges to reject guideline recommendations based on unsound and discriminatory policies.”); Jeffrey T. Ulmer et al., *Racial Disparity in the Wake of the Booker/Fanfan Decision*, 10 CRIMINOLOGY & PUB. POL’Y 1077, 1105–07 (2011) (attributing some of the sentencing disparity seen post-*Booker* to, among other things, immigration offenses accounting for a substantial amount of the disparity post-*Booker*); *see also id.* at 1105–06 (noting that the sentencing disparity seen post-*Booker* may not have been a result of judicial discretion and could be explained by (1) Black defendants being more likely than similarly situated white defendants to be imprisoned once convicted (as opposed to receiving lengthier sentences) and (2) prosecutors seeking below-Guidelines sentences less frequently for Black defendants).

137. *See* 2012 *BOOKER* REPORT, *supra* note 129, at 6. A pre-*Booker* report by the Commission found that the Guidelines and mandatory minimum system in place at the time “have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.” *See* U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 135 (2004).

138. *See* *United States v. Moyhernandez*, 5 F.4th 195, 209 (2d Cir. 2021) (Pooler, J., dissenting), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021).

these factors during section 404 proceedings could also benefit defendants whose offenses were committed after *Booker* by requiring judges to assess the petitioners' post-sentencing rehabilitation.<sup>139</sup> The Supreme Court held in *Pepper v. United States*<sup>140</sup> that when a defendant's sentence has been set aside on appeal, judges are not prohibited from considering post-sentencing rehabilitation when resentencing the defendant on remand.<sup>141</sup> Justice Sotomayor noted that post-sentencing conduct best illustrates the defendant's current "history and characteristics,"<sup>142</sup> which sentencing judges must consider during resentencing.<sup>143</sup> Further, post-sentencing conduct also "sheds light on" the likelihood of recidivism if the defendant is released, which is relevant to § 3553(a)(2)(B) and § 3553(a)(2)(C), as well as the defendant's continuing need for correctional treatment under § 3553(a)(2)(D).<sup>144</sup> Thus, when a sentence is set aside and remanded, district courts may assess a defendant's post-sentencing conduct in order to impose a sentence that is "'not greater than necessary,' to serve the purposes of sentencing."<sup>145</sup> The rule stated in *Pepper* applies even if it provides resentenced defendants with a procedural advantage unavailable to defendants at initial sentencing.<sup>146</sup>

Though no longer mandatory after *Booker*, the Guidelines remain an important aspect of federal sentencing.<sup>147</sup> Indeed, § 3553(a)(4) directs sentencing judges to refer to the Guidelines when imposing an initial sentence.<sup>148</sup> It is thus important to understand how the Guidelines now operate in the context of § 3553(a).

### C. The U.S. Sentencing Commission and the Federal Sentencing Guidelines Today

A reconsideration of the § 3553(a) factors would also affect First Step Act petitioners because initial sentences reflect the sentencing scheme in place at the time at which they are imposed.<sup>149</sup> The time at which these factors are

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139. See U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 15 (2014) ("At resentencing, a district court may consider evidence of post-sentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory guideline range.").

140. 562 U.S. 476 (2011).

141. *Id.* at 490–91.

142. *Id.* at 492 (quoting 18 U.S.C. § 3553(a)(1)).

143. See 18 U.S.C. § 3553(a)(1).

144. *Pepper*, 562 U.S. at 493.

145. *Id.* (quoting 18 U.S.C. § 3553(a)).

146. See *id.* at 502 (agreeing that consideration of post-sentencing rehabilitation may benefit defendants whose sentences were set aside on appeal relative to other defendants, but noting "that disparity arises not because of arbitrary or random sentencing practices, but because of the ordinary operation of appellate sentencing review.").

147. See 2012 *BOOKER REPORT*, *supra* note 129, at 5 (noting that sentencing courts must begin the sentencing process by accurately calculating the applicable Guidelines range and that the average sentence length historically tracks with the minimum Guidelines range).

148. 18 U.S.C. § 3553(a)(4)(A)(i).

149. See *United States v. Shaw*, 957 F.3d 734, 741–42 (7th Cir. 2020) ("Counsel may have pressed different arguments based on a different statutory framework; a court may have

considered bears on “the seriousness of the offense,”<sup>150</sup> as well as the applicable Guidelines policies in place.<sup>151</sup>

The Commission created the Guidelines in 1987.<sup>152</sup> Congress established the Commission as an independent judicial agency in the Sentencing Reform Act of 1984 to, among other things, promote “certainty and fairness” in sentencing, avoid disparities among similarly situated defendants while maintaining individualized review, and reflect the “advancement in knowledge of human behavior as it relates to the criminal justice process.”<sup>153</sup> The Commission operates by (1) promulgating and amending the Guidelines<sup>154</sup> and (2) issuing reports to Congress recommending any appropriate changes to sentencing legislation.<sup>155</sup> A fundamental reason for the existence of the Guidelines is to avoid sentencing disparity among defendants guilty of largely similar conduct and with similar criminal records.<sup>156</sup> The Commission also maintains an Office of Research and Data to conduct research and to collect and publish data on federal sentencing in practice.<sup>157</sup>

The Guidelines generate recommended sentences from a table that accounts for the seriousness of the defendant’s offense and the defendant’s criminal history.<sup>158</sup> There are forty-three offense levels and six criminal history categories.<sup>159</sup> Each crime has a base offense level that may be aggravated or mitigated by the specific character of the offense.<sup>160</sup> For example, robbery has a base level of twenty, which can be upgraded by five points if the defendant used a firearm and by two more if the firearm was discharged.<sup>161</sup> The offense level may also be adjusted in either direction based on factors that apply to any offense, such as a defendant’s minimal

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credited those arguments differently, as the statutory minimum and maximum often anchor a court’s choice of a suitable sentence.”).

150. 18 U.S.C. § 3553(a)(2)(A); *see also* U.S. SENT’G COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 100 (2002) (finding that “the offense seriousness of most crack-cocaine offenders is overstated by the 100-to-1 drug quantity ratio, suggesting that a differential this extreme is unjust.”).

151. 18 U.S.C. § 3553(a)(4)(A)(i).

152. *See* U.S. SENT’G COMM’N, *supra* note 14, at 1.

153. 28 U.S.C. § 991(b)(1)(B)–(C).

154. The Supreme Court upheld the constitutionality of the Commission’s rulemaking power and its location in the judicial branch in *Mistretta v. United States*, 488 U.S. 361 (1989). The delegation of rulemaking power outlined in 28 U.S.C. § 991(b)(1) was sufficiently detailed to constitute a permissible “intelligible principle,” and it was not unconstitutional to place the agency in the judicial branch because sentencing was one area of law historically shared between all three branches and Congress maintained a high degree of control over the Commission. *Id.* at 374, 379, 390–97.

155. *See* U.S. SENT’G COMM’N, *supra* note 14, at 1.

156. *Id.* at 2.

157. *Id.* at 27.

158. U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT’G COMM’N 2021).

159. *Id.*

160. *See* U.S. SENT’G COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1 (2014), [https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf) [<https://perma.cc/VQ9X-KLJT>].

161. *See id.*

participation in the crime or a defendant's attempt to cover it up.<sup>162</sup> Criminal history classification is generally based on the amount and length of prior convictions and whether the current offense was committed while the defendant was still serving a previous sentence.<sup>163</sup>

Though not mandatory after *Booker*,<sup>164</sup> the Guidelines still have a significant impact on sentencing.<sup>165</sup> The holding in *Booker* was not meant to abolish the Guidelines, and the Guidelines still form “the starting point and the initial benchmark” at sentencing.<sup>166</sup> District courts are instructed to “remain cognizant of them throughout the sentencing process”<sup>167</sup> and will usually impose a sentence within the applicable range.<sup>168</sup> And, in *Rita v. United States*,<sup>169</sup> the Supreme Court held that on appeal (but only on appeal), sentences within the applicable Guidelines range are presumptively reasonable, although a sentence outside the Guidelines is not presumptively *unreasonable*.<sup>170</sup> In part due to the protection that *Rita* gives to sentences within the Guidelines range, the Guidelines have a cognitive “anchoring” effect on judges.<sup>171</sup> This means that judges have a subconscious tendency to adjust their sentences to conform to the Guidelines range.<sup>172</sup> Thus, the Guidelines, while no longer mandatory, continue to exert a considerable influence over federal sentencing.<sup>173</sup>

District courts, however, still often impose sentences outside the Guidelines range by opting to “depart” or “vary” from the recommended range.<sup>174</sup> After consideration of all of the § 3553(a) factors, the district court should then decide whether the facts of the case merit a variance outside the Guidelines range.<sup>175</sup> Variances may work in either direction, and courts

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162. *See id.* at 2.

163. *See* U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 17 (2018). The criminal history category does not count previous minor offenses such as reckless driving, gambling, or trespassing. *See* U.S. SENT’G GUIDELINES MANUAL § 4A1.2(c) (U.S. SENT’G COMM’N 2021). Likewise, juvenile offenses committed more than five years prior to the current offense are not counted. *Id.* § 4A1.2(d)(2).

164. *See supra* notes 122–24 and accompanying text.

165. *See generally* U.S. SENT’G COMM’N, *supra* note 160, at 2.

166. *Gall v. United States*, 552 U.S. 38, 49 (2007).

167. *Id.* at 50 n.6.

168. *See Peugh v. United States*, 569 U.S. 530, 542 (2013).

169. 551 U.S. 338 (2007).

170. *See id.* at 351–53, 355 (holding that a presumption of reasonableness is permitted at the appellate level but that there can be no such presumption at trial because litigants there are entitled to freely argue that the Guidelines should not apply).

171. *See* Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 523–24 (2014).

172. *See id.* at 495, 498, 529.

173. *See generally id.* at 523–29.

174. *See* U.S. SENT’G COMM’N, *supra* note 14, at 19. Departures are beyond the scope of this Note, as they are provided for by the Guidelines themselves and do not involve separate consideration of the § 3553(a) factors. *See* U.S. SENT’G COMM’N, *supra* note 139, at 1. For an in-depth examination of departures, *see id.* at 4–39.

175. *See* U.S. SENT’G COMM’N, *supra* note 139, at 1–2.

frequently decide that the sentence should be above or below what the Guidelines suggest after consideration of the § 3553(a) factors.<sup>176</sup>

In issuing its first set of Guidelines, the Commission generally used an “empirical approach,” studying (among other sources) 10,000 presentence investigations, the substantive elements of various criminal statutes, and guidelines and statistics from the U.S. Parole Commission.<sup>177</sup> The Guidelines are updated based on new empirical findings undertaken by the Commission’s Office of Research and Data.<sup>178</sup> By declining to base the Guidelines on a recognized philosophical approach to criminal justice (e.g., crime control or rehabilitation), the Commission made them subject to “continuous evolution.”<sup>179</sup>

One example of this evolution concerns how the Guidelines designate “career offenders.”<sup>180</sup> A defendant is categorized as a career offender if, as an adult, a defendant is convicted of a “crime of violence” or an offense involving a controlled substance after having twice been previously convicted of such an offense.<sup>181</sup> A defendant’s status as a career offender significantly increases the sentencing range recommended by the Guidelines.<sup>182</sup> Recently, however, the Commission amended the Guidelines to reduce the number of people eligible for career offender status.<sup>183</sup> Passed

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176. *See id.* at 40–48 (cataloguing several cases that used the § 3553(a) factors to impose an above- or below-Guidelines sentence); *see, e.g.*, *United States v. Ruvalcava-Perez*, 561 F.3d 883, 887 (8th Cir. 2009) (affirming an upward variance due to the defendant’s history of violence, including against women); *United States v. Autery*, 555 F.3d 864, 874 (9th Cir. 2009) (affirming a downward variance granted to a defendant convicted of child pornography possession where the defendant had no history of substance abuse or sexual abuse and had the support of his wife and children); *United States v. Howe*, 543 F.3d 128, 132 (3d Cir. 2008) (affirming a downward variance based on, among other things, the defendant’s prior military service, various letters from members of his community attesting to his honorable and lawful character, and consistent church attendance); *United States v. Cavera*, 550 F.3d 180, 195–96 (2d Cir. 2008) (affirming an upward variance that was based on the defendant’s smuggling of guns into New York City, which is a more serious offense than smuggling guns into less populated areas, and on a deterrence-based rationale under § 3553(a)(2)).

177. U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT’G COMM’N 2021). For crack cocaine sentences, the Commission had earlier based the Guideline ranges on the Anti-Drug Abuse Act’s weight-based classification rather than its own empirical research. *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007). However, after reviewing the scientific literature and conducting its own research, the Commission amended the Guidelines in 2007 to reduce the disparity between crack and powder cocaine offenses. *See* U.S. SENT’G GUIDELINES MANUAL app. C, supp., amend. 706 (U.S. SENT’G COMM’N 2011). This amendment was made retroactive in 2008. *See id.* amend. 708.

178. *See* U.S. SENT’G COMM’N, *supra* note 14, at 27.

179. *See Rita v. United States*, 551 U.S. 338, 349–50 (2007) (noting that the decision to use empirical research was a deliberate attempt to avoid choosing between competing philosophies within the criminal justice community and to ensure that the Commission may receive input from all sides of the issue when amending the Guidelines).

180. U.S. SENT’G GUIDELINES MANUAL § 4B1.1 (U.S. SENT’G COMM’N 2021).

181. U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 15 (2016).

182. *Id.*

183. *See* Daniel P. Peyton, Comment, *Retroactive Justice: Toward Fundamental Fairness in Resentencing Crack Cocaine Offenders Under Section 404 of the First Step Act*, 54 U. RICH. L. REV. 1165, 1177 (2020).

in 2016, Guidelines Amendment 798 deleted a provision that defined a crime of violence as any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>184</sup> The purpose of this amendment was to simplify that categorization of crimes of violence and focus on “the most serious predicate offenses.”<sup>185</sup> This new focus aligned with the Commission’s finding that defendants classified as career offenders based solely on drug trafficking offenses were less likely to recidivate than career offenders who had committed a violent offense and would take relatively longer to recidivate if they ever did.<sup>186</sup> Notably, thus far, approximately 56 percent of defendants granted relief under section 404 of the First Step Act were originally sentenced as career offenders prior to this amendment.<sup>187</sup>

## II. IS CONSIDERATION OF § 3553(A) MANDATORY OR DISCRETIONARY UNDER THE FIRST STEP ACT?

More than three years after the passage of the First Step Act, the circuits are divided over whether courts must consider the § 3553(a) factors when deciding section 404 motions. While nearly all permit the lower courts to consider the § 3553(a) factors anew, whether petitioners are *guaranteed* review of these factors depends on where they were initially sentenced. This part examines each side’s interpretation of section 404 and discusses the split approaches to the text and legislative intent of the First Step Act, as well as other practical concerns addressed by certain decisions.

### A. The Mandatory Approach: The Third, Fourth, Sixth, and D.C. Circuits

The circuits following the mandatory approach have identified (1) the use of the word “impose” in the text of section 404, (2) the First Step Act’s overall intent to remedy past racial discrimination in sentencing, and (3) the uniformity and clarity of process as reasons to mandate consideration of the § 3553(a) factors. This section describes the reasoning of the Third, Fourth, Sixth, and D.C. Circuits and notes where these circuits may differ.

#### 1. “Impose” Implicates § 3553(a)

The courts following the mandatory approach view the use of the word “impose” in section 404(b) of the First Step Act as directing district courts to apply the § 3553(a) factors during proceedings.<sup>188</sup> Section 3553(a) by its

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184. U.S. SENT’G GUIDELINES MANUAL app. C, supp., amend. 798 (U.S. SENT’G COMM’N 2016). The Commission passed this amendment soon after the Supreme Court’s decision in *Johnson v. United States*, 576 U.S. 591, 602–03 (2015), which abrogated identical language in a separate sentencing statute for being unconstitutionally vague.

185. U.S. SENT’G COMM’N, *supra* note 181, at 52–53.

186. U.S. SENT’G COMM’N, REPORT-AT-A-GLANCE: CAREER OFFENDER ENHANCEMENTS (2016).

187. *See* U.S. SENT’G COMM’N, *supra* note 95, tbl.5.

188. *See, e.g.,* *United States v. Easter*, 975 F.3d 318, 324 (3d Cir. 2020); *United States v. Chambers*, 956 F.3d 667, 672–73 (4th Cir. 2020).

terms applies any time a court is “imposing” an initial sentence, so these courts reason that the use of “impose” in section 404(b) is a direction to follow § 3553(a).<sup>189</sup> Further, Congress legislates against a backdrop of prior sentencing legislation; therefore, when Congress uses the same word in two related statutes, it may be implied that the word has the same meaning in both contexts.<sup>190</sup> Because Congress could have used the limiting language from § 3582(c)(2),<sup>191</sup> but did not, these courts have held that the First Step Act should not be read to restrict the district courts’ ability to resentence defendants in the same way.<sup>192</sup>

Under this broad reading, the Third and Sixth Circuits have held that district courts *must* consider the § 3553(a) factors, including post-sentencing conduct, in addition to whether a defendant’s Guidelines range had been changed by the Fair Sentencing Act.<sup>193</sup> The Fourth Circuit, in addition to an evaluation of petitioners’ post-sentencing conduct,<sup>194</sup> has required lower courts to apply retroactive intervening case law when deciding First Step Act motions.<sup>195</sup> This may entail a recalculation of petitioners’ Guidelines range based on case law that developed after initial sentencing.<sup>196</sup> Each circuit agrees that once the required analysis is complete, courts then may grant or deny relief.<sup>197</sup>

The Sixth Circuit in *United States v. Boulding*<sup>198</sup> additionally held that “complete review of the motion on the merits,” as provided by section 404(c) of the First Step Act, calls for consideration of the § 3553(a) factors and an

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189. See *Easter*, 975 F.3d at 324–25; *Chambers*, 956 F.3d at 674 (citing *United States v. Rose*, 379 F. Supp. 3d 223, 234 (S.D.N.Y. 2019), *abrogated by* *United States v. Moyhermandez*, 5 F.4th 195 (2d Cir. 2021), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021)).

190. See *Easter*, 975 F.3d at 325.

191. See *Dillon v. United States*, 560 U.S. 817, 826–27 (2010).

192. See, e.g., *Chambers*, 956 F.3d at 671–74; *United States v. Boulding*, 960 F.3d 774, 782–83 (6th Cir. 2020).

193. See *Easter*, 975 F.3d at 323, 327; *United States v. Smith*, 959 F.3d 701, 703–04 (6th Cir. 2020).

194. See *United States v. McDonald*, 986 F.3d 402, 412 (4th Cir. 2021).

195. See *Chambers*, 956 F.3d at 669–75 (applying Fourth Circuit precedent established after the defendant’s initial sentence to eliminate the career offender enhancement from the defendant’s Guidelines calculation); *United States v. Lancaster*, 997 F.3d 171, 176 (4th Cir. 2021) (reversing a denial of petitioner’s motion when the lower court did not consider new case law regarding career offender designation and did not review the § 3553(a) factors in light of these changes in the law).

196. See *Chambers*, 956 F.3d at 672 (requiring the district court to update the defendant’s Guidelines range based on retroactive intervening case law); see also *Lancaster*, 997 F.3d at 177 (Wilkinson, J., concurring) (noting that the majority’s decision in this case extended the holding in *Chambers* to nonretroactive case law).

197. See, e.g., *Lancaster*, 997 F.3d at 175 (“If, after conducting the analysis, the court determines that the sentence would not be reduced, then no relief under the First Step Act is indicated.”); *United States v. White*, 984 F.3d 76, 85 (D.C. Cir. 2020) (citing *United States v. Jackson*, 945 F.3d 315, 319 (5th Cir. 2019)) (acknowledging that the First Step Act gives judges broad discretion to reduce a sentence or not); *Easter*, 975 F.3d at 327 (noting that district courts are not required to grant relief).

198. 960 F.3d 774 (6th Cir. 2020).

updated Guidelines calculation.<sup>199</sup> This includes an opportunity for the petitioner to challenge any sentencing enhancements the district court may apply in its amended Guidelines calculation or its § 3553(a) analysis.<sup>200</sup> The Sixth Circuit later, however, limited the application of *Boulding* to instances where the petitioner's original Guidelines range was altered by the Fair Sentencing Act.<sup>201</sup>

Finally, while these circuits require an updated consideration of the § 3553(a) factors, none permit full plenary resentencing during section 404 proceedings.<sup>202</sup> This means that defendants are not entitled to a hearing at which they would be present<sup>203</sup> or to completely relitigate the prior Guidelines determination and initial § 3553(a) analysis.<sup>204</sup> Instead, the district court should fill in the “gaps” remaining from the initial sentencing in view of “intervening circumstances,”<sup>205</sup> which may include health concerns,<sup>206</sup> post-sentencing conduct,<sup>207</sup> and new case law that renders a prior Guidelines range erroneous.<sup>208</sup>

## 2. Legislative History Supports a Broader Reading of Section 404

The D.C. Circuit in *United States v. White* found that the text of section 404 provides no exact limit on a district court's discretion in deciding First Step Act motions.<sup>209</sup> From this ambiguity, it held that congressional intent should govern how courts proceed.<sup>210</sup> As found in the *Congressional Record*, the intent of passing the First Step Act was to correct the ramifications of a sentencing regime that targeted racial minorities.<sup>211</sup> Given the importance of remedying this unfairness, the court noted that First Step

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199. *See id.* at 784 (“[T]he necessary review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors.”).

200. *See id.*

201. *See* *United States v. Maxwell*, 991 F.3d 685, 690–691 (6th Cir. 2021), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021). The Sixth Circuit broke with the Fourth Circuit's holding in *Chambers*, holding that no other intervening legal developments besides the Fair Sentencing Act need be considered during First Step Act proceedings. *Id.* However, this decision seemingly did not disturb *Boulding*'s holding that courts must weigh the § 3553(a) factors when ruling on a section 404 motion. *See id.* at 692–94 (affirming the district court's holding where it considered the defendant's rehabilitation arguments but ultimately declined to reduce his sentence based on his long history of criminal behavior for most of his adult life).

202. *See, e.g., Lancaster*, 997 F.3d at 175; *Easter*, 975 F.3d at 326; *Boulding*, 960 F.3d at 782–83.

203. *See Easter*, 975 F.3d at 326; *Boulding*, 960 F.3d at 782–83.

204. *See Lancaster*, 997 F.3d at 175.

205. *See id.*

206. *See Easter*, 975 F.3d at 327.

207. *See United States v. White*, 984 F.3d 76, 93 (D.C. Cir. 2020).

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

209. *White*, 984 F.3d at 88.

210. *Id.*

211. *Id.* at 89–90 (citing 164 CONG. REC. S7021, S7764 (daily ed. Nov. 15, 2018) (statements of Sens. Richard Durbin and Cory Booker)).

Act petitioners are owed “the most complete relief possible.”<sup>212</sup> As such, a sentencing court must consider the § 3553(a) factors in a way that is procedurally reasonable.<sup>213</sup> Turning to the petitioners before the court, the D.C. Circuit found that the district court fell below this standard by neglecting to either mention mitigating § 3553(a) factors in its decision or hold a hearing on the petitioners’ motions.<sup>214</sup> Failing to do either provided no indication that the district court considered these arguments,<sup>215</sup> and such consideration is required to fulfill Congress’s remedial intent in passing the First Step Act.<sup>216</sup>

### 3. Pragmatic Advantages to Requiring Consideration of the § 3553(a) Factors

The Third Circuit has also identified “pragmatic advantages” to reading section 404(b) as mandating consideration of the § 3553(a) factors.<sup>217</sup> The court stated that requiring consideration makes proceedings more (1) predictable, (2) “straightforward” for lower courts to handle, (3) consistent for appellate courts on review, and (4) likely to promote uniform evaluation of motions on the merits.<sup>218</sup> Indeed, regarding the appellate process for section 404 motions, the court questioned whether it would even be possible to review a district court’s ruling if it did not consider the § 3553(a) factors.<sup>219</sup>

Concurring with the Third Circuit’s reasoning in *Easter*, Judge Rosemary Pooler’s dissent in *United States v. Moyhernandez* additionally noted a logical inconsistency in merely permitting consideration of the § 3553(a) factors.<sup>220</sup> Allowing judges to disregard these factors contravenes *Booker* because it gives them discretion to uphold sentences that were based on mandatory Guidelines ranges that are now advisory, without regard to other § 3553(a) factors, which now must be considered.<sup>221</sup>

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

213. *See id.* at 90–91.

214. *Id.* at 92.

215. *Id.*

216. *Id.* at 91 (“Nothing less [than consideration of the § 3553(a) factors] is sufficient to meet the goals of the Fair Sentencing Act and the First Step Act to provide a remedy for defendants who bore the brunt of a racially disparate sentencing scheme.”).

217. *See United States v. Easter*, 975 F.3d 318, 325 (3d Cir. 2020).

218. *Id.*

219. *See id.* at 324.

220. *United States v. Moyhernandez*, 5 F.4th 195, 212 (2d Cir. 2021) (Pooler, J., dissenting).

221. *Id.* at 211–12 (noting that Congress was legislating in a post-*Booker* world); *see also Easter*, 975 F.3d at 325 (“Moreover, a permissive regime means that sentencing courts may ignore the § 3553(a) factors entirely for some defendants and not others, inviting unnecessary sentencing disparities among similarly situated defendants. Such a regime is antithetical to Congress’ intent and the Guidelines’ purpose.”).

*B. The Discretionary Approach: The First, Second, Eighth, Tenth, and Eleventh Circuits*

The circuits following the discretionary approach differ from the other circuits in their interpretation of section 404's text, the level of discretion the text affords district judges, and the practical effects of requiring judges to consider the § 3553(a) factors for every petitioner. This section examines the arguments favoring this approach.

1. The Inherent Textual Limitations of Section 404

The circuits applying the discretionary approach view the text of section 404 more narrowly than courts that follow the mandatory approach. They hold that, by its terms, section 404 sends a district court "back in time" to resentence the defendant "as if" sections 2 and 3 of the Fair Sentencing Act (and no other since-enacted laws) were in effect when the defendant committed the covered offense.<sup>222</sup> Though "impose" is used both in section 404 and § 3553(a), the discretionary-approach courts have held that the word's use in section 404 does not trigger mandatory consideration of the § 3553(a) factors because the "as if" clause limits the express reach of section 404 to the Fair Sentencing Act.<sup>223</sup> Because § 3553(a) is not mentioned in the text of either section 404 of the Fair Sentencing Act, there is no requirement that its provisions inform proceedings.<sup>224</sup>

Further, and in contrast to the mandatory-approach courts, the discretionary-approach courts argue that the word "impose" as it appears in § 3553(a) does not create the mandatory procedure but rather that the word "shall" imposes the requirement.<sup>225</sup> The exclusion of this mandatory language from the texts of the Fair Sentencing Act and First Step Act indicates that Congress did not intend to bind courts to certain procedures because other statutes use or exclude similar language to expand or limit judicial discretion.<sup>226</sup> For example, 18 U.S.C. § 3582(a) dictates that sentencing courts *shall* consider the § 3553(a) factors, whereas 18 U.S.C. § 3582(c)(1)(B), which governs motions under the First Step Act in most circuits,<sup>227</sup> merely states that courts *may* modify a sentence as permitted by statute.<sup>228</sup> Under this reasoning, this discrepancy indicates that courts "must presume that Congress intentionally chose to omit mandatory consideration" of the § 3553(a) factors by courts when deciding First Step Act motions.<sup>229</sup>

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222. See *United States v. Concepcion*, 991 F.3d 279, 286 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021) (No. 20-1650) (mem.); *Moyhermandez*, 5 F.4th at 207.

223. See, e.g., *Concepcion*, 991 F.3d at 288; *Moyhermandez*, 5 F.4th at 204; *United States v. Moore*, 963 F.3d 725, 727–28 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1118 (2021) (mem.).

224. See, e.g., *Concepcion*, 991 F.3d at 289–90; *Moyhermandez*, 5 F.4th at 203; *United States v. Stevens*, 997 F.3d 1307, 1315 (11th Cir. 2021); *Moore*, 963 F.3d at 727.

225. See *Moyhermandez*, 5 F.4th at 204; *Moore*, 963 F.3d at 727–28.

226. See *Stevens*, 997 F.3d at 1315; *Moore*, 963 F.3d at 727–28.

227. See *Ryan*, *supra* note 104, at 94.

228. See *Stevens*, 997 F.3d at 1315.

229. *Id.* at 1316.

Another reason these courts decline to handle section 404 motions like initial sentencings is that district courts may only reduce a defendant's sentence under section 404.<sup>230</sup> Under this view, such a restriction further blunts the effect of the word “impose” because “imposing” a reduced sentence is essentially the same as simply “reducing” one.<sup>231</sup> Section 404 thus implies that resentencing under section 404 constitutes a “step rather than [the] imposition of a sentence from scratch.”<sup>232</sup>

Additionally, several circuits view the use of the word “may” in section 404 as granting district courts broad discretion when ruling on section 404 motions.<sup>233</sup> To them, requiring courts to follow a specific procedure is at odds with this inherently permissive language.<sup>234</sup> Section 404's express statement that it does not require a district court to reduce any sentence likewise cuts against a reading of the First Step Act that requires consideration of the § 3553(a) factors.<sup>235</sup> That section 404(c) refers to “a complete review of the motion” does not counteract this argument because section 404(c) is concerned with limiting repetitive petitions, not defining a set procedure.<sup>236</sup>

While courts adopting this reasoning do not require consideration of the § 3553(a) factors or intervening legal developments, with the exception of the Ninth Circuit, none forbid it.<sup>237</sup> Following this permissive approach, the

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230. See *Moyhernandez*, 5 F.4th at 204; see also *United States v. Kelley*, 962 F.3d 470, 477–78 (9th Cir. 2020) (noting that “impose” as it appears in the First Step Act is necessarily limited because a defendant eligible for a higher sentence on reconsideration could not be duly sentenced under the Act), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

231. See *United States v. Concepcion*, 991 F.3d 279, 288 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021) (mem.).

232. See *Moyhernandez*, 5 F.4th at 204.

233. See, e.g., *id.* at 205; *Stevens*, 997 F.3d at 1315; *United States v. Mannie*, 971 F.3d 1145, 1149 (10th Cir. 2020).

234. See *Concepcion*, 991 F.3d at 288 (“[A] fresh evaluation of the section 3553(a) factors would, if honored, impermissibly cabin the discretion that the First Step Act vests in the district court.”); *Stevens*, 997 F.3d at 1316 (holding that requiring a § 3553(a) analysis of every motion “would impermissibly hamper and cabin this wide discretion that Congress expressly afforded district courts.”).

235. See *Stevens*, 997 F.3d at 1315.

236. See *Moyhernandez*, 5 F.4th at 204 (“It is unlikely that Congress ‘obliquely slipped’ a mandate for additional procedural steps ‘into a provision that bars repetitive litigation.’” (quoting *United States v. Moore*, 975 F.3d 84, 91 (2d Cir. 2020))).

237. Compare *United States v. Kelley*, 962 F.3d 470, 476 (9th Cir. 2020) (finding that a court may not reduce a sentence beyond what is authorized by the Fair Sentencing Act), with *Concepcion*, 991 F.3d at 289 (“[A] district court may, in its discretion, consider other factors relevant to fashioning a new sentence.”), and *Stevens*, 997 F.3d at 1314 (“[I]n exercising [their] discretion, district courts ‘may consider all the relevant factors, including the statutory sentencing factors’ set forth in § 3553(a)” (quoting *United States v. Jones*, 962 F.3d 1290, 1304 (11th Cir. 2020))), and *Moyhernandez*, 5 F.4th at 205 (refusing to prohibit consideration of the § 3553(a) factors), and *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020) (“When reviewing a section 404 petition, a district court may, but need not, consider the section 3553 factors.”), *cert. denied*, 141 S. Ct. 1118 (2021) (mem.). Arguing this issue before the Supreme Court, the U.S. government, while maintaining that the discretionary approach is optimal, has stated that it would prefer the mandatory approach over a reading of the First Step Act that would prohibit consideration of post-sentencing behavior. See Transcript of Oral Argument at 79–80, *Concepcion v. United States*, No. 20-1650 (U.S. Jan. 19, 2022),

Eleventh Circuit in *United States v. Stevens*,<sup>238</sup> took the unusual step (among discretionary-approach courts) of vacating a district court's denial of relief to a petitioner.<sup>239</sup> There, the court stated that district courts need not apply § 3553(a) but reversed because the lower court failed to consider either the "new history and characteristics arguments raised by Stevens regarding his post-incarceration rehabilitation" or anything related to his supervised release term.<sup>240</sup> Applying *Gall v. United States*<sup>241</sup> and *Rita*, it held that district courts handling section 404 motions must show that they have a "reasoned basis" for their decisions such that meaningful appellate review is possible.<sup>242</sup> Though reversing in part for failure to adequately address the defendant's arguments under § 3553(a) and stating that it may be "best practice" to do so, the court maintained that it is not required by the First Step Act.<sup>243</sup>

## 2. Pragmatic and Fairness Concerns with Reading Section 404 Too Broadly

Citing practical arguments not addressed by decisions endorsing the mandatory approach, other courts have noted that requiring consideration of anything more than the penalties altered by the Fair Sentencing Act would complicate section 404 proceedings in practice.<sup>244</sup> First, the mandatory approach could waste judicial resources by forcing courts to conduct a § 3553(a) analysis when the motion could otherwise be denied at the outset.<sup>245</sup> This would then have the knock-on effect of drawing attention away from more "meritorious" motions.<sup>246</sup>

A separate issue comes from the application of changes in the law that occurred after petitioners were sentenced.<sup>247</sup> Allowing section 404 petitioners to be resentenced pursuant to legal developments unrelated to crack cocaine would unfairly benefit these offenders relative to other

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[https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-1650\\_p8k0.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1650_p8k0.pdf) [<https://perma.cc/V3Q5-2MY5>].

238. 997 F.3d 1307 (11th Cir. 2021).

239. *Id.* at 1317–18.

240. *See id.* at 1317.

241. 552 U.S. 38 (2007).

242. *See Stevens*, 997 F.3d at 1317 (first citing *Gall*, 552 U.S. at 50–51; and then citing *Rita v. United States*, 551 U.S. 338, 356 (2007)).

243. *See id.* at 1318.

244. *See United States v. Moyhermandez*, 5 F.4th 195, 208 (2d Cir. 2021), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021); *United States v. Maxwell*, 991 F.3d 685, 692–93 (6th Cir. 2021), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021); *United States v. Concepcion*, 991 F.3d 279, 287–88 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021) (mem.); *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

245. *See Moyhermandez*, 5 F.4th at 208.

246. *See id.*

247. *See Concepcion*, 991 F.3d at 287–88; *Maxwell*, 991 F.3d at 692–93; *Kelley*, 962 F.3d at 478.

criminal defendants.<sup>248</sup> Whereas defendants similarly sentenced for powder cocaine offenses cannot have their sentences modified based on new law, crack cocaine offenders would gain such a benefit under a broader reading of the First Step Act.<sup>249</sup> This, the First Circuit reasoned, would lead to the “replace[ment] [of] one set of sentencing disparities with another.”<sup>250</sup>

### III. THE FIRST STEP ACT SHOULD BE READ TO REQUIRE CONSIDERATION OF THE § 3553(A) FACTORS

Given these two competing readings of the First Step Act, this part argues that the mandatory approach reflects a better way of understanding and applying section 404. Part III.A begins by addressing the central dispute between the circuits over the word “impose.” It agrees with the discretionary-approach courts that the word has a different meaning in the context of section 404 than the meaning it has in § 3553(a) because the First Step Act inherently permits more limited outcomes than initial sentencing does. But despite the Act’s limited nature, this part argues that reading the word “impose” to require consideration of the § 3553(a) factors does not contravene the Act’s text or intent. Part III.B then argues that, in light of the broader context in which Congress passed the First Step Act, the Act’s purpose is actually better served if courts adopt the mandatory approach. Part III.C then addresses the pragmatic and equitable concerns raised by certain discretionary-approach courts and concludes that they are not strongly supported. Finally, Part III.D examines the Eleventh Circuit’s decision in *United States v. Stevens*<sup>251</sup> to illustrate the confusion that may be caused by merely permitting consideration of the § 3553(a) factors rather than requiring it.

#### A. The Mandatory Approach Aligns with the Text of the First Step Act

The circuits following the discretionary approach correctly note that the word “impose” does not operate in the First Step Act in the same way it does in § 3553(a). The § 3553(a) factors in the initial sentencing context can be used to vary below *or above* the Guidelines range,<sup>252</sup> whereas under the First Step Act, the factors may only work to reduce or sustain a defendant’s original sentence.<sup>253</sup> This may suggest that Congress did not intend to

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248. See *Concepcion*, 991 F.3d at 287–88; *Maxwell*, 991 F.3d at 692–93; *Kelley*, 962 F.3d at 478.

249. See *Maxwell*, 991 F.3d at 693; *Kelley*, 962 F.3d at 478 (describing this advantage as an impermissible “windfall” for crack cocaine defendants); see also Brief for the United States at 30, *Concepcion v. United States*, No. 20-1650 (U.S. Dec. 15, 2021) (noting that this advantage would also be unavailable to crack cocaine offenders sentenced after the passage of the Fair Sentencing Act).

250. *Concepcion*, 991 F.3d at 288.

251. 997 F.3d 1307 (11th Cir. 2021).

252. See *supra* notes 174–76 and accompanying text.

253. See First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222; *United States v. Moyherman*, 5 F.4th 195, 204 (2d Cir. 2021), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021); *Kelley*, 962 F.3d at 478.

require consideration of the § 3553(a) factors because resentencing under the First Step Act is thus an inherently more limited procedure than initial sentencing.<sup>254</sup> And further, while none of these circuits explicitly cite legislative history, they do discuss the wide discretion afforded to judges by the First Step Act,<sup>255</sup> which is supported by the *Congressional Record*.<sup>256</sup> It was important to Congress that the Act not become a vehicle for automatic sentence reduction,<sup>257</sup> and the Act explicitly states that “[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”<sup>258</sup> So, requiring courts to implement a procedural step that often (but not always) operates to reduce a defendant’s sentence<sup>259</sup> may not reflect this grant of discretion.<sup>260</sup>

The application of the § 3553(a) factors, however, does not inherently favor section 404 petitioners. Although an analysis of the § 3553(a) factors can never result in an increased sentence under section 404, it may still dissuade a court from reducing one.<sup>261</sup> The mandatory approach thus does not necessarily restrict a court’s discretion in deciding whether to grant relief.<sup>262</sup> A court applying a § 3553(a) analysis may still consider a defendant’s individual circumstances and decide that a sentence reduction is unwarranted.<sup>263</sup> The mandatory approach merely requires the court to consider all of the relevant § 3553(a) factors, including mitigating evidence if it exists, before making its decision.<sup>264</sup> This balancing process, which can result in a grant or denial of relief, is consistent with Congress’s express

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254. See *supra* notes 175–76 and accompanying text.

255. See, e.g., *Moyhernandez*, 5 F.4th at 205; *Stevens*, 997 F.3d at 1316; *Concepcion*, 991 F.3d at 289–90.

256. See 164 CONG. REC. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Charles Schumer); *id.* at S7748 (statement of Sen. Amy Klobuchar).

257. See *id.* at S7748 (statement of Sen. Amy Klobuchar).

258. First Step Act § 404(c).

259. See *supra* note 176.

260. This broad discretion may, however, contravene the Ninth Circuit’s unique position that the analysis is limited to whether a defendant’s sentence would have been altered by the Fair Sentencing Act, *United States v. Kelley*, 962 F.3d 470, 476 (9th Cir. 2020), as this would seem to make evaluation of section 404 motions “automatic,” which is something Congress sought to avoid, see 164 CONG. REC. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Amy Klobuchar).

261. See, e.g., *United States v. Maxwell*, 991 F.3d 685, 694 (6th Cir. 2021), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021).

262. See *United States v. Boulding*, 960 F.3d 774, 782 (6th Cir. 2020) (“[A] defendant’s sentence will not be altered absent the court’s reasoned determination to do so.”).

263. See Jonathan D. Colan, *A Brief History of Section 404’s Crack Sentencing Reform*, 69 DOJ J. FED. L. & PRAC. Sept. 2021, at 57, 89 (noting instances where the § 3553(a) factors favored a denial of relief). Such consideration may include post-sentencing behavior, as well as facts presented during the defendant’s initial sentencing. See, e.g., *United States v. Black*, 992 F.3d 703, 705 (8th Cir. 2021) (noting the defendant’s history of domestic violence, prior convictions for crack cocaine possession, and violent infractions while in prison); *Maxwell*, 991 F.3d at 693 (affirming denial of relief where the district court weighed the defendant’s leadership role in a drug trafficking organization, his criminal history, and his likelihood of recidivating against his positive behavior while in prison).

264. See *United States v. White*, 984 F.3d 76, 91–93 (D.C. Cir. 2020); see also *supra* notes 36–43 and accompanying text.

opposition to authorizing automatic sentence reductions under the First Step Act.<sup>265</sup>

*B. The Mandatory Approach Promotes Congress's Intent in Passing the First Step Act*

The mandatory approach also adheres more closely to the broader intent behind the First Step Act. Congress passed the Fair Sentencing Act and First Step Act in acknowledgement of the injustice meted out by the Anti-Drug Abuse Act's harsh sentencing regime.<sup>266</sup> The sentences designed by the Anti-Drug Abuse Act were scientifically baseless,<sup>267</sup> ineffective at incarcerating the upper-level drug dealers it intended to target,<sup>268</sup> and racially discriminatory.<sup>269</sup> And for decades, crack cocaine offenders were sentenced under mandatory Guidelines ranges that were later deemed unconstitutional.<sup>270</sup> If a court may choose to ignore the § 3553(a) factors when evaluating motions under section 404, it has the power to confine these offenders to sentences that the law now views as impermissibly restrictive.<sup>271</sup> This especially deprives a defendant like Jose Moyhernandez,<sup>272</sup> who was initially sentenced under such a system,<sup>273</sup> of a fair process.

Importantly, this question also affects defendants sentenced after *Booker*. Mandatory consideration of the § 3553(a) factors will mean that courts moving forward will be required to consider post-sentencing behavior.<sup>274</sup> This will reward those who have truly rehabilitated themselves, which was one of the purposes of the First Step Act.<sup>275</sup>

It will also determine whether these defendants will be subjected to intervening case law and Guidelines amendments issued during their imprisonment, including changes made to the determination of “career

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265. See First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222; see also 164 CONG. REC. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Charles Schumer); *id.* at S7748 (statement of Sen. Amy Klobuchar).

266. See 156 CONG. REC. 3658 (2010) (statement of Sen. Richard Durbin); 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker); *id.* at S7644 (statement of Sen. Richard Durbin).

267. See *supra* notes 72–73 and accompanying text.

268. See 132 CONG. REC. 27193 (1986) (statement of Sen. Robert Byrd); *supra* note 61 and accompanying text.

269. See *supra* notes 64–70 and accompanying text.

270. See *United States v. Booker*, 543 U.S. 220, 233–35 (2005).

271. See *United States v. Moyhernandez*, 5 F.4th 195, 209 (2d Cir. 2021) (Pooler, J., dissenting) (noting that Judge Mukasey at initial sentencing would have imposed a below-Guidelines range had it been possible), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021).

272. Defendants originally sentenced prior to 2005 make up approximately 27 percent of successful section 404 petitioners so far. See U.S. SENT'G COMM'N, *supra* note 97, tbl. 2.

273. See *Moyhernandez*, 5 F.4th at 209 (Pooler, J., dissenting).

274. See *United States v. White*, 984 F.3d 76, 92–93 (D.C. Cir. 2020) (finding defendants' model conduct while incarcerated as strongly favoring sentence reduction); *United States v. Chambers*, 956 F.3d 667, 674–75 (4th Cir. 2020) (finding post-sentencing behavior may be highly relevant to sentencing under § 3553(a)).

275. See 164 CONG. REC. S7745 (daily ed. Dec. 18, 2018) (statement of Sen. Richard Blumenthal).

offender” status.<sup>276</sup> Despite losing their binding authority after *Booker*,<sup>277</sup> the Guidelines still act as an “anchor” that heavily impacts judicial discretion at sentencing.<sup>278</sup> They also remain a factor to be considered under § 3553(a)(4),<sup>279</sup> and it is noteworthy under § 3553(a)(2)(C)<sup>280</sup> that nonviolent career offenders have a lower rate of recidivism relative to other career offenders.<sup>281</sup> Thus, a guaranteed recalculation of the Guidelines range would provide a defendant with the opportunity to have his case reassessed both free from highly influential recommendations that the Commission later deemed erroneous and in light of Guidelines reflecting up-to-date data, especially regarding the likelihood of recidivism.<sup>282</sup>

Contrary to the reasoning of courts following the discretionary approach, this procedural step would not rob the district court of its discretion because the Guidelines are, after all, advisory.<sup>283</sup> As discussed in Part I.C, when imposing an initial sentence, judges may still vary from the Guidelines if they believe that a defendant’s individual circumstances merit doing so.<sup>284</sup> If the same standard applies to motions under section 404, a district judge could yet decide that, despite a new Guidelines range, the nature of a defendant’s specific case means sentence reduction is unwarranted. Thus, an updated Guidelines calculation would not require strict adherence; it would just ensure that judges provide a reason for declining to use it.<sup>285</sup>

Requiring renewed consideration of the § 3553(a) factors would also create uniformity in First Step Act proceedings. As it stands, whether defendants must receive such consideration is arbitrarily determined by the location of their original sentencing.<sup>286</sup> This is at odds with Congress’s overall desire in passing the Sentencing Reform Act to minimize sentencing disparity among similarly situated defendants while ensuring that they receive individually tailored sentences.<sup>287</sup> It would thus fit with two important objectives of sentencing to implement a single procedure that provides individualized evaluation to all defendants—and crucially, one that

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276. Compare *United States v. Lancaster*, 997 F.3d 171, 176 (4th Cir. 2021) (requiring the application of intervening, nonretroactive case law to the defendant’s case), with *United States v. Concepcion*, 991 F.3d 279, 289–90 (1st Cir.) (declining to require that courts consider any changes in the law beyond those set forth in the Fair Sentencing Act), *cert. granted*, 142 S. Ct. 54 (2021) (mem.).

277. See *United States v. Booker*, 543 U.S. 220, 259–64 (2005).

278. See *Bennett*, *supra* note 171, at 523–29.

279. 18 U.S.C. § 3553(a)(4).

280. See *id.* § 3553(a)(2)(C) (describing the need for the sentence to reflect the likelihood of the defendant committing future crimes).

281. See U.S. SENT’G COMM’N, *supra* note 186.

282. See *supra* notes 177–87.

283. See *supra* notes 123–26.

284. See *supra* notes 175–76.

285. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (holding that when imposing a sentence outside the Guidelines range, a judge must have “sufficiently compelling” reasons that justify the extent of the divergence from the Guidelines).

286. See *supra* Part II.

287. See *supra* note 153 and accompanying text.

does not mandate a single outcome.<sup>288</sup> Further, such a procedure would not produce significant practical hurdles or unfair sentencing practices.

*C. The Mandatory Approach Does Not Undermine Practicality or Fairness in Section 404 Proceedings*

Certain courts have noted that the mandatory consideration of intervening legal and factual developments would advantage crack cocaine offenders sentenced prior to 2010 relative to other similarly situated criminal defendants,<sup>289</sup> which would contravene § 3553(a) by promoting inter-defendant disparity.<sup>290</sup> However, this places too little weight on the fundamental fact that the First Step Act was narrowly focused on this specific class of defendant.<sup>291</sup> The act recognized that inmates still serving sentences based on the Anti-Drug Abuse Act's penalty structure were uniquely disadvantaged relative to other defendants.<sup>292</sup> Further, the First Step Act as conceived originally contemplated only an estimated 2600 prisoners' sentences.<sup>293</sup> As there were approximately 2,100,000 people incarcerated when this legislation was passed,<sup>294</sup> the focus on such a small group of inmates indicates a magnified attentiveness to the sentences of these particular persons. And under *Pepper*, a court at resentencing may consider evidence of a defendant's post-sentencing rehabilitation even if it may confer to the defendant a benefit unavailable to other defendants sentenced for similar conduct.<sup>295</sup>

Further, the Second Circuit's pragmatic concerns<sup>296</sup> are not strong. The Supreme Court has held that consideration of the § 3553(a) factors at initial sentencing need not be extensively detailed when the case is "conceptually simple."<sup>297</sup> So long as the record indicates that the court heard a defendant's mitigating evidence under § 3553(a), judges are allowed to sign a form which states that they carefully considered all of the § 3553(a) factors.<sup>298</sup> Thus, if

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288. See 164 CONG. REC. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Charles Schumer); *id.* at S7748 (statement of Sen. Amy Klobuchar).

289. See *United States v. Maxwell*, 991 F.3d 685, 692–93 (6th Cir. 2021), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021); *United States v. Concepcion*, 991 F.3d 279, 288 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021) (mem.); *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.).

290. See 18 U.S.C. § 3553(a)(6).

291. See *supra* Part I.A.3.

292. See 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker); *id.* at S7745 (statement of Sen. Richard Blumenthal).

293. See *id.* at S7745 (statement of Sen. Richard Blumenthal). This would later prove to be an underestimate. See U.S. SENT'G COMM'N, *supra* note 97, tbl.1.

294. See 164 CONG. REC. S7745 (daily ed. Dec. 18, 2018) (statement of Sen. Richard Blumenthal).

295. See Ryan, *supra* note 104, at 102 (noting, however, that applying *Pepper*'s reasoning to section 404 proceedings requires a "logical leap").

296. See *United States v. Moyherman*, 5 F.4th 195, 208 (2d Cir. 2021) ("Formal consideration of the § 3553(a) factors in every case would put sand in the gears, and delay consideration of the many meritorious motions."), *petition for cert. filed*, No. 21-6009 (U.S. Oct. 15, 2021).

297. See *Rita v. United States*, 551 U.S. 338, 359 (2007).

298. See *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018).

courts deciding section 404 petitions must only consider the § 3553(a) factors to the extent they already do at initial sentencing, straightforward cases will require that judges only take the short step of signing a form without describing their reasoning in depth.<sup>299</sup> For potentially “meritorious”<sup>300</sup> claims, however, district courts must accordingly do more.<sup>301</sup>

While the procedure necessary to adhere to § 3553(a) at initial sentencing does not always require judges to provide deep analysis,<sup>302</sup> it guarantees at least some record on which the defendant can appeal and ensures that the district court does not improperly ignore the defendant’s arguments.<sup>303</sup> While it is apparent from the cases discussed above that district courts may misapply the § 3553(a) factors or selectively apply them,<sup>304</sup> a procedural guarantee makes these errors discoverable and more easily rectifiable on appeal.<sup>305</sup>

The mandatory approach also has the pragmatic advantage of providing clear instructions to district courts, a point highlighted by the Eleventh Circuit’s decision in *United States v. Stevens*.<sup>306</sup>

#### D. The Mandatory Approach Provides Greater Clarity

Finally, the mandatory approach provides more clarity to district courts. The Eleventh Circuit’s decision in *Stevens* illustrates the confusion created by granting district judges discretion to ignore § 3553(a). In simply reverting to the sentencing standards set out in *Gall*<sup>307</sup> and *Rita*,<sup>308</sup> the Eleventh Circuit failed to explain how a district court can provide adequate grounds for its decision without considering the § 3553(a) factors.<sup>309</sup> Both *Gall* and *Rita*

299. See *Rita*, 551 U.S. at 359; *Chavez-Meza*, 138 S. Ct. at 1965.

300. See *Moyhernandez*, 5 F.4th at 208.

301. See *Rita*, 551 U.S. at 357 (“Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.”).

302. See *Chavez-Meza*, 138 S. Ct. at 1965.

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

304. See, e.g., *United States v. White*, 413 F. Supp. 3d 15, 51–52 (D.D.C. 2019), *rev’d and remanded*, 984 F.3d 76 (D.C. Cir. 2020); *United States v. Chambers*, No. 03-cr-1131, 2019 WL 3072641, at \*3 (W.D.N.C. July 12, 2019), *vacated and remanded*, 956 F.3d 667 (4th Cir. 2020).

305. See *United States v. White*, 984 F.3d 76, 91–93 (D.C. Cir. 2020) (highlighting the § 3553(a) factors missed by the district court and instructing the district court to consider the facts on remand); *United States v. Chambers*, 956 F.3d 667, 675 (4th Cir. 2020) (vacating the district court’s denial of relief in part because the district court did not consider the defendant’s post-sentencing conduct); see also *Easter*, 975 F.3d at 324 (questioning whether appellate review of section 404 decisions is possible if the lower court neglects to consider § 3553(a)).

306. 997 F.3d 1307, 1317 (11th Cir. 2021).

307. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (holding that on initial sentencing, a district court “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing”).

308. See *Rita v. United States*, 551 U.S. 338, 356 (2007) (“The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.”).

309. See *Stevens*, 997 F.3d at 1317 (holding that the degree of explanation required for denying a section 404 motion is the same as in the initial sentencing context).

refer to what a judge must do when imposing an initial sentence, as the court in *Stevens* itself noted.<sup>310</sup> Further, *Gall* specifically reaffirms that district court judges must evaluate the § 3553(a) factors before determining a sentence.<sup>311</sup> Indeed, the district court at this stage may not even presume that the Guidelines range is appropriate because defendants are entitled to individualized review of their cases based on § 3553(a).<sup>312</sup> Moreover, the *Stevens* court vacated the district court's decision in part specifically because the district court did not demonstrate that it had considered the defendant's arguments under § 3553(a).<sup>313</sup> It is therefore unclear how district courts following the discretionary approach, at least in the Eleventh Circuit, may avoid consideration of the § 3553(a) factors. By explicitly requiring such consideration, the mandatory approach thus provides district courts with comparatively simpler instruction.

#### CONCLUSION

While a plain reading of section 404's text may not demand it, requiring consideration of the § 3553(a) factors does not contravene the text. Moreover, this approach is preferable in light of both Congress's intent in passing the First Step Act and the practical advantages provided by a mandatory procedure. The First Step Act was intended to provide a remedy for people sentenced to decades in prison based on laws that Congress and society now acknowledge were unfair. It focused on a narrow class of offenders whose situations were particularly egregious. It would thus contravene this legislation to deny these people guaranteed individualized review of their cases.

Further, such an approach would promote procedural uniformity and clarity without causing unnecessary delays. Courts may already use streamlined processes for handling straightforward § 3553(a) arguments at initial sentencing. Requiring all courts to consider the § 3553(a) factors in the context of section 404 motions would not impair these streamlined processes. In fact, as exemplified by the Eleventh Circuit's decision in *Stevens*, district courts would have clear and uniform instructions for what they must do to satisfy section 404. This Note therefore concludes that district courts should be required to conduct a complete § 3553(a) analysis before deciding whether to reduce a section 404 petitioner's sentence.

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310. *See id.*

311. *See Gall*, 552 U.S. 38, 49–50 (2007) (“Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.”).

312. *See id.*

313. *See Stevens*, 997 F.3d at 1317.