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## A First Step Back in Time?

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## A FIRST STEP BACK IN TIME?

### ABSTRACT

*This Note discusses the implications of the United States Supreme Court’s holding in *Concepcion v. United States*, which left open whether district courts must reanalyze the 18 U.S.C.A. § 3553(a) factors when ruling on a motion to reduce a defendant’s sentence under the First Step Act. The decision settled a dispute between the First, Fifth, Ninth, and Eleventh Circuits, which did not require sentencing courts to consider intervening factual or legal developments; and the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits which did. However, the Supreme Court’s decision only obligates a district court to consider intervening factual and legal developments when raised by the parties. This places the burden on defendants to raise the issue, which is why this Note argues that instead, district courts should always be required to reanalyze the sentencing factors when ruling on a First Step Act motion. The sentencing factors account for the defendant’s unique characteristics, especially against the backdrop of the First Step Act, which Congress designed to remedy an unjust blanket sentencing system.*

*This Note aims to explain the War on Drugs, the Fair Sentencing Act, the First Step Act, and the Supreme Court’s decision in *Concepcion*. After this, the discussion focuses on the validity of each circuit court of appeal’s caselaw and the subsequent impacts on public policy.*

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I. INTRODUCTION

On June 19, 1986, professional basketball player Len Bias died from a cocaine overdose less than two days after the Boston Celtics drafted him second overall in the 1986 NBA draft.<sup>1</sup> His death was mistakenly attributed to crack cocaine, which sparked a public outcry about a perceived crack epidemic.<sup>2</sup> Three weeks later, in an attempt to stop crack use, Congress passed the Anti-Drug Abuse Act of 1986 (“ADAA”).<sup>3</sup> However, it was clear from the beginning that the ADAA had a disproportionate impact on African Americans.<sup>4</sup> The ADAA imposed penalties 100 times harsher for crack cocaine than powder cocaine.<sup>5</sup> However, Congress did not alter the ADAA despite this sentencing disparity until it passed the Fair Sentencing Act in 2010.<sup>6</sup>

The Fair Sentencing Act lowered the sentencing ratio from 100:1 to 18:1, eliminated some mandatory minimum sentences, and increased the amount of cocaine needed to trigger the remaining mandatory minimums.<sup>7</sup> However, the statute was silent on whether its changes could be applied retroactively to a

<sup>1</sup> Michael Weinreb, *The Day Innocence Died*, ESPN <http://www.espn.com/espn/eticket/story?page=bias> (last visited Oct. 9, 2022); Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, 87 TEMP. L. REV. 645, 646 (2015).

<sup>2</sup> Deborah J. Vagins, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU (Oct. 25, 2006), [https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf).

<sup>3</sup> See Fabens-Lassen, *supra* note 1, at 646.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at n.7–9.

<sup>6</sup> *Id.* at 646.

<sup>7</sup> Kyle Graham, *Sorry Seems To Be The Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 765–66 (2011).

defendant convicted before its enactment.<sup>8</sup> In *Dorsey v. United States*,<sup>9</sup> the Supreme Court held that the Fair Sentencing Act applied to defendants arrested before its enactment.<sup>10</sup> However, the defendant in *Dorsey* had not been convicted when Congress enacted the statute.<sup>11</sup> Thus, the Court did not answer whether the Fair Sentencing Act applied to defendants who had already been convicted under the previous statutory scheme.

The retroactive question was one of the leading drivers behind Congress enacting the First Step Act of 2018. The First Step Act reduced the mandatory minimum sentences for certain drug traffickers, expanded the sentencing judge's discretion to impose a lower sentence if the offender has a minor criminal record, eliminated the stacking of concurrent charges, and authorized courts to apply the Fair Sentencing Act retroactively.<sup>12</sup> However, while the First Step Act cleared the retroactive ambiguity, federal courts have struggled to determine whether the act's requirement for district courts to "impose a sentence" means that a sentencing court must reconsider the defendant's entire sentence or whether the sentencing court is merely required to modify the part of the sentence that would have changed under retroactive application of the Fair Sentencing Act.

This Note aims to provide a comprehensive survey of the federal circuits on the sentencing factors. First, it will discuss the development of federal sentencing, the War on Drugs, the Fair Sentencing Act, and the First Step Act. Next, it discusses the arguments raised in each Circuit Court of Appeals and the Supreme Court's decision in *Concepcion*. It then discusses the current law in each circuit. This Note argues that the Supreme Court's decision is a step in the right direction but leaves more room for ambiguity. The issue is critical because the sentencing factors personalize the defendant and force sentencing judges to consider a defendant's steps toward rehabilitation or continuing criminal behavior.

## II. BACKGROUND

Before discussing the First Step Act and the conflict between the circuits, it is essential to understand the relevant statutory scheme. First, this section discusses the development of uniform federal sentencing and the Sentencing Reform Act. Next, it briefly discusses the War on Drugs and the Anti-Drug Abuse Act, which created a sentencing disparity. Finally, it addresses the Fair Sentencing Act and the First Step Act, which Congress designed to address the disparity.

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<sup>8</sup> See *Dorsey v. United States*, 567 U.S. 260 (2012).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 282.

<sup>11</sup> *Id.*

<sup>12</sup> NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

A. *Congress Enacts the Sentencing Reform Act to Standardize Federal Sentencing*

“For almost a century, Congress delegated near absolute discretion to the sentencing judge.”<sup>13</sup> The sentencing judge had a wide range of sentences that he could impose on a defendant, and if the sentence was within that range, it was unreviewable on appeal.<sup>14</sup> Additionally, Congress further delegated power to the Parole Commission, which set release dates for rehabilitated inmates.<sup>15</sup> The dual system had several flaws, including unpredictable sentences, the Parole Commission releasing prisoners based on its view of appropriate imprisonment, and the Judiciary attempting to anticipate the actions of the Parole Commission when sentencing defendants.<sup>16</sup> These issues forced Congress to take an active role in federal sentencing.

In 1984, Congress passed the Sentencing Reform Act of 1984 (“SRA”).<sup>17</sup> Congress enacted the SRA because district courts had virtually unchecked discretion within a broad range of statutory ranges.<sup>18</sup> Congress designed the SRA to make the federal sentencing scheme more uniform and predictable.<sup>19</sup> The SRA established the sentencing factors that district courts must consider when imposing a new sentence.<sup>20</sup> Additionally, the SRA abolished the federal parole board and created the United States Sentencing Commission (“the Commission”).<sup>21</sup>

The SRA created the Commission as an independent commission of the judicial branch.<sup>22</sup> The Commission’s primary goal was to reduce sentencing disparity and uncertainty.<sup>23</sup> Accordingly, the Commission promulgated guidelines that created uniform sentencing. However, the Commission’s guidelines were ironically too successful and were heavily criticized for removing too much discretion from the district courts.<sup>24</sup>

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<sup>13</sup> The Honorable Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 186 (1993).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 188 (The Sentencing Reform Act was later codified as 18 U.S.C.A. § 3553).

<sup>18</sup> U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 1 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811\\_fed-sentencing-basics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf).

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *See id.* at 3; 18 U.S.C.A § 3553(a)(2) (West 2022).

<sup>21</sup> Hatch, *supra* note 13, at 188–89.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup>*Id.* at 191–92.

The guidelines promulgated by the Commission were mandatory for 18 years until the Supreme Court held that mandatory guidelines were unconstitutional in *United States v. Booker*.<sup>25</sup> Since *Booker*, the guidelines set forth by the Commission are advisory.<sup>26</sup> Consequently, the *Booker* decision vested more power in the sentencing factors as district courts can now depart from the guidelines if the sentencing factors weigh against the recommended sentence. However, it is essential to remember that the guidelines still hold weight and are where sentencing judges routinely start when calculating a sentence.<sup>27</sup>

The SRA requires that when a sentencing court imposes a sentence, it must analyze the relevant factors.<sup>28</sup> The current sentencing 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,<sup>29</sup> (3) the kinds of sentences available, (4) the kinds of sentence and the sentencing range issued by the Sentencing Commission, (5) any pertinent policy statement, (6) the need to avoid unwarranted sentence disparities, and (7) the need to provide restitution to the victims.<sup>30</sup> A sentencing court should weigh the factors and decide if a sentence is justified.<sup>31</sup> For most sentences, appellate courts use the sentencing factors to determine if the sentence is reasonable.<sup>32</sup>

#### B. *The War on Drugs and the Anti-Drug Abuse Act*

The War on Drugs began when former U.S. President Richard Nixon signed the Controlled Substances Act in 1970.<sup>33</sup> The Controlled Substances Act

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<sup>25</sup> *United States v. Booker*, 543 U.S. 220 (2005); Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 HASTINGS L.J. 771, 783 (2018).

<sup>26</sup> Divine, *supra* note 25, at 783.

<sup>27</sup> There is a considerable amount of legal scholarship that argues that *Booker* has only minimally impacted sentencing. *See, e.g.*, Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279 (2006).

<sup>28</sup> 18 U.S.C.A. § 3553 (West 2022).

<sup>29</sup> This factor has four subfactors: “(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C.A. § 3553 (a)(2)(A)–(D) (West 2022).

<sup>30</sup> 18 U.S.C.A. § 3553 (a)(3)–(7) (West 2022).

<sup>31</sup> *See Gall v. United States*, 552 U.S. 38, 38–39 (2007).

<sup>32</sup> *Id.* at 39.

<sup>33</sup> *War on Drugs*, HISTORY (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> (outlining five “schedules” in the Act used to classify drugs based on their medical application and potential abuse).

repealed all previous federal substance control laws and imposed a unified statutory scheme.<sup>34</sup> The Act created five schedules of drugs, with class one the most serious and class five the least.<sup>35</sup> In June 1971, President Nixon officially “declared war” and stated that drug abuse was “public enemy number one.”<sup>36</sup> In 1973, President Nixon created the Drug Enforcement Administration with 1,470 special agents and a budget of \$75 million.<sup>37</sup>

By the mid-1980s, the public feared that crack cocaine would spread into the suburbs.<sup>38</sup> In addition, the media reported that crack was relatively inexpensive to create and warned that it targeted America’s youth.<sup>39</sup> In response to growing public outrage, Congress passed the Anti-Drug Abuse Act of 1986. Congress believed that crack was more dangerous than powder cocaine because it found that crack was highly addictive, harmful, and its users tended to be violent.<sup>40</sup> Additionally, Congress found that crack use was prevalent among teenagers because of its potency and low cost.<sup>41</sup>

The Anti-Drug Abuse Act created a two-tiered scheme of five and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses.<sup>42</sup> Congress wanted to “link the ten-year mandatory minimum . . . to major drug dealers and to link the five-year minimum . . . to serious traffickers.”<sup>43</sup> Critically, the Act treated every gram of crack as the equivalent to 100 grams of powder cocaine, any defendant who possessed five grams of crack faced a five-year mandatory minimum sentence, and possession of at least 50 grams resulted in a ten-year mandatory minimum sentence.<sup>44</sup>

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<sup>34</sup> JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS 2 (2021), <https://sgp.fas.org/crs/misc/R45948.pdf>.

<sup>35</sup> Cocaine, both powdered and crack, is currently a class II drug. Class II drugs are classified with a high abuse potential, an accepted medical use, and abuse may lead to severe psychological or physical dependence. *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> (last visited Sept. 3, 2022); *Controlled Substances: Alphabetical Order*, U.S. DRUG ENF’T ADMIN. 7 (Aug. 2, 2022), [https://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf).

<sup>36</sup> *War on Drugs*, *supra* note 33.

<sup>37</sup> *Id.* (Today the agency has nearly 5,000 agents and a budget of \$2.03 billion).

<sup>38</sup> Hillary E. LaBar, *The Fair Sentencing Act Isn’t All It’s “Cracked” Up to Be: How Recent Congressional Action on Federal Crack Cocaine Sentencing Schemes Failed to End the Disparity Between Crack and Powder Cocaine Offenses*, 64 SYRACUSE L. REV. 313, 320 (2014).

<sup>39</sup> See e.g., Kevin Cullen, *New ‘Crack’ Drug a Major Challenge, Officials Say*, BOS. GLOBE, May 1, 1986, at 29; Peter Kerr, *Extra-Potent Cocaine: Use Rising Sharply Among Teen-Agers*, N.Y. TIMES (Mar. 20, 1986), <https://www.nytimes.com/1986/03/20/nyregion/extra-potent-cocaine-use-rising-sharply-among-teen-agers.html>.

<sup>40</sup> *Kimbrough v. United States*, 552 U.S. 85, 95–96 (2007).

<sup>41</sup> *Id.* at 96.

<sup>42</sup> *Id.* at 95.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 96.

While Congress was drafting the ADAA, the Sentencing Commission formulated the Sentencing Guidelines.<sup>45</sup> The Commission adopted a similar scheme for drug-trafficking offenses. The Guidelines use a drug quantity table based on drug type and weight to set the base offense level when sentencing a defendant convicted of a drug trafficking offense.<sup>46</sup> The Guidelines adopted the same 100:1 ratio for crack and powdered cocaine, which resulted in crack traffickers receiving higher sentences than cocaine traffickers.<sup>47</sup>

However, the unison between Congress and the Commission ended in 1995 when the Commission identified three problems with the crack disparity.<sup>48</sup> First, it found that crack and powder cocaine were quite similar, contradicting the disparity.<sup>49</sup> For example, the Commission reported that crack and powdered cocaine trafficking resulted in similar violence rates and bodily harm when ingested.<sup>50</sup> Second, the Commission concluded that the disparity was inconsistent with severely punishing major drug traffickers because major traffickers generally imported powder cocaine which the low-level dealers would convert into crack.<sup>51</sup> Finally, the Commission was concerned about the disparity affecting African Americans at a higher rate.<sup>52</sup> It found that 85% of defendants convicted of crack offenses in federal court were African American, which resulted in sentences at a 100:1 ratio being imposed “primarily upon black offenders.”<sup>53</sup> Despite suggestions from the Commission for ratios ranging from 1:1–20:1, Congress continued to ignore the disparity until 2010.<sup>54</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 97.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 94.

<sup>50</sup> *Id.* at 98.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 99.



C. *Congress Enacts the Fair Sentencing Act and First Step Act to Correct the Sentencing Disparity*

In 2010, Congress enacted the Fair Sentencing Act to lower the sentencing disparity between crack and powder cocaine.<sup>55</sup> The Fair Sentencing Act increased the amount of crack needed to trigger the five-year mandatory minimum from 5 grams to 28 grams and the amount required to trigger the ten-year minimum from 50 grams to 280 grams.<sup>56</sup> This change effectively reduced the sentencing disparity from 100:1 to 18:1.<sup>57</sup> However, the Fair Sentencing Act did not apply retroactively to those sentenced before 2010, under the ADAA.<sup>58</sup>

This question of retroactivity in the Fair Sentencing Act is one of the many reasons that Congress enacted the First Step Act in 2018.<sup>59</sup> The legislative history of the First Step Act shows that Congress overwhelmingly supported reducing the sentencing disparity, with 91% of the House<sup>60</sup> and 88% of the Senate<sup>61</sup> voting “yea.” Indeed, the discussions on the House and Senate floors illustrate its support. For example, Republican Representative Doug Collins, who helped sponsor the bill in the House, stated, “the legislation includes carefully tailored sentencing reforms to address inherent disparities in our sentencing laws while keeping violent criminals from the incentives and benefits of the bill.”<sup>62</sup> Fittingly, Democrat Representative Cedric Richmond coined, “Is it a perfect bill? No, it is not. Is it a first step? Yes, and it is a good first step.”<sup>63</sup> Additionally, Senator Booker, who sponsored the bill in the Senate, said, “the racially biased crack cocaine sentencing disparity has already been negotiated down from 100 to 1 to 18 to 1. It should be equal. It should be 1 to 1, but we made progress.”<sup>64</sup> Indeed, his remarks emphasized the hope that this statute would give individuals a second chance.<sup>65</sup>

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<sup>55</sup> LaBar, *supra* note 38, at 330.

<sup>56</sup> *Dorsey v. United States*, 567 U.S. 260, 269 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 282 (finding that retroactive application of the Fair Sentencing Act extended to those who committed a crack cocaine offense prior to the Fair Sentencing Act but only if the defendant had not yet been sentenced under the ADAA).

<sup>59</sup> *United States v. Kelley*, 962 F.3d 470, 472 (2020).

<sup>60</sup> S. 756: *First Step Act*, GOVTRACK (Dec. 20, 2018, 1:58 PM), <https://www.govtrack.us/congress/votes/115-2018/h448>.

<sup>61</sup> S. 756: *First Step Act*, GOVTRACK (Dec. 18, 2018, 8:22 PM), <https://www.govtrack.us/congress/votes/115-2018/s271>.

<sup>62</sup> 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018).

<sup>63</sup> 164 CONG. REC. H10365 (daily ed. Dec. 20, 2018).

<sup>64</sup> 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018).

<sup>65</sup> *See id.*

Section 404 of the First Step Act applies the Fair Sentencing Act retroactively to defendants convicted before the Fair Sentencing Act.<sup>66</sup> Subsection (a) defines the scope articulating that a “covered offense” is “a violation of a Federal criminal statute, the statutory penalties for which were modified by . . . the Fair Sentencing Act.”<sup>67</sup> Subsection (b) explains how a sentencing court may reduce a sentence: “a court . . . may impose a reduced sentence as if . . . the Fair Sentencing Act of 2010 [was] in effect at the time the time the covered offense was committed.”<sup>68</sup> Finally, subsection (c) limits a court’s ability to impose a reduced sentence if “the sentence was previously imposed or previously reduced in accordance with the . . . Fair Sentencing Act” or “if a previous motion made under [The First Step Act] was . . . denied after a complete review of the motion on the merits.”<sup>69</sup> It is important to remember that a defendant still must file a motion to reduce their sentence, and the court’s decision is entirely discretionary.<sup>70</sup> Despite this discretion, the First Step Act has produced results.

From 2018 through August 2020, federal courts granted over 2,000 motions for a reduced sentence based on the First Step Act.<sup>71</sup> As a result, on average, sentences were reduced by 71 months, a 26% decrease.<sup>72</sup> In addition, the Commission found that 91% of the offenders who received a reduced sentence were African Americans convicted of crack cocaine offenses.<sup>73</sup>

### III. THE FIRST STEP ACT CREATES MORE INCONSISTENCY

Every circuit agreed that during initial sentencing, a court must apply the sentencing factors and justify the sentence based on the weight of the factors.<sup>74</sup> However, the circuits were split on whether the second sentencing court must reanalyze the sentencing factors anew when deciding a First Step Act motion. Additionally, there were disagreements about the scope of the First Step Act and whether it authorizes a sentencing court to consider intervening factual and legal developments. The Supreme Court answered these questions in *Concepcion v.*

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<sup>66</sup> *Id.* The Fair Sentencing Act and the First Step Act fall under 18 U.S.C.A. § 3582(C)(1)(3)’s exception to the rule of finality. *See* 18 U.S.C.A. § 3582(c) (West 2022); *Dillion v. United States*, 560 U.S. 817, 824 (2010).

<sup>67</sup> First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222 (2018).

<sup>68</sup> *Id.* § 404(b).

<sup>69</sup> *Id.* § 404(c).

<sup>70</sup> *Id.* § 404(b).

<sup>71</sup> JULIE ZIBULSKY & CHRISTINE KITCHENS, U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018 ONE YEAR OF IMPLEMENTATION 43 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831\\_First-Step-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 44.

<sup>74</sup> 18 U.S.C.A. § 3553 (West 2018).

*United States*. The first goal of this Note is to explain the arguments that were posed to the Supreme Court, and the second goal is to explain the landscape of the law after *Concepcion*. This Note groups the circuits into two rough categories.<sup>75</sup> The first are those that were overruled by *Concepcion*, which includes the First, Fifth, Ninth, and the Eleventh Circuits. The second group consists of the circuits whose opinions have survived *Concepcion*, which includes the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits. After explaining the circuit split, this Note looks at the implications of the Supreme Court's decision.

A. *The First Step Act's Text is Ambiguous*

The root of this circuit split is no secret. The First Step Act is entirely silent on whether a district court is required to apply the sentencing factors when ruling on a First Step Act motion.<sup>76</sup> Instead, the text authorizes a district court to “impose a reduced sentence as if [§§] 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.”<sup>77</sup> The First Step Act does not mention the sentencing factors, and this is particularly crucial because Congress has explicitly required district courts to analyze the sentencing factors in other legislation.<sup>78</sup> The term “impose” is the crux of the dispute. The circuits that required district courts to consider the sentencing factors argued that “impose” is Congress's way of mandating that district courts must consider the sentencing factors.<sup>79</sup>

Several circuits have articulated that the term “impose” requires a district court to consider the sentencing factors when ruling on a First Step Act motion.<sup>80</sup> The argument is that instead of choosing the term modify or reduce, Congress specifically chose a loaded word.<sup>81</sup> Moreover, the text of the Sentencing Reform Act states, “[f]actors to be considered in imposing a sentence.”<sup>82</sup> Thus, since the First Step Act requires a district court to impose a sentence and the SRA requires consideration of the sentencing factors when imposing a sentence, Congress

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<sup>75</sup> The author acknowledges that there are diverse approaches to each circuit that are addressed in kind. However, this Note organizes the circuits based on whether their case law required district courts to apply the sentencing factors.

<sup>76</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018).

<sup>77</sup> *United States v. Concepcion*, 991 F.3d 279, 286 (1st Cir. 2021) (quoting First Step Act, § 404(b)) (emphasis added).

<sup>78</sup> See *United States v. Stevens*, 997 F.3d 1307, 1315 (11th Cir. 2021) (first citing 18 U.S.C.A. § 3582(a) (West 2022); and then citing 18 U.S.C.A. § 3582(c)(2) (West 2022)).

<sup>79</sup> See *infra* Part IV.

<sup>80</sup> See, e.g., *United States v. Easter*, 975 F.3d 318, 323–27 (3d Cir. 2020).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 324 (quoting 18 U.S.C.A. § 3553(a) (West 2022)) (emphasis added).

must have intended for district courts to consider the sentencing factors.<sup>83</sup> Indeed, this is a rational argument. Combined with the practical consideration and intent of the First Step Act, it is plausible that Congress intended for district courts to consider the sentencing factors.

However, this reading ignores that Congress has always been explicit when requiring the courts to analyze the sentencing factors.<sup>84</sup> Indeed, when a court imposes an initial sentence, the governing language states, “[courts] shall consider the factors outlined in [§] 3553(a) to the extent that they are applicable.”<sup>85</sup> Another example is the statute that requires a district court to reduce a sentence due to a change in the Commission’s guideline range.<sup>86</sup> The text clearly says, “[the court] may reduce the term of imprisonment, after considering the factors outlined in § 3553(a) to the extent they are applicable.”<sup>87</sup> This example illustrates that when Congress intends for district courts to analyze the sentencing factors, it gives clear instructions, even when the statute only reduces the term of imprisonment, like the First Step Act.

Additionally, there is a textual argument against requiring district courts to consider the sentencing factors.<sup>88</sup> First, the “as is” clause in the First Step Act limits its scope.<sup>89</sup> This clause restricts the scope of the First Step Act by only allowing a district court to apply §§ 2 and 3 of the Fair Sentencing Act, which would allow a sentencing court to rectify the sentencing disparity between powder and crack cocaine offenses.<sup>90</sup> Sections 2 and 3 of the Fair Sentencing Act do not mention the sentencing factors or provide another textual justification.<sup>91</sup>

Furthermore, the discretionary nature of the First Step Act implies that the term “impose” does not mean that district courts are required to apply the sentencing factors.<sup>92</sup> First, whether a district court reduces a sentence at all is permissive because the statute states a district court “may” rather than “shall.”<sup>93</sup> Second, district courts cannot impose a completely new sentence because it may only reduce a defendant’s sentence.<sup>94</sup> This again reduces the likelihood that the First Step Act requires district courts to consider the sentencing factors because

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<sup>83</sup> *Id.* at 324–25.

<sup>84</sup> *Id.*

<sup>85</sup> 18 U.S.C.A. § 3582(a) (West 2022).

<sup>86</sup> *Id.* § 3582(c)(2).

<sup>87</sup> *United States v. Stevens*, 997 F.3d 1307, 1315 (11th Cir. 2021).

<sup>88</sup> *United States v. Concepcion*, 991 F.3d 279, 288 (1st Cir. 2021).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021).

<sup>94</sup> *United States v. Concepcion*, 991 F.3d 279, 288 (1st Cir. 2021).

it places several restrictions on their sentencing power.<sup>95</sup> Thus, several rational arguments are for and against requiring a district court to reconsider a defendant's sentencing factors and any intervening factual and legal developments.

### B. *Concepcion v. United States*

The United States Supreme Court weighed in on the issue in *Concepcion v. United States*.<sup>96</sup> The question that *Concepcion* presented to the Supreme Court was “whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact”<sup>97</sup> The Supreme Court held that yes, a district court can consider all legal and factual developments that are raised by the parties when ruling on a First Step Act motion.<sup>98</sup> However, the Court limited its holding by maintaining that district courts are not required to reduce any sentence based on intervening developments, and any relief is discretionary.<sup>99</sup>

The Court discussed how, historically, courts have always considered every relevant factor when sentencing a defendant.<sup>100</sup> It then outlined the long history of district courts regularly considering evidence of a defendant's rehabilitation after sentences were vacated on appeal.<sup>101</sup> Next, it addressed the previously discussed textual arguments against considering intervening developments, finding that they were unpersuasive.<sup>102</sup> However, the Court did not mandate that district courts must always consider factual or legal developments and only concluded that all a district court must do is demonstrate that it considered the arguments raised by the parties.<sup>103</sup>

### C. *Circuits That Concepcion Overruled*

#### 1. The First Circuit

The First Circuit's principal case on the issue is *United States v. Concepcion*,<sup>104</sup> where the court held that a defendant is not entitled to plenary

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<sup>95</sup> *Id.*

<sup>96</sup> 142 S. Ct. 2389.

<sup>97</sup> *Id.* at 2399.

<sup>98</sup> *Id.* at 2404.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2398.

<sup>101</sup> *Id.* at 2400.

<sup>102</sup> *Id.* at 2402.

<sup>103</sup> *Id.* at 2404.

<sup>104</sup> *United States v. Concepcion*, 991 F.3d 279, 279 (1st Cir. 2021).

resentencing under the First Step Act.<sup>105</sup> When ruling on Concepcion’s First Step Act motion, the district court did not consider any of the § 3553(a) sentencing factors.<sup>106</sup> Still, it concluded that his sentence would have been the same if Concepcion had been sentenced today under the First Step Act.<sup>107</sup> Concepcion appealed, arguing that the First Step Act requires a sentencing court to evaluate the § 3553(a) factors anew.<sup>108</sup>

The court found that the First Step Act only authorized a district court to retroactively apply §§ 2 and 3 of the Fair Sentencing Act and, considering any other changes, goes beyond the limit of this authorization.<sup>109</sup> It reasoned that the First Step Act provides a specific relief and that it was not the appropriate vehicle for a defendant to “demand the benefits of emerging legal developments unrelated to [ §§ ] 2 and 3 of the Fair Sentencing Act.”<sup>110</sup> Thus, in the First Circuit, a defendant may only use the First Step Act to reduce their sentence if subjected to the five or ten-year minimum sentences under the ADAA.<sup>111</sup>

The court did acknowledge that the First Step Act requires a sentencing court to impose a sentence and that the SRA requires a sentencing court to analyze the § 3553 factors when imposing a sentence.<sup>112</sup> However, it distinguished the First Step Act by pointing out that it only authorizes a sentence reduction, concluding that there is no meaningful difference between imposing a reduced sentence and reducing a sentence.<sup>113</sup> Thus, the SRA’s requirement does not apply in this context.

The First Circuit took a rigid approach, and it can be inferred from the opinion that a district court was not even allowed to reconsider the factors. The Supreme Court reversed the First Circuit in *Concepcion v. United States*.<sup>114</sup>

## 2. The Fifth Circuit

The Fifth Circuit did not require a sentencing court to consider the § 3553(a) sentencing factors. The first case that touched on this issue was *United States v. Hegwood*,<sup>115</sup> where the court took a hard stance against plenary resentencing. In 2008, Michael Hegwood pleaded guilty to possession with the

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<sup>105</sup> *Id.* at 282.

<sup>106</sup> *Id.* at 283.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 286.

<sup>110</sup> *Id.* at 287.

<sup>111</sup> *See id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 288.

<sup>114</sup> *Infra* Part IV.

<sup>115</sup> 934 F.3d 414 (5th Cir. 2019).

intent to distribute five grams or more of cocaine, and the district court sentenced him to serve 200 months in prison.<sup>116</sup> In 2019, Hegwood filed a motion for a reduced sentence under the First Step Act, and the district court granted the motion but did not apply any changes in Fifth Circuit precedent since Hegwood had been convicted, which would have warranted a lower sentence.<sup>117</sup> Hegwood appealed to the Fifth Circuit, claiming that this failure to apply changes in the law retroactively was contrary to the First Step Act.<sup>118</sup>

The Fifth Circuit disagreed, finding that the First Step Act grants a district judge “limited authority to consider reducing a previously-imposed sentence.”<sup>119</sup> The court then laid out the mechanics for a First Step Act motion.<sup>120</sup> First, the district court places itself in the time frame of the original sentencing, altering the law only by the changes mandated by the Fair Sentencing and First Step Acts.<sup>121</sup> Imposing the new sentence maintains all the original characteristics of the first sentence except those affected by the Fair Sentencing Act.<sup>122</sup> The Supreme Court disagreed and abrogated the holding.<sup>123</sup>

The court next addressed the First Step Act in *United States v. Jackson*.<sup>124</sup> The court emphatically declared that a district court is not required to consider a defendant’s post-sentencing conduct but may do so if necessary.<sup>125</sup> Additionally, it clarified that *Hegwood* prohibits a district court from considering changes in the law, except for those in the Fair Sentencing Act.<sup>126</sup> However, *Jackson* did not address the sentencing factors directly, with the court stating in a footnote that “we do not hold that the court *must* consider the factors in 18 U.S.C § 3553(a) in deciding whether to resentence under the [First Step Act.] We reserve the issue for another day.”<sup>127</sup>

The court first indicated a preference for a sentencing court to consider the sentencing factors in *United States v. Batiste*.<sup>128</sup> The Court did not issue a bright-line rule, but the district court’s “due consideration” of the sentencing

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<sup>116</sup> *Id.* at 415 (noting that Hegwood’s PSR attributed over 9 grams of crack for sentencing purposes, classified him as a category VI, and his final offense level was 31).

<sup>117</sup> *Id.* at 416

<sup>118</sup> *Id.* at 417.

<sup>119</sup> *Id.* at 418.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See* *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

<sup>124</sup> 945 F.3d 315 (5th Cir. 2019).

<sup>125</sup> *Id.* at 322 n.7.

<sup>126</sup> *Id.* at 321.

<sup>127</sup> *Id.* at 322 n.8.

<sup>128</sup> 980 F.3d 466 (5th Cir. 2020).

factors was a significant reason the court affirmed its ruling.<sup>129</sup> Indeed, in *United States v. Whitehead*,<sup>130</sup> the Court again addressed the issue in a footnote.<sup>131</sup> It expressed a preference for reconsideration of the sentencing factors, “consideration of the pertinent § 3553(a) factors certainly seems appropriate[.]”<sup>132</sup> However, it again acknowledged the current ambiguity “we have left open whether district courts *must* undertake the analysis [of the sentencing factors].”<sup>133</sup> Interestingly, the court has expressed it is entirely aware of the ambiguity but sidestepped the issue.

### 3. The Ninth Circuit

The court’s first opinion on the subject was *United States v. Kelley*,<sup>134</sup> where it ruled that the First Step Act does not permit plenary resentencing.<sup>135</sup> Although this case does not directly address whether a district court must consider the sentencing factors directly, the Court prohibited any consideration of intervening factual or legal developments.<sup>136</sup> The Supreme Court abrogated the holding in *Concepcion*.<sup>137</sup>

The court does directly answer this question in an unpublished memorandum opinion. In *United States v. Houston*,<sup>138</sup> the court held that the district court did not abuse its discretion by not considering the sentencing factors when denying the appellant’s First Step Act motion.<sup>139</sup> After *Concepcion*, the Ninth Circuit has endorsed consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a).<sup>140</sup>

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<sup>129</sup> See *id.* at 478.

<sup>130</sup> 986 F.3d 547 (5th Cir. 2021).

<sup>131</sup> *Id.* at 551 n.4.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> 962 F.3d 470 (9th Cir. 2020).

<sup>135</sup> *Id.* at 471.

<sup>136</sup> *Id.* at 475.

<sup>137</sup> See *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

<sup>138</sup> 805 F. App’x 546 (9th Cir. 2020).

<sup>139</sup> *Id.* at 546–47.

<sup>140</sup> See *United States v. Carter*, 44 F.4th 1227, 1228 (9th Cir. 2022) (recognizing that *Kelley* has been overruled by *Concepcion* and that district courts may consider legal changes outside the First Step Act); *United States v. Browning*, No. 20-50308, 2022 WL 43764112, at \*1 (9th Cir. Sept. 22, 2022) (finding that analyzing the sentencing factors is sufficient).



#### 4. The Eleventh Circuit

Like the previously mentioned circuits, the Eleventh Circuit adopted a conservative approach to the First Step Act. The Court first addressed the First Step Act in *United States v. Denson*,<sup>141</sup> where it held that the Act is a limited remedy.<sup>142</sup> The First Step Act only allows a district court to reduce a sentence for a “covered offense” and only to the extent that §§ 2 and 3 of the Fair Sentencing Act were in effect when the defendant committed the covered offense.<sup>143</sup> However, the First Step Act does not allow a district court to reduce a defendant’s sentence based on other changes in the law since the defendant’s conviction.<sup>144</sup> Essentially, *Denson* banned plenary resentencing in the Eleventh Circuit, and district courts cannot consider any changes in the law that would change the defendant’s sentence if imposed today. The Supreme Court abrogated this holding in *Concepcion*.<sup>145</sup>

The Eleventh Circuit expanded the district courts’ discretion in *United States v. Jones*,<sup>146</sup> where it held that district courts could consider relevant factors when deciding to grant a First Step Act motion, including the sentencing factors.<sup>147</sup> However, this consideration is entirely discretionary, and a district court only abuses its discretion if it applies the wrong legal standard.<sup>148</sup> The Supreme Court eventually vacated this decision with a summary order in October 2022.<sup>149</sup>

Furthermore, in *United States v. Stevens*,<sup>150</sup> the Eleventh Circuit clarified that a district court does not need to consider the sentencing factors when it decides the merits of a First Step Act motion.<sup>151</sup> Instead, a district court must explain its reasoning to allow for meaningful appellate review.<sup>152</sup> The court justified its holding with the following justifications: (1) it did not want to reduce the discretion of district judges,<sup>153</sup> (2) the First Step Act does not explicitly require consideration of the sentencing factors,<sup>154</sup> and (3) Congress has explicitly

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<sup>141</sup> 963 F.3d 1080 (11th Cir. 2020).

<sup>142</sup> *Id.* at 1089.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See Concepcion v. United States*, 142 S. Ct. 2389 (2022).

<sup>146</sup> 962 F.3d 1290 (11th Cir. 2020).

<sup>147</sup> *Id.* at 1304.

<sup>148</sup> *Id.*

<sup>149</sup> *Jackson v. United States*, No. 21-5874, 2022 WL 4650968 (U.S. Oct. 3, 2022).

<sup>150</sup> 997 F.3d 1307 (11th Cir. 2021).

<sup>151</sup> *Id.* at 1314–16.

<sup>152</sup> *Id.* at 1317.

<sup>153</sup> *Id.* at 1316.

<sup>154</sup> *Id.*

required district courts to consider the sentencing factors in other legislation.<sup>155</sup> Moreover, the Eleventh Circuit has articulated its own standard that a district court must articulate when it rules on a First Step Act motion.

District courts must adequately explain their decision by setting forth enough to show that it considered the parties' arguments and has a reasoned basis for its decision.<sup>156</sup> The court compared this explanation to the one needed when a sentencing court initially imposes a sentence stating that it does not have to be lengthy.<sup>157</sup> The critical issue is whether the explanation clarifies that the court had a reasoned basis for reducing or not reducing the defendant's sentence under the First Step Act.<sup>158</sup> If the district court fails to provide a detailed enough explanation, the Eleventh Circuit will remand the case back to the district court and demand a complete explanation.<sup>159</sup> Additionally, the Eleventh Circuit recommended that a district court consider the sentencing factors but fell short of requiring it.<sup>160</sup> After *Concepcion*, the Eleventh Circuit endorsed *Steven's* framework.<sup>161</sup>

#### D. Circuits That Survived *Concepcion*.

##### 1. The Second Circuit

The Second Circuit first addressed plenary resentencing in *United States v. Moore*,<sup>162</sup> holding that a defendant is not entitled to plenary resentencing under the First Step Act.<sup>163</sup> In *Moore*, the appellant argued on a First Step Act motion that his sentencing range would have been lower under the Fair Sentencing Act.<sup>164</sup> The district court denied the motion finding that 188 months was still an appropriate sentence under the guidelines because of Moore's criminal history and disciplinary infractions while in prison.<sup>165</sup>

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<sup>155</sup> *Id.* at 1315 (citing 18 U.S.C.A. §§ 3582(a), (c)(2) (West 2022)).

<sup>156</sup> *Id.* at 1317 (citing *Gall v. United States*, 552 U.S. 38, 50–51 (2007)).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (citing *Rita v. United States*, 551 U.S. 338, 356 (2007)).

<sup>159</sup> *Id.* (although the Eleventh Circuit does not require an analysis of the sentencing factors for an adequate explanation, it did cite the absence of the district court's analysis of the factors as a reason for the explanation being inadequate).

<sup>160</sup> *Id.*

<sup>161</sup> See *United States v. Moore*, No. 21-11912, 2022 WL 3651932, at \*3 (11th Cir. Aug. 25, 2022) (holding that district courts have the discretion to reduce a sentence under the First Step Act but it must provide a reasoned basis and consider intervening changes of law or fact).

<sup>162</sup> 975 F.3d 84 (2d Cir. 2020).

<sup>163</sup> *Id.* at 92.

<sup>164</sup> *Id.* at 87 (under the Fair Sentencing Act, Moore's offense level would have been a 29 which would lower his guideline range).

<sup>165</sup> *Id.* at 88.

Moore appealed to the Second Circuit, arguing that the district court erred by not considering intervening case law from the Second Circuit. Under the intervening case law, he argued that his sentence should have only been 110–137 months.<sup>166</sup> Thus, while his argument does not implicate the sentencing factors directly, he still argued that the First Step Act requires a sentencing court to consider other changes in the law outside of §§ 2 and 3 of the Fair Sentencing Act.

However, the Second Circuit disagreed with Moore’s interpretation of the First Step Act. It held that the First Step Act does not require a sentencing court to reconsider all aspects of the original sentencing.<sup>167</sup> Moore failed to persuade the court that “impos[ing] a reduced sentence” requires a sentencing court to treat a reduced sentence under the First Step Act the same as it would when imposing an original sentence.<sup>168</sup> Additionally, it found that language in § 404(c), which bars defendants from filing successive motions if their first motion is denied “after a complete review . . . on the merits,” did not obligate a sentencing court to retroactively apply updates in the law to an offender’s original sentence.<sup>169</sup> The court subsequently denied Moore’s motion.

The Second Circuit built on the *Moore* decision in *United States v. Moyherhandez*.<sup>170</sup> In *Moyherhandez*, the Court held that a sentencing court does not have to analyze the § 3553(a) sentencing factors but is permitted to do so.<sup>171</sup> For example, in 1996, Moyherhandez sold roughly 90 grams of crack cocaine to a confidential informant, which triggered a mandatory minimum sentence of 20 years under the ADAA.<sup>172</sup> However, under the Fair Sentencing Act, Moyerhandez’s 90 grams fell below the 280-gram threshold for the mandatory minimum of 20 years.<sup>173</sup>

Moyerhandez filed a motion to reduce his sentence with the district court, and he argued that the § 3553(a) factors warranted a reduction.<sup>174</sup> The district court denied his motion, finding that his original sentence did not change under the First Step Act, and ruled that “there is no mandate to consider [the] § 3553(a) factors when reducing a sentence under the [the First Step Act].”<sup>175</sup>

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<sup>166</sup> *Id.* at 90.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 91.

<sup>169</sup> *Id.*

<sup>170</sup> *See* 5 F.4th 195 (2d Cir. 2021).

<sup>171</sup> *Id.* at 198.

<sup>172</sup> *Id.* at 199.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 200.

<sup>175</sup> *Id.* (quoting *United States v. Moyerhandez*, No. 97-CR-197, 2020 WL 728780, at \*2 (S.D.N.Y. Feb. 13, 2020)).

Moyherhernandez appealed, arguing that sentencing courts must consider the § 3553(a) factors.<sup>176</sup>

The Second Circuit disagreed with Moyherhernandez’s interpretation of the First Step Act, holding that considering the 3553(a) factors is not required.<sup>177</sup> The court found that § 404 does not explicitly direct a court to consider the sentencing factors and relied on the holding in *Moore*.<sup>178</sup> The court followed the same *Moore* analysis that a court can only impose a reduced sentence. This limitation implies that Congress did not intend for the sentencing court to analyze anything other than changes in the law under the First Step Act and Fair Sentencing Act.<sup>179</sup> However, the court did concede that the factors are a helpful tool and remain sound guiding principles.<sup>180</sup> The Supreme Court vacated the decision,<sup>181</sup> however, the Second Circuit believed that this was only because the district court did not explain that it had considered Moyherhernandez’s argument.<sup>182</sup> Therefore, the Second Circuit’s case law remains mostly undisturbed.<sup>183</sup>

## 2. The Third Circuit

The Third Circuit was the first jurisdiction to mandate that district courts consider the applicable sentencing factors when ruling on a First Step Act motion.<sup>184</sup> In *United States v. Easter*,<sup>185</sup> the court outlined its rationale for diverting from the majority rule, which gives district courts the discretion to consider the sentencing factors.<sup>186</sup> First, the court interpreted the phrase “impose a reduced sentence” in the First Step Act to trigger analysis of the sentencing factors because district courts must consider the sentencing factors when “imposing a sentence” under the SRA.<sup>187</sup> Next, it conceded that, unlike other statutes,<sup>188</sup> the First Step Act does not explicitly state that the sentencing factors need to be analyzed.<sup>189</sup> However, the sentencing factors apply when a district

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<sup>176</sup> *Id.* at 201.

<sup>177</sup> *Id.* at 202.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 204.

<sup>180</sup> *Id.* at 205.

<sup>181</sup> *Moyherhernandez v. United States*, 142 S. Ct. 2899 (2022).

<sup>182</sup> *United States v. Moyherhernandez*, No. 20-625-CR, 2022 WL 2896973, at \*1 (2d Cir. July 19, 2022).

<sup>183</sup> *Id.*

<sup>184</sup> *United States v. Easter*, 975 F.3d 318, 320 (3d Cir. 2020).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 323–26.

<sup>187</sup> *Id.* at 324 (quoting 18 U.S.C.A. § 3553(a) (West 2022)).

<sup>188</sup> *Id.* at 323 (citing 18 U.S.C.A. §§ 3582(c)(1)(A), (c)(2) (West 2022)).

<sup>189</sup> *Id.* at 324.

court imposes a sentence because the First Step Act prescribes its procedural framework, unlike other statutes.<sup>190</sup> Additionally, the court felt that requiring the district courts to analyze the sentencing factors allows the appellate court to adequately review the district court's exercise of discretion.<sup>191</sup>

The Third Circuit is in line with the majority rule on plenary resentencing, holding that any changes to the law outside of the Fair Sentencing Act should not be considered.<sup>192</sup> The court compared plenary resentencing with the sentencing factors by articulating that a defendant's post-conviction rehabilitation is "plainly relevant" when imposing a sentence.<sup>193</sup> Indeed, the court acknowledges that any relief under the First Step Act is discretionary. However, it still requires some accountability from the district courts to articulate their reasoning by analyzing the sentencing factors.<sup>194</sup> Recently, the Third Circuit revisited the issue, finding that *Concepcion* only changed its caselaw by restricting a district court's ability to "recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act."<sup>195</sup>

### 3. The Fourth Circuit

The Fourth Circuit's interpretation of the First Step Act mandated that district courts consider the sentencing factors and change errors from the original sentence.<sup>196</sup> In *United States v. Chambers*,<sup>197</sup> the court agreed with the "impose a sentence" argument.<sup>198</sup> Like the Third Circuit, it held that "impose" is substantially different from "modify" or "reduce" and that this choice of language shows that Congress intended for sentencing courts to consider the sentencing factors on a First Step Act motion.<sup>199</sup> Furthermore, a defendant's post-sentencing conduct is relevant when imposing a new sentence; a court must freshly analyze the sentencing factors.<sup>200</sup> However, this does not mean that all sentencing factors must be relitigated.<sup>201</sup> Instead, the scope of the district court's analysis should be limited to the "gaps left by the original sentencing"

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See id.* at 326.

<sup>193</sup> *Id.* at 327 (citing *United States v. Hudson*, 97 F.3d 605, 612 (7th Cir. 2020)).

<sup>194</sup> *Id.*

<sup>195</sup> *United States v. Shields*, 48 F.4th 183, 190 (3d Cir. 2022).

<sup>196</sup> *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 672.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 674–75.

<sup>201</sup> *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021).

proceedings to allow for the current sentencing court to impose a new sentence in light of the intervening circumstances.<sup>202</sup>

The court articulated the required analysis in *United States v. Collington*.<sup>203</sup> First, a sentencing court must accurately recalculate the Guidelines sentence range, fix any original errors, and apply intervening case law that is retroactive.<sup>204</sup> Second, it must use the sentencing factors to determine the appropriate sentence.<sup>205</sup> Third, it can even depart downward from the new Guidelines range if the sentencing factors warrant the departure.<sup>206</sup> Indeed, this is the most expansive reading of the First Step Act, and the sentencing court may consider any relevant information for resentencing.<sup>207</sup>

The Fourth Circuit adopted an expansive reading of the First Step Act. However, while district courts are not supposed to engage in plenary resentencing, the court mandates considering all legal and factual developments.<sup>208</sup> Moreover, the court has attempted to label this action as fixing an error, which is not plenary resentencing<sup>209</sup> because it is not a change in the law. Instead, it must have been an error during the original sentencing.<sup>210</sup> Finally, a reasonableness standard is imposed on district courts rather than just an abuse of discretion standard.<sup>211</sup> Substantial reasonableness requires a district court to justify a sentence under the totality of the circumstances.<sup>212</sup> This standard is justified by the First Step Act's language requiring district courts to undertake "a complete review of the motion on the merits."<sup>213</sup> Indeed, the Fourth Circuit's approach encourages sentencing courts to reduce sentences when appropriate.

#### 4. The Sixth Circuit

The Sixth Circuit has touched on each issue previously discussed. It holds that sentencing courts must consider the sentencing factors when ruling on a First Step Act motion, defendants are not entitled to plenary resentencing, the

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<sup>202</sup> *Id.*

<sup>203</sup> *See* 995 F.3d 347 (4th Cir. 2021).

<sup>204</sup> *Id.* at 355.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *See* *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020); *Collington*, 995 F.3d at 355.

<sup>209</sup> *Collington*, 995 F.3d at 355, 358 (stating that "the First Step Act contemplates a robust resentencing analysis, albeit not a plenary resentencing hearing").

<sup>210</sup> *Id.* at 355.

<sup>211</sup> *Id.* at 358.

<sup>212</sup> *Id.* at 360.

<sup>213</sup> *Id.* at 359 (quoting the First Step Act § 404(c), 132 Stat. at 5222).

sentencing court must consider any relevant changes to the defendant's guideline calculation, and any decision on a First Step Act motion is subject to a reasonableness standard.<sup>214</sup> However, the Sixth Circuit has been far from consistent.

Initially, the Sixth Circuit did not prohibit courts from considering the sentencing factors, and it hinted that it is required.<sup>215</sup> The court split from the majority by allowing district courts to consider developments after the defendant committed the covered offense when considering whether to reduce the defendant's sentence.<sup>216</sup> The court justified this deviation because it is easier for a district judge to evaluate the current sentencing factors than the defendant's original sentencing factors, especially if much time has passed since the defendant's original conviction.<sup>217</sup> This, of course, benefits defendants who have been model inmates since the sentence and hurts those who have not made efforts to rehabilitate themselves.

The court took a pragmatic approach to sentencing, articulating that it would be inefficient for sentencing courts to use a novel and untested methodology and that sticking to the tried-and-true sentencing factors "makes sense."<sup>218</sup> However, while still highly encouraged, the court ruled that considering the sentencing factors is not required in *United States v. Maxwell*.<sup>219</sup> Although there is no actual mandate that a district court considers the sentencing factors, there appears to be a de facto mandate.

The Sixth Circuit required district courts to consider intervening factual and legal developments when ruling on a First Step Act motion, and these developments are considered when "balancing the § 3553(a) factors and in deciding whether to modify the original sentence."<sup>220</sup> This is further supported by the court's ruling in *United States v. Howard*.<sup>221</sup> The court reversed the district court because it did not analyze the sentencing factors, which is considered an abuse of discretion.<sup>222</sup>

Like all other circuits, the Sixth Circuit interpreted the First Step Act not to allow plenary resentencing and de novo application of current law.<sup>223</sup> However, district courts can still apply to intervening precedential and factual

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<sup>214</sup> *United States v. Boulding*, 960 F.3d 774, 784–85 (6th Cir. 2020).

<sup>215</sup> *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 358.

<sup>218</sup> *Id.* at 357.

<sup>219</sup> 991 F.3d 685, 691 (6th Cir. 2021).

<sup>220</sup> *Id.* at 692.

<sup>221</sup> 852 F. App'x 1017 (6th Cir. 2021).

<sup>222</sup> *Id.* at 1019.

<sup>223</sup> *United States v. Foreman*, 958 F.3d 506, 508 (6th Cir. 2020).

developments when resentencing a defendant.<sup>224</sup> Prior to *Concepcion*, this approach was one of the most liberal and allowed the sentencing court to consider more than any circuit (other than the Fourth Circuit).<sup>225</sup>

The Sixth Circuit subjects a district court's ruling to a reasonableness standard like the Fourth Circuit.<sup>226</sup> During an initial sentence, sentencing courts must articulate an explanation for their decision that is "arithmetical, technical, or mechanical."<sup>227</sup> Reasonableness requires that the sentence is both procedurally and substantively sound.<sup>228</sup> A sentence is procedurally unreasonable if the court fails to calculate the Guidelines range correctly, treats Guidelines as mandatory, fails to consider the § 3553(a) factors, uses erroneous facts, or does not adequately explain the chosen sentence.<sup>229</sup> Additionally, a sentence is substantively unreasonable if the district court fails to consider "pertinent § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor."<sup>230</sup> A district court must consider the sentencing factors unless it can create a novel way to articulate that its decision is reasonable to the appellate court.

### 5. The Seventh Circuit

The Seventh Circuit currently does not require a district court to consider the sentencing factors unless explicitly raised by the defendant. In *United States v. Shaw*,<sup>231</sup> the court stated that "nothing in the First Step Act precludes a court from utilizing § 3553(a)'s familiar framework when assessing a defendant's arguments, and doing so makes good sense."<sup>232</sup> Further, the court found that since granting relief under the First Step Act is discretionary, the sentencing factors are a useful tool that district courts knew how to apply.<sup>233</sup> Indeed, a sentencing court should consider new statutory minimum or maximum penalties, current guidelines, the defendant's post-conviction conduct, and other relevant information.<sup>234</sup> However, the court does not require district courts to consider the

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<sup>224</sup> *Maxwell*, 991 F.3d at 692.

<sup>225</sup> *Id.* at 690–91.

<sup>226</sup> *Foreman*, 958 F.3d at 514.

<sup>227</sup> *Id.*

<sup>228</sup> *United States v. Nichols*, 897 F.3d 729, 737 (6th Cir. 2018).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (quoting *United States v. Moon*, 513 F.3d 527, 543 (6th Cir. 2008)).

<sup>231</sup> 957 F.3d 734 (7th Cir. 2020).

<sup>232</sup> *Id.* at 741 (citing *United States v. Allen*, 956 F.3d 355, 358 (6th Cir. 2020)).

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 741–42.



sentencing factors, and it stated, “[w]e leave for another day whether a court is required to take §3553(a) factors into consideration.”<sup>235</sup>

The following principal case is *United States v. Hudson*,<sup>236</sup> where the court reaffirmed the reasoning in *Shaw*.<sup>237</sup> The court disagreed with the district court’s conclusion that the First Step Act does not grant sentencing courts the authority to consider the §3553(a) factors.<sup>238</sup> Still, it was not the day that the court would decide whether district courts must consider the § 3553(a) sentencing factors, and the court did not mention the issue.<sup>239</sup> *Shaw* and *Hudson* make it clear that a district may consider the sentencing factors and that the Seventh Circuit believes it to be the best practice, but the cases do not explain when a district court should not consider the § 3553(a) factors.

In *United States v. Fowowe*,<sup>240</sup> the Seventh Circuit adopted a flexible standard for district courts to rule on a First Step Act motion. It explained that a district court must consider the arguments presented in a defendant’s motion, including arguments based on the § 3553(a) factors.<sup>241</sup> After a district court considers the arguments, it must give more than a “barebones explanation” when it issues a ruling.<sup>242</sup> If the district court fails to do so, then the appellate court will deem the ruling a “non-exercise of discretion [that] is itself an abuse of discretion.”<sup>243</sup> Critical to this Note, the court articulated that “a district court is authorized—as distinct from required—to consider” the sentencing factors.<sup>244</sup>

The court then addressed whether the First Step Act requires district courts to engage in plenary resentencing,<sup>245</sup> which accounts for changes in the Circuit’s case law rather than just the changes articulated in the Fair Sentencing Act.<sup>246</sup> The court held that the First Step Act authorizes but does not require a

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<sup>235</sup> *Id.* at 743 n.2.

<sup>236</sup> 967 F.3d 605 (7th Cir. 2020).

<sup>237</sup> *See id.* at 613.

<sup>238</sup> *Id.*

<sup>239</sup> *See generally id.* (the district court in *Hudson* ruled prior to the Seventh Circuit’s decision in *Shaw* which explains the district court’s inconsistent ruling).

<sup>240</sup> 1 F.4th 522 (7th Cir. 2021).

<sup>241</sup> *Id.* at 527 (citing *United States v. Shaw*, 957 F.3d 734, 740 (7th Cir. 2020)).

<sup>242</sup> *Id.* (citing *United States v. Corner*, 967 F.3d 662, 666 (7th Cir. 2020) (per curiam)).

<sup>243</sup> *Id.* (quoting *Corner*, 967 F.3d at 666).

<sup>244</sup> *Id.* at 529.

<sup>245</sup> *Id.* at 528 (explicitly stating that, instead of deciding whether the First Step Act authorizes plenary resentencing, it would decide whether the First Step Act authorizes a district court to consider intervening judicial decisions which changed the relevant law after the defendant’s conviction. For consistency, it is referred to as plenary resentencing in this note, but it is important to note that the scope of the court’s decision only applies to intervening judicial decisions and not statutory law).

<sup>246</sup> *Id.* at 528–34.

district court to reduce a sentence based on an intervening judicial decision.<sup>247</sup> Indeed, the Seventh Circuit has adopted the most flexible approach, allowing but not requiring a district court to consider any relevant factor when deciding a First Step Act motion.

## 6. The Eighth Circuit

The principal case in the Eighth Circuit is *United States v. Moore*,<sup>248</sup> where the court ruled that district courts “may, but need not, consider the [§] 3553 factors.”<sup>249</sup> The court justified its decision because reducing a sentence under § 404 of the First Step Act is permissive, and the act does not explicitly mention the § 3553 factors. Additionally, it found persuasive that Congress has mandated consideration of the § 3553 factors in other legislation but failed to do so in the First Step Act.<sup>250</sup> Finally, the court held that the absence of express language requiring consideration of the sentencing factors in the First Step Act outweighed the shared term “impose” and held that the word “does not plainly mandate application of the § 3553 factors.”<sup>251</sup>

The appellant additionally argued that § 404(c) requires a complete review of the motion on the merits, and this review must include the applicable § 3553 sentencing factors.<sup>252</sup> The court disagreed and held that a complete review in the Eighth Circuit only means that a district court “considered [the] [petitioner’s] arguments in the motion and had a reasoned basis for its decision.”<sup>253</sup> The court, in its conclusion, implies that had the appellant included information about the relevant sentencing factors in his motion, then the district court would have had to consider the petitioner’s argument.<sup>254</sup>

However, in *United States v. Booker*,<sup>255</sup> the court clarified that a district court does not have to respond to every argument made by the defendant, nor must the court recite each sentencing factor.<sup>256</sup> Thus, it is unclear if there is any situation where a district court is required to consider the § 3553(a) sentencing factors.

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<sup>247</sup> *Id.* at 532.

<sup>248</sup> 963 F.3d 725 (8th Cir. 2020).

<sup>249</sup> *Id.* at 727.

<sup>250</sup> *Id.* (citing 18 U.S.C.A. § 3582(c)(2) (where Congress explicitly requires a district court to consider the § 3553 factors)).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 728.

<sup>253</sup> *Id.* (quoting *United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019)).

<sup>254</sup> *See id.* at 729.

<sup>255</sup> 974 F.3d 869 (8th Cir. 2020).

<sup>256</sup> *Id.* at 871 (first citing *United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019); and then citing *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020)).

### 7. The Tenth Circuit

The Tenth Circuit makes it clear that district courts can consider the sentencing factors, but not whether a district court must consider the factors. First, the court implicitly authorized district courts to use the sentencing factors when deciding a First Step Act motion in *United States v. Mannie*.<sup>257</sup> The sentencing factors were not at issue in this case, but the court did affirm the district court's ruling, which relied on the sentencing factors.<sup>258</sup> Additionally, the court stated directly that district courts may consider the sentencing factors in *United States v. Brown*.<sup>259</sup> In *Brown*, it noted that the § 3553(a) factors may be considered because, codified or not, courts have always considered similar factors from the common law and common sense.<sup>260</sup> Indeed, district courts can consider the sentencing factors. However, it is unclear whether they must consider the sentencing factors.

The Tenth Circuit's case law has not directly answered this question, but in an unpublished opinion, the court held that district courts are not required to consider the sentencing factors.<sup>261</sup> The appellant argued that a district court must consider each sentencing factor when denying a motion for a reduced sentence.<sup>262</sup> The court, however, disagreed, holding that "a district court need not consider the § 3553(a) factors to rule on a motion for a reduced sentence under § 404 of the First Step Act, although it is permitted to do so."<sup>263</sup>

### 8. The D.C. Circuit

The D.C. Circuit focused on the purpose of the First Step Act, which is to remedy a "racially disparate sentencing scheme."<sup>264</sup> The D.C. Circuit's case law on the subject is not as developed as the other circuits, and the Court has not ruled on plenary resentencing nor given an opinion on the interpretation of the term "impose a sentence."<sup>265</sup>

However, sentencing courts must consider the sentencing factors rather than apply statutory canons of interpretation.<sup>266</sup> The court focuses heavily on the

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<sup>257</sup> See 971 F.3d 1145 (10th Cir. 2020).

<sup>258</sup> *Id.* at 1158.

<sup>259</sup> See generally 974 F.3d 1137 (10th Cir. 2020).

<sup>260</sup> *Id.* at 1151 n.5 (citing *Mannie*, 971 F.3d at 1158).

<sup>261</sup> See *United States v. London*, 853 F. App'x 259, 261 (10th Cir. 2021).

<sup>262</sup> *Id.* at 260.

<sup>263</sup> *Id.* at 261 (citing *Mannie*, 971 F.3d at 1158 n. 18).

<sup>264</sup> *United States v. White*, 984 F.3d 76, 81 (D.C. Cir. 2020).

<sup>265</sup> See generally *id.*; *United States v. Lawrence*, 1 F.4th 40 (D.C. Cir. 2021).

<sup>266</sup> *United States v. Lawrence*, 1 F.4th 40, 44 (D.C. Cir. 2021).

intent of the First Step Act.<sup>267</sup> The court does this by intentionally restricting sentencing courts' discretion to deny First Step Act motions to eligible defendants.<sup>268</sup> Sentencing courts must consider the sentencing factors, and this is to ensure that district courts sufficiently consider the motions.<sup>269</sup> The D.C. Circuit is wary of sentencing courts that may frustrate Congress's intent of the statute.<sup>270</sup>

The D.C. Circuit outlines its expectations for sentencing courts clearly in *United States v. Lawrence*.<sup>271</sup> It held that the district court's decision must "take into account Congress's purposes in passing the Fair Sentencing Act and the First Step Act."<sup>272</sup> A district court does this by acknowledging that the statutes are strong remedial measures meant to rectify disproportionate and racially disparate sentencing penalties.<sup>273</sup> Specifically, it must consider "all relevant factors," including intervening statutory penalties, updates to the sentencing guidelines, the post-sentencing conduct of the defendant, and all other relevant information about the defendant.<sup>274</sup> This line of reasoning is in step with the Third, Fourth, and Sixth Circuits. Yet, the court took an interesting approach to avoid the uphill textual battle and instead focused on the policy benefits of making sentencing courts consider the sentencing factors.

#### IV. FUTURE DEVELOPMENTS

It is clear from Part III that the circuits took vastly different approaches when applying the First Step Act, and even within each rough category, there are divergent approaches. Ironically, this directly conflicts with Congress's intent to reduce sentencing disparity with the Sentencing Reform Act, the Fair Sentencing Act, and the First Step Act. However, the Supreme Court ruled on the issue in *Concepcion v. United States* by reversing the First Circuit.<sup>275</sup>

Although the Court's decision permits a district court to consider the sentencing factors, it still leaves room for ambiguity and allows the Circuit Courts of Appeals to determine if consideration is mandatory when the parties do not raise the issue. Critically, given that many First Step Act motions are filed

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<sup>267</sup> *Id.* at 42–43.

<sup>268</sup> *White*, 984 F.3d at 85–86.

<sup>269</sup> *Id.* at 90–91; *Lawrence*, 1 F.4th at 43–44.

<sup>270</sup> *White*, 984 F.3d at 89.

<sup>271</sup> 1 F.4th 40 (D.C. Cir. 2021).

<sup>272</sup> *Id.* at 47.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 142 S. Ct. 2389, 2396 (2022).

by pro se litigants, courts would have no obligation to consider the intervening changes if the pro se defendant fails to raise the issue.<sup>276</sup>

This is why forcing district courts to reevaluate the sentencing factors is practical, ensures adequate appellate review, and rewards defendants who take steps toward rehabilitation. The sentencing factors are the most efficient way for a judge to justify their ruling on a First Step Act motion because judges use the sentencing factors every time they impose an initial sentence.<sup>277</sup> Familiarity creates an efficient process and prevents district courts from formulating their novel methodology for ruling on First Step Act motions.<sup>278</sup> Forcing a court to justify its ruling on the sentencing factors creates an organized and predictable system which is why Congress created the sentencing factors in the first place.<sup>279</sup> Also, it ensures that the judge who is ruling on the First Step Act motion has accurate information. This is especially critical when the judge ruling on the First Step Act motion is not the same judge who initially sentenced the defendant.<sup>280</sup> If the judge relies solely on the earlier judge's interpretation of the sentencing factors, the new sentence may not be accurate.

This Note shows that the federal system was inconsistent with First Step Act motions, and the Supreme Court's decision still leaves room for inconsistency, which is similar to the initial federal sentencing issues before Congress enacted the SRA.<sup>281</sup> For example, post-*Concepcion*, the Ninth Circuit requires district courts to always consider the sentencing factors.<sup>282</sup> On the other hand, the Second Circuit believes that district courts are not obligated to analyze the sentencing factors, unless raised by the parties.<sup>283</sup>

Forcing district courts to assess the sentencing factors also helps appellate review.<sup>284</sup> The sentencing factors make the trial court's job easier and ensure that the record is preserved for appellate review.<sup>285</sup> In addition, this ensures that appellate courts can adequately hold district courts accountable when they deny or grant a First Step Act motion. Indeed, it seems illogical not to

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<sup>276</sup> See *United States v. Seabrookes*, No. 21-3208, 2022 WL 3098651, at \*3 (3d Cir. Aug. 4, 2022).

<sup>277</sup> *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020) (holding that the sentencing factors make sense).

<sup>278</sup> *Id.*

<sup>279</sup> See generally *United States v. Booker*, 543 U.S. 220, 871 (2005).

<sup>280</sup> *Allen*, 956 F.3d at 358.

<sup>281</sup> See *supra* Part I.

<sup>282</sup> *United States v. Houston*, No. 20-10043, 2022 WL 3097369, at \*1 (9th Cir. Aug. 1, 2022).

<sup>283</sup> *United States v. Moyhermandez*, No. 20-625-CR, 2022 WL 2896973, at \*1 (2d Cir. July 19, 2022).

<sup>284</sup> *United States v. Stevens*, 997 F.3d 1307, 1318 (11th Cir. 2021).

<sup>285</sup> *Id.*

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maintain a uniform standard that promotes judicial efficiency and does not require judges to act as time travelers.

#### V. CONCLUSION

The First Step Act is a step in the right direction to lower the sentencing disparity between crack and powdered cocaine offenders. However, the legislation is imperfect with several flaws, both substantively and procedurally. The current statute makes no mention of the sentencing factors. However, there is a strong argument for the practicality of the sentencing factors. It assists the judicial process, ensures that defendants who have made an effort to rehabilitate are recognized, and ensures that the First Step Act corrects the previous blanket sentencing scheme.

The sentencing disparity between crack and powdered cocaine is an issue that developed in the late 20th century and is still alive today. The Fair Sentencing Act and the First Step Act are reasonable steps in the right direction to fix this inequity. The Supreme Court's decision in *Concepcion* is a step in the right direction, but Congress may need to amend the Act to ensure that it is uniformly implemented.

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