

2021

First Step Act of 2018: How Its Statutory Interpretation Limits Criminal Justice Reform

Adriana E. Morquecho

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Law and Society Commons](#)

Recommended Citation

Morquecho, Adriana E. (2021) "First Step Act of 2018: How Its Statutory Interpretation Limits Criminal Justice Reform," *American University Journal of Gender, Social Policy & the Law*. Vol. 29 : Iss. 2 , Article 2. Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol29/iss2/2>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Journal of Gender, Social Policy & the Law by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

FIRST STEP ACT OF 2018: HOW ITS STATUTORY INTERPRETATION LIMITS CRIMINAL JUSTICE REFORM

ADRIANA E. MORQUECHO*

| | |
|--|-----|
| I.Introduction | 226 |
| II.Background | 228 |
| A. Sentencing Legislation Affecting the First Step Act of 2018 | 228 |
| 1. From the War on Drugs to the Fair Sentencing Act of 2010 | 228 |
| 2. First Step Act of 2018 | 230 |
| 3. 18 U.S.C. § 3582 | 231 |
| B. Second Circuit Jurisprudence on the Application of the First Step Act of 2018 | 233 |
| C. Fifth Circuit Jurisprudence on the Application of the First Step Act of 2018 | 234 |
| D. Fourth Circuit Jurisprudence on the Application of the First Step Act of 2018 | 236 |
| III.Analysis | 237 |
| A. The Policies of the 1980 and Future Legislation Have Failed to Address Meaningful Criminal Justice Reform | 237 |
| B. The Fifth Circuit Erred in Finding that a First Step Act Motion is Similar to a § 3582(c)(2) Motion for a Reduction in Sentence | 238 |
| C. While Broader, the Fourth Circuit’s Application of the First Step Act Still Limits its Applicability | 241 |
| D. The Second Circuit’s Application of the First Step Act | |

*J.D. Candidate, 2022, American University Washington College of Law, B.A., Political Science, magna cum laude, 2015, Binghamton University. I would like to thank the Journal of Gender, Social Policy and the Law Vol. 29 staffers for their feedback, support, and tireless efforts during an incredibly unprecedented time. Specifically, a huge thank you to my editor, Mary Kate O’Connell, and technical editor, Harrison Neidish, for their feedback and guidance. Finalmente, gracias a mis padres, Cecibel Cisneros y Alejandro Morquecho, por su cariño y apoyo incondicional durante mis estudios.

| | |
|--|-----|
| Allows the First Step Act’s to Modify a Sentence Previously Imposed Adequately..... | 244 |
| IV. Policy Recommendation..... | 246 |
| V. Conclusion | 248 |

I. INTRODUCTION

Today, the United States incarcerates more people than any other country in the world.¹ Nearly half a million people are incarcerated in federal and state prisons for drug offenses, up from just 41,000 in 1980.² Mass incarceration has disproportionately affected communities of color, with the American Civil Liberties Union noting that one out of every three Black boys and one out of every six Latino boys born today can expect to be imprisoned, compared to one out of every seventeen white boys.³ Notably, the 1980s marked the beginning of the War on Drugs, which led to a spike in the number of arrested and incarcerated people for drug offenses.⁴ As a result, Congress implemented several reforms that have reduced prison populations in recent years.⁵ Congress enacted the Fair Sentencing Act of 2010 (“Fair Sentencing Act”) on August 3, 2010, which proved to be the right step towards criminal justice reform, but it fell short because it did not apply

1. See *Mass Incarceration*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Oct. 26, 2020) (noting that despite making up nearly five percent of the global population, the United States has nearly twenty-five percent of the world’s prison population).

2. See James Cullen, *The United States is (Very) Slowly Reducing Incarceration*, BRENNAN CTR. FOR JUST., (Jan. 18, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/united-states-very-slowly-reducing-incarceration> (observing that despite a decline of roughly two percent in the prison population in 2015, the number of incarcerated persons is still three times as high as what it was in 1980).

3. See *Mass Incarceration*, *supra* note 1 (adding that the population of women in prisons is also growing in the United States); accord Alexs Kajstura, *Women’s Mass Incarceration: The Whole Pie*, AM. CIV. LIBERTIES UNION 1, 4 (2017), https://www.aclu.org/sites/default/files/field_document/womenprisonreport_final.pdf (stating that drug and property offenses make up more than half of the offenses for which women are incarcerated).

4. See, e.g., Criminal Justice Facts, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Oct. 26, 2020) (asserting that the number of incarcerated people rose from 40,900 in 1980 to 452,964 in 2017).

5. See *id.* (contending that the stabilization of the prison population has occurred partially due to declining crime rates, legislation, and policy changes with commonsense approaches to public safety).

retroactively.⁶ In response, Congress sought⁷ to rectify the Fair Sentencing Act's shortcomings with the First Step Act of 2018 ("First Step Act.")⁸ This Comment argues that the First Step Act will fail to reduce mass incarceration at the federal level, which was primarily fueled by mandatory minimums for drug crimes, partly due to the way judges are interpreting and applying the statute.⁹ This Comment analyzes the Second Circuit's application of the First Step Act in *United States v. Holloway*,¹⁰ arguing that its application provides the best means for achieving the goals of the First Step Act, compared to both the Fourth Circuit's and Fifth Circuit's narrower interpretation of the First Step Act in *United States v. Chambers* and *United States v. Hegwood*, respectively.¹¹ Part II discusses the policies that led to high prison rates and Congressional efforts that mitigated these rates by addressing mandatory minimum sentencing.¹² Part III argues that courts have misapplied the First Step Act, leading to an unequal application of the statute and demonstrating the First Step Act's shortcomings in addressing criminal justice reform by comparing other courts' applications to the Second Circuit's application of the First Step Act.¹³ Part IV recommends how Congress can shape the next iteration of criminal justice reform, allowing for more broad and significant criminal justice reform by addressing minimum sentencing issues across the board.¹⁴ Finally, Part V concludes by reiterating that the First Step Act's interpretation by courts

6. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (stating that the Fair Sentencing Act affected defendants sentenced in late 2010 or after).

7. See Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 LOY. CHICAGO L. J. 101, 133 (2020) (arguing the First Step Act's legislative history supports the view that courts may conduct plenary resentencing, citing testimony by Senators Amy Klobuchar, Bill Nelson, and Corey Booker who support broad judicial discretion when reducing mandatory minimums).

8. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (making the Fair Sentencing Act's Section 2 and 3 retroactive).

9. See, e.g., *United States v. Chambers*, 956 F.3d at 667, 680 (4th Cir. 2020) (Rushing, J., dissenting) (acknowledging that the majority's decision places the Fourth Circuit in conflict with other circuits on the interpretation of the First Step Act).

10. See *United States v. Holloway*, 956 F.3d 660, 660 (2d Cir. 2020) (holding the broadest application of the First Step Act).

11. See *United States v. Hegwood*, 934 F.3d 414, 414 (5th Cir. 2019); see also *United States v. Chambers*, 956 F.3d at 667, 680 (applying the First Step Act narrowly).

12. See *infra* Part II (covering the Congressional acts that preceded the First Step Act of 2018).

13. See *infra* Part III (comparing the decisions of the Second, Fourth, and Fifth Circuits to analyze the statutory interpretation of the First Step Act).

14. See *infra* Part IV (advocating for a change to the next iteration of the First Step Act that addresses mandatory minimums).

presents challenges that directly impact the First Step Act's goal in its effort to address criminal justice reform.¹⁵

II. BACKGROUND

A. Federal Sentencing Legislation from 1986 to 2018

1. From the War on Drugs to the Fair Sentencing Act of 2010

In 1986, Congress enacted the first of a series of statutes detailing mandatory minimum terms of imprisonment for drug offenses.¹⁶ The increase in the length of prison sentences, which increased the mandatory time required to be served, led to dramatic growth in America's prison population, sitting at 1,435,500 people in state and federal prisons as of 2019.¹⁷ Importantly, in the 1980s, Congress passed the Anti-Drug Abuse Act of 1986,¹⁸ establishing mandatory minimum sentences for federal drug trafficking cases.¹⁹ Critics of the Anti-Drug Abuse Act of 1986 have long noted the adverse effect it had on the Black community.²⁰ Two years later, Congress revisited the 1986 Act and enacted the Anti-Drug Abuse Act of 1988,²¹ which proved to be even more punitive than its predecessor, as it extended the impact for drug-related criminal activity to housing benefits and more.²² The policies of the '80s led to a rapid rise in incarcerations for

15. See *infra* Part V (concluding that the First Step Act has not largely addressed minimum sentencing issues, which ultimately led to issues of mass incarceration).

16. See *The Problems with Mandatory Minimum Sentences*, 77 JUDICATURE 124, 124 (1993) (discussing newly enacted statutes specifying mandatory minimum terms of imprisonment for various crimes).

17. See Jacob Kang-Brown, et al., *People in Prison in 2019*, VERA INSTITUTE OF JUSTICE 1, 3 (May 2019), <https://www.vera.org/downloads/publications/people-in-prison-in-2019.pdf> (reporting on data from people who were incarcerated in state and federal prisons as of December 31, 2019).

18. See Pub. L. No. 99-570, 100 Stat. 3207 (1986).

19. See Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, AM. CIV. LIBERTIES UNION 1, 2 (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> (imposing a minimum five-year sentence for the distribution of five grams of crack cocaine, while imposing the same sentence for the distribution of 500 grams of powder cocaine—100 times the amount of crack cocaine).

20. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 67 (2d ed. 2010) (outlining that these effects continue to persist today).

21. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

22. See *id.* at 4301 (stating the Anti-Drug Abuse Act of 1988 authorized housing agencies to evict tenants engaged in criminal activity on or near public housing

nonviolent drug offenses, ranging from 50,000 in 1980 to 400,000 in 1997.²³

President Obama signed the Fair Sentencing Act to address the discriminatory disparity between crack and powder cocaine sentencing laws.²⁴ The Fair Sentencing Act raised the amount of crack cocaine required to trigger a mandatory minimum sentence and eliminated the mandatory minimum sentence for simple possession of crack cocaine, thereby drastically lowering the sentencing disparities from 100:1 to 18:1 between powder and crack cocaine.²⁵ While this action was a step in the direction of effective criminal justice reform because it reduced mandatory minimums, the Fair Sentencing Act did not provide relief to those serving mandatory minimum sentences before its enactment.²⁶ However, eight years after the Fair Sentencing Act passed into law, and with bipartisan support,²⁷ an opportunity emerged that was overlooked by the Fair Sentencing Act with the passage of the First Step Act.²⁸

premises).

23. *See War on Drugs*, HISTORY (May 31, 2017), <https://www.history.com/topics/crime/the-war-on-drugs> (last visited Oct. 26, 2020) (adding that by 2014, nearly half of the 186,000 people serving time in federal prisons had been incarcerated on drug-related charges).

24. *See* Fair Sentencing Act of 2010, PUB. L. NO. 111-220, 124 Stat. 2372 (2010). *See also* *President Obama Signs Bills Reducing Cocaine Sentencing Disparity*, AM. CIV. LIBERTIES UNION, (Aug. 3, 2010), <https://www.aclu.org/press-releases/president-obama-signs-bill-reducing-cocaine-sentencing-disparity>.

25. *See* Ryan Carlsen, *The Fair Sentencing Act of 2010: How Fair Is It*, 16 PUB. INT. L. REP. 17, 22 (2010).

26. *See* *United States v. Berry*, 701 F.3d 374, 375 (11th Cir. 2012) (agreeing with other circuits that the Fair Sentencing Act does not apply retroactively).

27. *See* Vivian Ho, *Criminal Justice Reform Bill Passed by Senate in Rare Bipartisan Victory*, THE GUARDIAN (Dec. 19, 2018, 7:29 AM), <https://www.theguardian.com/us-news/2018/dec/18/first-step-act-criminal-justice-reform-passes-senate>; *see also* Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. FOR JUST. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law> (noting the House passed the First Step Act by an overwhelming 358-36 vote before going to President Trump's desk); Van Jones and Louis Reed, *The One Issue that Could Bring Democrats and Republicans Together*, CNN (Mar. 9, 2021), <https://www.cnn.com/2021/03/09/opinions/bipartisanship-criminal-justice-reform-jones-reed/index.html> (adding that the bipartisan support garnered around criminal justice reform could prove beneficial for a Biden administration).

28. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018) (codified at 21 U.S.C. § 841 note (2018)).

2. *First Step Act of 2018*

Broadly, the First Step Act contains the following three components: (1) correctional reform through the establishment of a risk and needs assessment system conducted by the Bureau of Prisons (BOP), (2) sentencing reform through changes to penalties for certain federal offenses, and (3) reauthorization of the Second Chance Act of 2007 (P.L. 110 199).²⁹ Most relevant to this Comment, Section 404 of the First Step Act remedied the shortcomings of the Fair Sentencing Act by making Section 2 and 3 of the Act retroactive,³⁰ thus allowing district court judges to reduce mandatory minimum penalties for crack cocaine offenses that occurred before 2010.³¹

Section 404(a) of the First Step Act begins by defining a covered offense to mean “a violation of a [f]ederal criminal statute, the statutory penalties for which were modified by [S]ections 2 or 3 of the Fair Sentencing Act of 2010.”³² Section 404(b) notes who is eligible to raise a motion to reduce a sentence, stating that a motion can be filed by the defendant, the Director of the BOP, an attorney for the government, or the court itself.³³ Section 404(c) states the limitations of the First Step Act.³⁴ Mainly, that no court can entertain a motion under the First Step Act if a sentence was previously imposed or previously reduced under the Fair Sentencing Act.³⁵ In sum, the First Step Act allows a defendant sentenced for a crack cocaine offense committed before 2010 to bring a motion to a court requesting a sentencing reduction, and the court has the discretion to consider it based on the sentencing adjustments created by the Fair Sentencing Act.³⁶

Relevant to this Comment, Section 404(b) maintains that a court that imposed a sentence for violating a federal criminal statute can *impose* a

29. See Nathan James, Cong. Research. Serv., R45558, *The First Step Act of 2018: An Overview* 10 (2019), <https://crsreports.congress.gov/product/pdf/R/R45558> (allowing federal funding for state and federal reentry programs).

30. See *id.* at 9 (adding that retroactivity of the Fair Sentencing Act of 2010 is not automatic, and a prisoner must petition the court to have their sentence reduced).

31. See *United States v. Willis*, No. 02-3924, 2020 U.S. App. Lexis 4244, at *2 (6th Cir. Feb. 11, 2020).

32. See *id.*

33. See *id.*

34. See First Step Act of 2018 § 404(c).

35. See *id.* at 404(c) (adding that a court cannot entertain a motion made under the First Step Act if a previous motion under the Fair Sentencing Act was previously denied on the merits).

36. See First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018) (emphasizing the First Step Act does not require a court to reduce any sentence according to this Section).

reduced sentence.³⁷ Individuals seeking relief through a motion under the First Step Act only receive one opportunity to file their motion, as courts are not allowed to review a motion previously imposed or reduced per the Fair Sentencing Act, or a motion previously denied on the merits after it has gone through a complete review by the court.³⁸ Finally, the First Step Act grants discretionary power to the court.³⁹

3. 18 U.S.C. § 3582

In reviewing motions brought under the First Step Act, district courts analogize such motions to those raised under 18 U.S.C. § 3582, warranting a closer look into this statute.⁴⁰

To close the gap on the unlimited discretion judges had when reducing a sentence,⁴¹ Congress created Section 3582(c) within the framework of the Sentencing Reform Act of 1984.⁴² This Section allowed judges to consider whether a defendant's circumstances changed, making it inequitable or even unjust for them to continue to be imprisoned.⁴³

Under Section 3582(c)(2), a court can reduce an individual's sentence after considering the factors outlined in Section 3553(a).⁴⁴ This Section provides that when sentencing, a judge should consider several different factors, including but not limited to the actual need for the sentence imposed, the kinds of sentences that are available to that defendant, and the need to avoid sentencing disparities among other defendants in similar situations.⁴⁵

37. *See id.* § 404(b), 132 Stat. at 5222 (adding that the calculation must be done *as if* Sections 2 and 3 of the Fair Sentencing Act were in effect when the covered offense was committed).

38. *See id.* § 404(c).

39. *See id.* (stating that a court is not required to reduce any sentence according to Section 404).

40. *See United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019); *see also United States v. Boulding*, 379 F. Supp. 3d 646, 653 (W.D. Mich. 2019) (finding the First Step Act is similar to Section 3582(c)).

41. *See* Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 FED. SENT. R. 167, 168 (2009) (stating Congress repealed Rule 35(b), which constrains the circumstances for granting sentencing relief).

42. *See id.* (adding that legislative history shows a link between the repeal of Rule 35(b) with the enactment of § 3582(c), which meant to fill the void in the sentencing system created by the elimination of Rule 35(b)).

43. *See id.* (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at 5).

44. *See* 18 U.S.C. § 3582(c)(2) (2018).

45. *See* Sarah E. Welch, *Reviewing Leniency: Appealability of 18 U.S.C. § 3582(c)(2) Sentence Modification Motions*, 85 U. CHI. L. REV. 1269, 1274-275 (2018)

In 2010, the Supreme Court reviewed Section 3582(c)(2) when deciding *Dillon*.⁴⁶ The Court found that Section 3582(c)(2) proceedings are not resentencing proceedings per se, but that these proceedings instead modify a term of imprisonment “by giving courts the power to ‘reduce’ an otherwise final sentence in the circumstances specified by the [Sentencing] Commission.”⁴⁷ In writing for the majority, Justice Sotomayor noted that when reviewing a Section 3582(c)(2) motion, district courts were to consider the factors set in Section 3553(a) *only if* a sentence reduction is consistent with the applicable policy statements set out by the Sentencing Commission.⁴⁸ In *Dillon*, the Court noted that Section 3582(c)(2) requires a two-step inquiry where the reviewing court must determine that a reduction is consistent with Section 1B1.10⁴⁹ before considering whether to reduce a sentence entirely or in part.⁵⁰ In turn, Section 1B1.10 lays out the policy statements that apply to Section 3582(c)(2) and emphasizes a person’s eligibility for sentencing reduction.⁵¹

Finally, in contrast to Section 3582(c)(2), Section 3582(c)(1)(B) indicates that a court may “modify an imposed term of imprisonment to the extent [...] expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure[.]”⁵² According to *United States v. Wirsing*, when reviewing a motion under Section 3582(c)(1)(B), a court must turn to an applicable statute to determine the extent that specific statute allows for an adjustment

(noting that judges also consider factors such as the defendant’s history, Sentencing Commission policy statements, and restitution to victims).

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

47. See *id.* at 825-26 (adding that because the statute only applies to a defendant whose sentence was lowered by the Sentencing Commission, it can be inferred that Congress intended for the statute to only allow a modification in sentencing, not resentencing entirely).

48. See *id.* at 827 (emphasis added) (showing that § 3582(c)(2) mandates a two-step inquiry, requiring the court to “determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized [sentence reduction] is warranted.” Further, in doing so, the court must review the factors in § 3553(a)).

49. See U.S.S.G § 1B1.10 (2018) (outlining that the Sentencing Guidelines Manual sets out the rules for implementing sentencing of individuals).

50. See *Dillon*, 560 U.S. at 827 (according to the factors set in Section 3553(a)).

51. See Evan R. Kreiner, *Whose Applicable Guideline Range Is It Anyway - Examining Whether Nominal Career Offenders Can Receive Sentence Modifications Based on Retroactive Reductions in the Crack Cocaine Guidelines*, 112 COLUM. L. REV. 870, 875 (2012) (explaining that eligibility consideration under § 3582(c)(2) is triggered only when there is an amendment in place that grants retroactive effect to lower a sentencing range).

52. See 18 U.S.C. § 3582(c)(1)(B) (2018).

to an individual's sentence.⁵³

B. Second Circuit Jurisprudence on the Application of the First Step Act of 2018

On January 9, 2009, Jason Holloway pled guilty to possession of fifty but less than 150 grams of cocaine.⁵⁴ The government recommended a sentencing range of 168-210 months of prison.⁵⁵ Ultimately, Holloway was sentenced to 168 months in prison by the district court.⁵⁶ Roughly two months after the passage of the First Step Act, Holloway petitioned the court to reduce his sentence pursuant to Section 404 of the First Step Act.⁵⁷ However, the Probation Office ("PO") concluded that based on a presentence report, which contains information about the offense committed and prior criminal activity, Holloway's motion under the First Step Act did not allow for a sentencing reduction because the revised sentencing range under the sentencing guidelines was basically equivalent to his original sentence.⁵⁸ The district court agreed with the PO and considered Holloway's motion under 18 U.S.C. § 3582(c)(2).⁵⁹ However, on review, the Second Circuit held that under the First Step Act's plain language, Holloway was eligible to reduce his sentence under Section 404 of the First Step Act.⁶⁰ The Second Circuit reasoned that a First Step Act motion for relief is not evaluated correctly under Section 3582(c)(2).⁶¹ Instead, by the purview of the statute, the First Step Act allows a motion to stand on its own without needing to analyze and apply law outside of its own statutory authorization, meaning there was no need to compare it to or review it as a Section 3582(c)(2)

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

54. *See* United States v. Holloway, 956 F.3d 660, 661-62 (2d Cir. 2020) (stating Holloway also conceded to two prior convictions, which rendered him a career offender).

55. *See id.* at 662 (showing the sentence recommendation came after the Probation Officer (hereinafter "PO") prepared a Presentence Investigation Report and recommended a sentencing range based on the sentencing Guidelines).

56. *See id.* (adding his sentence would include ten years of supervised release).

57. *See id.* at 663.

58. *See id.* (adding that the PO produced a report concluding that Holloway was not eligible for a reduction of his term of imprisonment after interpreting Holloway's motion as one made under Section 3582(c)(2)).

59. *See id.*

60. *See* United States v. Holloway, 956 F.3d 660, 664 (2d Cir. 2020) (noting that first, Holloway's offense was covered by Section 404(a) because it was a violation of the federal criminal statute).

61. *See id.* at 665 (finding that § 3582(c)(2) applies only if the defendant seeks a reduction because he was sentenced to a term of imprisonment based on a sentencing range that was lowered by the Sentencing Commission).

motion.⁶² Strikingly, the defendant in *United States v. Kelly*⁶³ moved for a reduced sentence under the First Step Act.⁶⁴ On review, the Ninth Circuit held that a court is limited to the First Step Act's language itself and not another intervening statute, including Section 3582.⁶⁵

C. Fifth Circuit Jurisprudence on the Application of the First Step Act of 2018

In 2019, the Fifth Circuit reviewed Michael Hegwood's First Step Act motion where he requested a reduction for a sentence of 200 months to 151-188 months, which he claimed to be eligible for per the First Step Act's retroactive application of the Fair Sentencing Act.⁶⁶ Hegwood was charged and plead guilty to conspiracy and possession with intent to distribute five grams or more of cocaine.⁶⁷ Further, since Hegwood was convicted of two prior felony controlled-substance offenses, the court determined he was a "career offender"⁶⁸ and sentenced him to serve 200 months with five years of supervised release.⁶⁹ Further still, when requesting relief under the First Step Act, Hegwood argued he no longer qualified as a career-offender under new case law and thus, contended his sentencing range should be reduced to 77-96 months.⁷⁰ The district court conducted a hearing and held that it would not change Hegwood's career offender status and resentenced him "on the congressional change and that alone."⁷¹ Hegwood appealed, and the Fifth

62. *See id.* at 665-66.

63. *See United States v. Kelley*, 962 F.3d 470, 479 (9th Cir. 2020) (agreeing with *Hegwood* that the First Step Act does not allow plenary resentencing but stating the First Step Act allows sentence reduction, thus it functions on its own terms).

64. *See id.* at 474 (noting that the district court recalculated Kelley's sentencing guidelines as if the crime had been committed before 2010).

65. *See id.* at 476 (9th Cir. 2020) (breaking with the Fifth Circuit's reasoning in *Hegwood*).

66. *See United States v. Hegwood*, 934 F.3d 414, 414-16 (5th Cir. 2019) (noting that the motion was filed under the First Step Act for this very reason).

67. *See id.* at 415.

68. *See Quick Facts on Career Offenders*, U.S. SENTENCING COMM'N (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf (defining career offender as someone who commits a crime of violence or a controlled substance offense after two prior felony convictions for those crimes).

69. *See Hegwood*, 934 F.3d at 415 (noting that Hegwood's sentence was calculated based on the 2008 sentencing guidelines).

70. *See id.* at 416 (arguing that under Tex. Health & Safety Code Ann. §481.1129(a) (West 2020), convictions should be not treated as controlled substance offenses (citing *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017))).

71. *See id.* (indicating the congressional change was only the one provided by the

Circuit began by interpreting the First Step Act's text by analyzing Section 404(a).⁷²

The Fifth Circuit began by noting that Section 404(b) gives a court discretion to reduce a sentence “as if” Sections 2 or 3 of the Fair Sentencing Act were in effect when the offense on review was committed.⁷³ The Fifth Circuit added that a court has limited authority to consider reducing a sentence previously imposed.⁷⁴

In contrast to the Second Circuit's reasoning, the Fifth Circuit concluded the First Step Act's limitations make it similar to Section 3582(c).⁷⁵ The Fifth Circuit reasoned that Congress only expressly included the retroactive application of Sections 2 and 3 of the Fair Sentencing Act and did not address Section 3553(a) factors, thus it did not intend for courts to apply those additional factors when reviewing a motion.⁷⁶ The Fifth Circuit added that courts only impose and do not modify a sentence under the First Step Act because the sentencing is done by applying the Fair Sentencing Act's changes, including applying new case law or other factors governed by Section 3553(a).⁷⁷

Thus, according to the Fifth Circuit, under the First Step Act, a court is imposing, rather than modifying, a sentence because the court takes into account matters that would have been relevant at the original sentencing.⁷⁸ Thus, the new sentence imposed by the court “conceptually substitutes for

First Step Act).

72. *See id.* at 418 (contending the First Step Act limits application to a “covered offense,” meaning a violation of a federal criminal statute, which includes the statutory penalties modified by Section 2 or 3 of the Fair Sentencing Act).

73. *See id.*; *see also* *United States v. Wirsing*, 943 F.3d 175, 180 (4th Cir. 2019) (stating that Congress gave the court discretion when deciding sentencing modification motions by citing § 404(c), 132 Stat. at 5222).

74. *See United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019).; *cf. Kelley*, 962 F.3d at 477 (agreeing with *Hegwood* that the First Step Act does not allow plenary resentencing but stating the First Step Act allows sentence reduction, and thus functions on its own terms).

75. *See* 18 U.S.C. § 3582(c)(2) (2018) (being another vehicle for defendants to file motions for a reduction of sentence).

76. *See Hegwood*, 934 F.3d at 418 (assessing that Section 3582 directs the district court to only consider the factors outlined in Section 3553(a) if and when they are applicable).

77. *See id.* at 418-19 (stating that the district court committed no error in continuing to apply the career-criminal enhancement when it decided *Hegwood*'s motion for a reduced sentence).

78. *See id.* at 418-19

the original sentence, as opposed to modifying that sentence.”⁷⁹

D. Fourth Circuit Jurisprudence on the Application of the First Step Act of 2018

Nearly a year after *Hegwood*, the Fourth Circuit in *United States v. Chambers* held that the district court required recalculating a defendant’s sentencing guidelines range without the need to observe a career offender enhancement.⁸⁰ After being sentenced to serve almost twenty-two years in prison for possession with intent to distribute fifty or more grams of cocaine, Chambers moved to reduce his sentence pursuant to the First Step Act.⁸¹ In his motion, Chambers asked the court to retroactively apply intervening case law declaring he no longer qualified as a career offender.⁸² This application would have reduced Chambers’s sentence to 57-71 months from the 262-327 month original sentence, but the district court only reduced his supervised release from ten to eight years in accordance with the Fair Sentencing Act.⁸³

The Fourth Circuit reasoned that Section 404(b) of the First Step Act expressly permits a court to impose a reduced sentence, not merely modify or reduce one.⁸⁴ Acknowledging the Fifth Circuit’s decision in *Hegwood*, the Fourth Circuit noted that rather than analogizing the First Step Act to Section 3582(c)(2) as the Fifth Circuit did, the Fourth Circuit looks at the First Step Act itself, which expressly allows a district court to ‘impose’ a reduced sentence, and not just to ‘reduce’ it.⁸⁵ The Fourth Circuit concluded by noting it would be contrary to Congress’ intent to maintain a career-

79. *See id.* at 419.

80. *See United States v. Chambers*, 956 F.3d 667, 675 (4th Cir. 2020) (reaching the same conclusion as the Second Circuit, but with a slightly different issue given that Chambers was erroneously deemed to be a career offender).

81. *See id.* at 668.

82. *See id.*

83. *See id.* at 668, 670 (explaining that because Section 404(b) of the First Step Act does not authorize plenary resentencing, it could not remove Chambers’ career offender status when recalculating his sentence reduction, nor could it reduce his sentencing under the Section 3553(a) factors because of Chambers’ criminal history, despite the district court’s determination that Chambers was eligible for a sentence reduction under the First Step Act).

84. *See id.* at 672 (adding that unlike motions under Section 3582(c)(2), the First Step Act does not include language that precludes a court from applying intervening case law, with the only limitation being that a motion under the First Step Act cannot be reviewed once it has been denied on the merits or has been imposed or reduced under the Fair Sentencing Act).

85. *See United States v. Chambers*, 956 F.3d 667, 673 (2020) (4th Cir. 2020) (citing *United States v. Wirsing*, 943 F.3d at 177).

offender designation that has been designated as wrong.⁸⁶ The Fourth Circuit also added that the First Step Act authorized courts to remedy the circumstances of defendants who bore the “brunt of a racially disparate sentencing scheme.”⁸⁷ The Fourth Circuit added that, because of the First Step Act’s purpose, Congress “did not import the strictures of Section 3582(c)(2).”⁸⁸

III. ANALYSIS

A. *The Policies of the 1980s and Future Legislation Have Failed to Address Meaningful Criminal Justice Reform*

The increase in prison sentences, which are largely driven by mandatory minimums, led to dramatic growth in America’s prison population.⁸⁹ At least one study suggests that the rise in America’s prison population between 1980 and 2001 can be attributed to changes in sentencing regulations.⁹⁰ Notably, the disproportionality of the impact mandatory minimums have had on communities of color is startling.⁹¹

The Anti-Drug Abuse Act of 1988⁹² placed restrictions on persons with prior criminal activity from obtaining public housing.⁹³ The Anti-Drug Abuse Act of 1988 also expanded the cut on federally funded benefits to

86. *See id.* at 674 (stating this had been that case in Chambers’ offense).

87. *Id.* at 674; *see also* Ames Grawert, *What Is the First Step Act — And What’s Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> (adding that the First Step Act is intended to do two things: cut unnecessarily long federal sentences and improve conditions in federal prison).

88. *See Chambers*, 956 F.3d at 674.

89. *See* Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 696 (1995) (showing the staggering amount of prison population growth in the United States).

90. *See* Alexander, *supra* note 20, at 92 (adding that in twenty-five years, the prison population grew from approximately 350,000 to 2.3 million due to changes in law and policies).

91. *See id.* at 111 (stating the disproportionality between boys of color who can expect to be imprisoned in comparison to their white peers).

92. *See* Pub. L. No. 100-690, 102 Stat. 4181 (1998) (expanding on the Anti-Drug Abuse Act of 1986).

93. *See FAFSA Facts*, OFF. OF NAT’L DRUG CONTROL POL’Y U.S. DEP’T OF EDUC., https://www.ndsu.edu/fileadmin/onestop/finaid/other/DrugRelated_Convictions_FAFSA_Facts.pdf (last visited Feb. 4, 2021) (noting the Anti-Drug Abuse Act of 1988 includes provisions authorizing federal and state judges to deny certain federal benefits, including Title IV and HEA student aid, to persons convicted of drug trafficking or possession).

persons with criminal activity by barring them from obtaining food stamps.⁹⁴ While the First Step Act has served to grant much needed relief after being incarcerated under harsh mandatory minimums, the lack of uniformity in how courts are implementing the First Step Act does not allow for complete success in addressing the high prison population rates.⁹⁵

B. The Fifth Circuit Erred in Finding that a First Step Act Motion is Similar to a § 3582(c)(2) Motion for a Reduction in Sentence

For years, Congress tried to pass criminal justice reform legislation but failed due to opposition from senators.⁹⁶ The First Step Act has been revered as a critical piece of legislative justice reform, as it was the first significant reduction to federal drug sentences.⁹⁷

However, the Fifth Circuit's interpretation of the First Step Act undercuts the First Step Act's purpose: to provide relief to individuals like Hegwood who were sentenced under laws that severely penalized drug crimes.⁹⁸ The Fifth Circuit in *Hegwood* viewed Section 3582(c)(2) as almost incorporated by the First Step Act by virtue of its similar language.⁹⁹ However, the First Step Act states that a district court that imposes a sentence can *impose* a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act were in effect when the offense was committed.¹⁰⁰

94. See Alexander, *supra* note 20, at 197 (adding that racial violence has been rationalized and legitimated through the criminal justice system, which has led to discriminatory and arbitrary impositions of the death penalty).

95. See Criminal Justice Facts, *supra* note 4 (asserting that changes to law enforcement and sentencing policies stemming from the "tough on crime" era led to the increase in prison populations we observe today).

96. See Ames Grawert & Tim Lau, *How the First Step Act Became Law – and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> (stating the legislation failed to pass, despite overwhelming bipartisan support, due to opposition from Senator Tom Cotton (R-AR.) and then-Senator Jeff Sessions (R-AL.).

97. See *id.* (noting the importance of the First Step Act because it includes language that paves way for meaningful sentencing reform, "which would reduce the number and amount of people in prison, and is part of the starting point of any serious legislation for criminal justice reform"); see also Press Release, Mike Lee US Senator for Utah, Sen. Lee Cosponsors the Smarter Sentencing Act (Mar. 26, 2021) (noting that Senators Lee and Durbin introduced the Smarter Sentencing Act in 2013, and many of its provisions were key to the development of the First Step Act).

98. See *United States v. Chambers*, 956 F.3d 667, 672, 674 (4th Cir. 2020) (stating that the First Step Act authorizes the courts to provide a remedy to defendants who bore the brunt of a racially disparate sentencing laws).

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

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

The Fifth Circuit described what Section 404 resentencing hearings looked like by stating that a “district court decides on a new sentence by placing itself in the original sentencing time frame.”¹⁰¹

In contrast, 18 U.S.C. § 3582(c) maintains that a “court may *modify* an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.”¹⁰² The Fifth Circuit’s erroneous interpretation takes the word “impose” out of its use in the First Step Act and misplaces it by comparing it to “modify” in Section 3582(c)(2).¹⁰³ Also, the Fifth Circuit overlooks the role that Section 3582 plays in sentencing reductions. The Supreme Court in *Dillon v. United States* held that Section 3582(c)(2) allows a court to reduce an otherwise final sentence pursuant to a Guidelines amendment if a reduction is consistent with the Commission’s policy statements.¹⁰⁴

Section 3582 allows for a narrow application that, contrary to the First Step Act, would not allow courts to impose new sentences.¹⁰⁵ As previously stated, the Federal Rules of Criminal Procedure impact this process because they require that a defendant must be present during an initial sentencing proceeding, but they do not require that a defendant be present at a Section 3582(c)(2) proceeding.¹⁰⁶ Further, the Supreme Court in *Dillon* noted that a court’s power under Section 3582(c)(2) depends on whether the Sentencing Commission decided not just to amend the sentencing Guidelines but also to make that amendment to the Guidelines retroactive.¹⁰⁷

In rejecting Hegwood’s argument that since Congress uses the word “impose,” the court should have recalculated his Guidelines sentence, the Fifth Circuit imposes a limitation on the First Step Act that Congress could not have intended.¹⁰⁸ In effect, the Fifth Circuit attaches Section 3582(c)(2)

(2018) (emphasis added).

101. See *Hegwood*, 934 F.3d at 418 (adding that the court does so by “altering the relevant legal landscape only by the changes mandated by the [...] Fair Sentencing Act”).

102. See 18 U.S.C. § 3582(c) (2018) (emphasis added).

103. See *Hegwood*, 934 F.3d at 417-18.

104. See *Dillon v. United States*, 560 U.S. 817, 821 (2010) (reiterating that the Section 3582(c) motion only allowed for this modification).

105. See *Welch*, *supra* note 45 at 1283 (reiterating the court’s view that Section 3582(c) is already very limited in its nature, as a sentence is otherwise final).

106. See *id.* (citing the court’s reasoning in *Dillon*).

107. See *Dillon v. United States*, 560 U.S. 817, 826 (adding that the court is bound by the Commission’s statements, which dictate the amount of a prisoner’s sentence affected by the amendment may be reduced).

108. See *United States v. Chambers*, 956 F.3d 667, 677 (4th Cir. 2020) (contending Congress’ manifested intent in Sections 2 and 3 of the Fair Sentencing Act and Section

to a completely separate piece of legislation that seeks to remedy the impact of harsh sentencing policies and reduce the high rates of imprisonment—a pillar of criminal justice reform.¹⁰⁹ Further, in finding for the government and rejecting Hegwood’s argument, the Fifth Circuit ignores the fact that under Section 3582(c)(2), a court reduces an individual’s sentence after considering the factors outlined in Section 3553(a).¹¹⁰ Although one of these factors includes policy statements outlined by the Sentencing Commission, the First Step Act was a piece of legislation largely driven by Congress to achieve some form of criminal justice reform, and thus, has no purview to separate factors a court can consider when determining whether a prisoner deserves a sentence reduction.¹¹¹

Finally, in October 2011, Hegwood filed a motion under 28 U.S.C. § 2255, requesting the Fair Sentencing Act’s retroactivity.¹¹² When analyzing that motion in 2011, the district court construed the motion to reduce Hegwood’s sentence under Section 3582(c)(2) and denied it.¹¹³ However, suppose the motion had not been denied. In that case, it stands reasonable to argue that the court would not have been allowed to modify, let alone impose a sentence, when Hegwood filed his motion under the First Step Act because Section 404(c) states that no court can entertain a motion made under the First Step Act to reduce a sentence if the sentence was previously imposed or previously reduced by the Fair Sentencing Act.¹¹⁴ However, at no point does the Fifth Circuit recognize that by consistently construing motions to lessen a sentence—even when the motion is made under a Congressional act, like the First Step Act and Fair Sentencing Act—as one related to another

404 of the First Step Act was to reduce the disparity in crack and powder cocaine sentencing, not to correct Guidelines application errors).

109. *See* Criminal Justice Facts, *supra* note 4 (explaining some of the factors which led to high prison populations in the United States).

110. *See* 18 U.S.C. § 3582(c)(2) (2018) (noting that these factors include consideration of the nature and circumstances of the offense, as well as the defendant’s history, Sentencing Commission policy statements, other defendants in similar situations, and restitution to victims).

111. *See, e.g.,* United States v. Kelley, 962 F.3d 470, 477-78 (9th Cir. 2020) (acknowledging that motions made under the First Step Act are not viewed under Section 3582(c)(1)(B) because this statute does not implement the First Step Act, and thus, 3582(c)(2) would not implement the First Step Act).

112. *See* United States v. Hegwood, 934 F.3d 414, 416 (5th Cir. 2019) (adding that the motion was denied given that the Fair Sentencing Act did not apply retroactively, so Hegwood did not have an opportunity for relief in 2011).

113. *See id.*

114. *See id.* (noting that the 2011 motion was denied because Hegwood was deemed a career offender, which made him ineligible under Section 3582(c)(2)).

established statute, the court can create issues that would prohibit a prisoner from benefiting from a sentence reduction to no fault of their own, but rather by how the court interpreted their motion.

As the Second Circuit rightly recognized in *Holloway*, a motion under the First Step Act is based on its own explicit statutory interpretation.¹¹⁵ Unlike the Fourth and Second Circuit, the *Hegwood* Court makes no mention of Section 3582(c)(1)(B) and erroneously treats the First Step Act equally as limited as 3582(c)(2), thus imposing limitations that prohibit an individual from obtaining relief.¹¹⁶

C. While Broader, the Fourth Circuit's Application of the First Step Act Still Limits its Applicability

The Fourth Circuit in *Chambers* interpreted Section 3582(c)(2) as granting a court the authority to make a limited adjustment to what would have been a final sentence, barring the district court from correcting errors made in the original sentencing.¹¹⁷ The *Chambers* court rejected using such a limiting exception because doing so would subvert Congress' intent to provide a remedy for defendants who face racially disparate sentencing.¹¹⁸ The *Chambers* court noted retroactive guideline errors based on intervening case law are no different from a typo, and thus, do not require plenary resentencing to correct.¹¹⁹ But, indeed, and as the court stated, it is one thing to ignore an error and another to maintain and perpetuate an error.¹²⁰ *Chambers* relied on the reasoning in *Wirsing*¹²¹ to provide for a 404(b) analysis distinct from Section 3582(c)(2).¹²²

115. *See* United States v. Holloway, 956 F.3d 660, 665-66 (2d Cir. 2020).

116. *See* *Hegwood*, 934 F.3d at 418-9 (noting that because of these limitations, the court could not apply intervening precedent and did not change the sentencing enhancement).

117. *See* United States v. Chambers, 956 F.3d 667, 676 (4th Cir. 2020) (concluding that reductions under § 404 of the First Step Act are distinct from retroactive drug reductions under § 3582(c)(2)).

118. *See id.* at 674 (adding that this was Congress' reason for not including the limiting factors of § 3582(c)(2) in the First Step Act).

119. *See id.*

120. *See id.* (asserting that maintaining Chambers' sentencing error would contravene the efforts to provide relief to individuals who have borne the impact of racially disparate sentencing laws).

121. *See* United States v. Wirsing, 943 F.3d 175, 186 (4th Cir. 2019) (noting that defendants who are not otherwise excluded under Section 404(c) of the First Step Act from filing a motion under the Act are indeed eligible for relief).

122. *See* *Chambers*, 956 F.3d at 675 (Rushing, J., dissenting) (asserting Section 3582(c)(1)(B) only provides review for what is expressly permitted in Section 404(b),

In contrast to the Fifth Circuit's holding in *Hegwood*, the Fourth Circuit reasoned that motions filed under the First Step Act do not fall under Section 3582(c)(2), but rather Section 3582(c)(1)(B).¹²³ While interpreting 404(b), the *Chambers* court highlighted the courts' ability to impose a reduced sentence, which would correct a defendant's situation erroneously deemed to be a career-offender.¹²⁴ This contention also demonstrates the erroneous application by the Fifth Circuit when construing a motion under the First Step Act as a Section 3582(c)(2) motion, since an individual deemed a career offender is ineligible for relief under Section 3582(c)(2).¹²⁵ This application contrasts with modifying or reducing a sentence, which does not allow rectifying such an error.¹²⁶ As a result, the Fourth Circuit noted a court must recalculate sentencing guidelines.¹²⁷

The only limiting language in Section 404(c) is that a court cannot entertain a motion for someone with a previously denied motion on the merits and whose sentence was already imposed or reduced according to the Fair Sentencing Act.¹²⁸ In summary, *Chambers* correctly declined to follow *Hegwood* because Section 404(b) should be construed independently of Section 3582(c)(2).¹²⁹ The Ninth Circuit further reinforces this in *Kelley*,¹³⁰ where although the court sided with the Fifth Circuit in *Hegwood*, it

which is not much, since as the majority of the Court notes, Section 404(b) offers little guidance; thus district courts are being asked to shape what a resentencing under the First Step Act looks like).

123. *See id.* at 671 (citing *Wirsing*, 943 F.3d at 184-85) (adding that there is no reason to suppose motions brought pursuant to Section 3582(c)(1)(B) are restricted to Section 3582(c)(2)).

124. *See Chambers*, 956 F.3d at 677 (4th Cir. 2020).

125. *See United States v. Hegwood*, 934 F.3d 414, 416, 419 (5th Cir. 2020) (stating this reasoning was also why Hedgewood's first motion for a reduced sentence was denied, eight years prior to his motion under the First Step Act).

126. *See Chambers*, 956 F.3d at 679 (Rushing, J., dissenting) (recognizing that the First Step Act gives retroactive application of the Fair Sentencing Act).

127. *See id.* at 672; *see also* Lisa Lorish, *Fourth Circuit Publishes Strong & Defendant Friendly Opinion Re: Sentencing Reductions Under Section 404 of the First Step Act*, DEFENDER SERV. OFF. (Apr. 30, 2020), <https://www.fd.org/news/fourth-circuit-publishes-strong-defendant-friendly-opinion-re-sentencing-reductions-under> (arguing there is broader language in the *Chambers* opinion, nearly suggesting the First Step Act allows full resentencing).

128. *See Chambers*, 956 F.3d at 672.

129. *See id.* at 672 (adding that the strictures of Section 3582(c)(2) are irrelevant to Section 3582(c)(1)(B)).

130. *See United States v. Kelley*, 962 F.3d 470, 476-777 (9th Cir. 2020) (limiting the scope of the First Step Act by stating that a court cannot use it to impose a new sentencing, but recognizing it has the power as a stand-alone statute).

acknowledged that it would not view the Act as a motion similar to Section 3582(c)(1)(B) because this statute does not implement the First Step Act.¹³¹ After the First Step Act was enacted, the defendant in *Kelley* moved for a reduced sentence.¹³² The lower court recalculated *Kelley's* sentencing Guidelines range as if the Fair Sentencing Act had been in effect when she was initially sentenced and did not consider any other changes in the law.¹³³ On review, the Ninth Circuit concluded the First Step Act allows a court to conduct a limited review where the court is essentially limited to the First Step Act's language itself and not another intervening statute, including sections 3582(c)(2) and 3582(c)(1)(B).¹³⁴

The First Step Act was enacted to fix the retroactivity limits placed by the Fair Sentencing Act.¹³⁵ The *Chambers* dissent argues that Section 404(b) should not be another excuse for a court to collaterally attack a conviction, as it does not have the power to do so.¹³⁶ The dissent cites *Hegwood* favorably, reasoning that Section 404(b) is limited by the general principles of finality and does not grant the courts plenary power, even if the statute itself does not explicitly contain limits to how a court can impose a reduced sentence.¹³⁷ But the dissent ignores that the majority did not expressly address whether *Chambers's* sentencing adjustment is an entirely new sentence, the way the Fifth Circuit decided in *Hegwood*.¹³⁸

In *United States v. Hegwood*, the Court declined to labor on the point that “impose” and “modify” requires calculating a Guidelines offense level anew, which would include recalculating his career-offender enhancement.¹³⁹ The

131. *See id.* at 477 (noting that Section 3582(c)(1)(B) is a general provision that merely acknowledges that courts may modify sentences “to the extent otherwise expressly permitted by statute or rule”).

132. *See id.* at 474.

133. *See id.*

134. *See id.* at 477 (adding that because section 3582(c)(1)(B) only authorizes a court to implement another statute allowing for a sentence modification, “it does no more than point us back to where we began: the First Step Act’s text, which does not permit a plenary resentencing”).

135. *See Chambers*, 956 F.3d at 673 (stating the need to recognize Congressional intent when reviewing a motion under the First Step Act).

136. *See Chambers*, 956 F.3d at 679 (Rushing, J., dissenting) (arguing that the majority’s holding grants relief beyond what is offered by the Fair Sentencing Act, which requires sentence modification for small errors created by sentencing guidelines).

137. *See id.* at 680 (acknowledging that the majority’s decision places the Fourth Circuit in conflict with other circuits on the interpretation of the First Step Act, namely the Fifth Circuit in *Hegwood*).

138. *See id.* at 676.

139. *See United States v. Hegwood*, 934 F.3d 414, 417 (5th Cir. 2019) (adding that

Court noted that the only thing Section 404(b) allowed was the limited discretion to apply Section 2 and 3 of the Fair Sentencing Act “as if” it were in effect when the covered offense was committed.¹⁴⁰ The Court articulated Section 404(b) as only allowing changes in sentencing as it relates to an increase in the amount of cocaine base for mandatory minimum sentences, and it eliminated mandatory minimums for simple possession of cocaine base because the language “as if” only incorporates sections 2 and 3 of the Fair Sentencing Act.¹⁴¹

Section 3582(c)(1)(B) provides a reasonable framework that allows the First Step Act to stand on its own and not be limited by 3582(c)(2).¹⁴² *Chambers* addressed a narrow issue but it is important case law that paves way for recognition that the First Step Act allows for broader resentencing and not merely sentencing modifications.¹⁴³ Given that the Fourth Circuit dealt with a unique issue, the Second Circuit is the best example of how a court can achieve the First Step Act’s goals.¹⁴⁴

D. The Second Circuit’s Application of the First Step Act Allows the First Step Act’s to Modify a Sentence Previously Imposed Adequately

By construing the First Step Act under Section 3582, the Fourth and Fifth Circuits undermine the purpose of the First Step Act by not using it to get around the sentencing rules that were part of the problem in the first place.¹⁴⁵ This problem was the harsh sentencing policing that led to a staggering prison population that impacted communities today.¹⁴⁶ In this instance, the Second Circuit correctly applied the First Step Act and Section 404 by not placing restrictions on the First Step Act and expanding how courts are

Congress did not authorize plenary resentencing under the First Step Act).

140. *See Hegwood*, 934 F.3d at 418 (stating the First Step Act provides that a district court may impose a reduced sentence “as if” sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed).”

141. *See United States v. Chambers*, 956 F.3d 667, 677 (4th Cir. 2020) (stating the Court rejected *Hegwood*’s argument that the First Step Act required the district court to use new case law to apply the factors of 18 U.S.C § 3553(a)).

142. *See id.* at 671.

143. *See Lorish*, *supra* note 127 (stating the Fourth Circuit opinion nearly suggests the First Step Act allows full resentencing).

144. *See United States v. Chambers*, 956 F.3d 667, 669 (4th Cir. 2020) (noting that *Chambers* was erroneously deemed a career offender at his initial sentencing).

145. *See United States v. Holloway*, 956 F.3d 660, 662 (2d Cir. 2020) (emphasizing that the Fair Sentencing Act did not apply retroactively to defendants, like *Holloway*).

146. *See Kang-Brown*, *supra* note 17 (stating that the federal and state prison populations sit at 1,435,500 people as of 2019).

expressly permitted to modify sentences under the First Step Act.¹⁴⁷ Through its holding, the Second Circuit demonstrates the First Step Act provides courts with an explicit and independent source of authority to reduce sentences for eligible individuals; thus, those filing these motions do not need to show that the First Step Act lowers their sentencing ranges under the Sentencing Guidelines, but rather only need to show that they are eligible because they committed a covered offense with a statutory penalty modified by Sections 2 or 3 of the Fair Sentencing Act.¹⁴⁸

The First Step Act does not have many guidelines on how to directly approach sentencing, but points to the increase in the amount of cocaine for mandatory minimums and eliminates a mandatory minimum sentence for simple possession of cocaine.¹⁴⁹ However, the language “impose” implies that a court does have the power to review a sentence and determine a final sentence instead of modifying a previous one.¹⁵⁰ The language “as if” also reinforces this because the court has to take itself back in time and impose a sentence as if it were the first time it was doing so under the new standards set by the Fair Sentencing Act.¹⁵¹ The dissent in *Chambers* argues the Fourth Circuit erred in its decision because it states a sentence can be modified in the absence of “limiting language to preclude the court from applying intervening case law.”¹⁵² But applying intervening case law is not only reasonable when functioning under a statute whose very purpose is to address the problem of disproportionate sentencing, but falls under the discretion the First Step Act gives the courts.¹⁵³

147. See *Holloway*, 956 F.3d at 665 (showing that a First Step Act motion cannot be properly evaluated under Section 3582(c)(2), as this incorporates § 1B1.10 limitations, which would require that the prisoner’s Guidelines range be reduced to make him eligible for a sentence reduction).

148. See *id.* at 667 (highlighting that a non-violent drug-related crime, like those analyzed in this Comment, would apply).

149. See First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018) (applying in accordance with the amendments made by Sections 2 and 3 of the Fair Sentencing Act).

150. See *Holloway*, 956 F.3d at 666 (stating that under the First Step Act, the court could reduce his term sentence as well as the time served under supervised release).

151. See *id.*; see also *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (asserting that Section 404(b) expressly allows a court to “impose a reduced sentence.” The language is not limited to “modify” or “reduce,” but by using “impose” shows broader applicability of Section 2 and 3 of the Fair Sentences Act).

152. See *Chambers*, 956 F.3d at 677 (Rushing, J., dissenting).

153. See *Holloway*, 956 F.3d at 666 (citing the First Step Act to iterate that even if *Holloway* qualifies for a sentencing reduction, he is not entitled to it because Section 404(c) makes relief discretionary).

Congress' intent behind the First Step Act was to get rid of career offense punishments; thus, it focused on offenses related to cocaine possession as a means to address high sentencing terms.¹⁵⁴ For example, if a mandatory minimum sentence for simple possession were used to brand someone a career-offender, then it is reasonable that a reviewing court would have discretion to impose a sentence that unjustly led to the creation of a career-offender in the first place.¹⁵⁵ Thus, the Second Circuit correctly noted that the court has the discretion to impose a sentence, and the court should be allowed to use intervening case law to a defendant's advantage when it is applied retroactively, since it is not a collateral attack motion, but rather a substantive change in the law that allows a defendant to get at least some minimal hearing for a sentence reduction.¹⁵⁶

The First Step Act gives courts some discretion in imposing new sentences, and since it is procedurally different from an attack on a prior judgement, courts should also be allowed to use retroactive case law to the benefit of defendants.¹⁵⁷

IV. POLICY RECOMMENDATION

During the last presidential debate gearing up to the 2020 election, Donald Trump highlighted the work he has done on criminal justice reform.¹⁵⁸ The President referenced the First Step Act, which he signed into law in 2018, and which is considered significant bi-partisan legislation promoting criminal justice reform.¹⁵⁹ As its name suggests, the First Step Act is just that, a first step toward achieving broader criminal justice reform.¹⁶⁰ While

154. *See id.* at 677 (including that Congress' manifested intent in Sections 2 and 3 of the Fair Sentencing Act of 2010 and Section 404 of the First Step Act is to reduce the disparity in crack and powder cocaine sentencing, not to correct Guidelines application errors).

155. *See id.*

156. *See, e.g.,* United States v. Holloway, 956 F.3d 660, 662 (2d Cir. 2020); *see also* Chambers, 956 F.3d at 675 (noting that the Fourth Circuit correctly recognized that the defendant, Chambers, was erroneously sentenced as a "career offender," and that this designation quadrupled his applicable guideline range).

157. *See Chambers*, 956 F.3d at 677 (emphasizing that sentencing errors and adjustments in case law ought to be taken into consideration).

158. *See* Sarah McCammon, *Trump, Clemency And Criminal Justice*, NAT'L PUB. RADIO (Oct. 22, 2020) <https://apps.npr.org/liveblogs/20201022-debate/>.

159. *See* First Step Act, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/index.jsp> (last visited Oct. 26, 2020) (providing an overview of how the First Step Act affects the Federal Bureau of Prisons' inmates).'

160. *See generally* First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018) (adding that the First Step Act was revered by many, but several recognized

the U.S. experienced the lowest drop in rates of incarceration in more than forty-five years in 2015, there is still much to focus on to address criminal justice reform.¹⁶¹ The First Step Act can provide meaningful ways to address the sentencing disparities that have led to a disproportionate number of Black people being imprisoned.¹⁶²

In June 2020, and amid the COVID-19 pandemic, Senator Grassley introduced new, bipartisan legislation to reform compassionate release, expanding a goal within the First Step Act of 2018.¹⁶³ In this new legislation, Senator Grassley noted Congress' attempt to clarify, and expand on, the programs written into the First Step Act.¹⁶⁴ Rightly so, a further interaction of the First Step Act ought to focus on both expanding and clarifying how exactly the First Step Act should be interpreted.¹⁶⁵ Notably, the Biden Administration should leverage the bipartisan support that the First Step Act received at its inception to achieve meaningful criminal justice reform.¹⁶⁶

The Federal Bureau of Prisons reported that 2,100 people had received sentence reductions under the First Step Act as part of its retroactive application of the Fair Sentencing Act.¹⁶⁷ However, given the First Step Act's uneven application, a closer look is needed to determine what a motion under the First Step Act grants.¹⁶⁸ In a future iteration of the First Step Act,

its limitations and thus pushed for further reform).

161. *See* Cullen, *supra* note 2 (acknowledging that even if the U.S. continued the trend it experienced in 2016, where the rate of incarceration fell by three percent, it would take until 2040 to reach the incarceration levels of 1985).

162. *See id.* (stating that the rates of Black people being imprisoned is almost six times as high as rates of imprisonment for white people).

163. *See Durbin, Grassley Introduce New, Bipartisan Legislation to Reform Elderly Home Detention And Compassionate Release Amid COVID-19 Pandemic*, (June 23, 2020), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-introduce-new-bipartisan-legislation-to-reform-elderly-home-detention-and-compassionate-release-amid-covid-19-pandemic>.

164. *See id.*

165. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018)

166. *See* Jones and Reed, *supra* note 27 (indicating three major ways the Biden administration can leverage bipartisan support for criminal justice reform, including increasing funding for the First Step Act, fixing federal supervision systems, and backing existing bipartisan legislative efforts).

167. *See* Abbe Lowell, *Pandemic Should Propel New Prison Reforms*, Law360 (Oct. 25, 2020, 8:02 PM) <https://www.law360.com/access-to-justice/articles/1317517/pandemic-should-propel-new-prison-reforms> (adding that a Second Step Act could include sentencing guidelines that could expand supervised probationary sentences, and judges would have more discretion to change traditional sentences).

168. *Compare* United States v. Hegwood, 934 F.3d 414 (5th Cir. 2019), and United States v. Kelley, 962 F.3d 470 (9th Cir. 2020) *with* United States v. Holloway, 956 F.3d

Congress ought to address whether, like Section 3582(c)(2), the First Step Act offers an opportunity to adjust an otherwise final sentence. Further, the First Step Act offers a more significant opportunity to address sentencing reform; thus, rather than focusing on developing new legislation to reduce mandatory minimum sentencing like the Smarter Sentencing Act, there is an opportunity to build those provisions in the next iterations of the First Step Act.¹⁶⁹ However, real criminal justice reform should seek to eliminate any extent of mandatory sentencing, especially for lower-level crimes, including minor marijuana trafficking and immigration crimes.¹⁷⁰ In addition, to avoid many of the issues presented by the First Step Act's varied interpretation by the courts, true criminal justice reform should seek to provide better guidance to the courts instead of adding another layer of judicial discretion when imposing sentences for nonviolent crimes.¹⁷¹

V. CONCLUSION

The First Step Act of 2018 intended to address criminal justice reform by addressing the impact of years of legislation that led to unfairly long sentences and improving the conditions of overpopulated federal prisons.¹⁷² Although the First Step Act has paved the way for a reduction in sentencing for several people with drug-related charges,¹⁷³ the First Step Act's provisions making the Fair Sentencing Act of 2010 retroactive has limitations.¹⁷⁴ Policies and legislation that drove mass incarceration have disproportionately affected communities of color.¹⁷⁵ And now, given the

660 (2d Cir. 2020).

169. See Press Release, Mike Lee US Senator for Utah, Sen. Lee Cosponsors the Smarter Sentencing Act (Mar. 26, 2021) (stating the Smarter Sentencing Act intends to give judicial discretion and flexibility to courts addressing sentencing for non-violent drug charges).

170. See Grawert and Lau, *supra* note 96 (adding that the First Step Act still leaves significant mandatory minimum sentences in place).

171. See First Step Act of 2018, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018) (granting judicial discretion).

172. See Grawert, *supra* note 87 (stating that the goal of the First Step Act was to make the "federal justice system fairer and more focused on rehabilitation").

173. See Cullen, *supra* note 2 (noting that in 2015, the prison population fell by a little over two percent).

174. See *Hegwood*, 934 F.3d at 418 (concluding that under Section 3582, the district court is only required to consider the Section 3553(a) factors to the extent that they are applicable).

175. See *Mass Incarceration*, *supra* note 1 (adding that women are the fastest growing incarcerated population in the United States); accord Kajstura, *supra* note 3 (stating that drug and property offenses make up more than half of the offenses for which women are

disconnect in how courts are interpreting the First Step Act, many of these individuals sentenced under harsh drug-related laws are not receiving adequate relief under the First Step Act.¹⁷⁶

incarcerated).

176. *See* United States v. Chambers, 956 F.3d 667, 673 (4th Cir. 2020) (citing United States v. Wirsing, 943 F.3d 175, 177 (4th Cir. 2019)).