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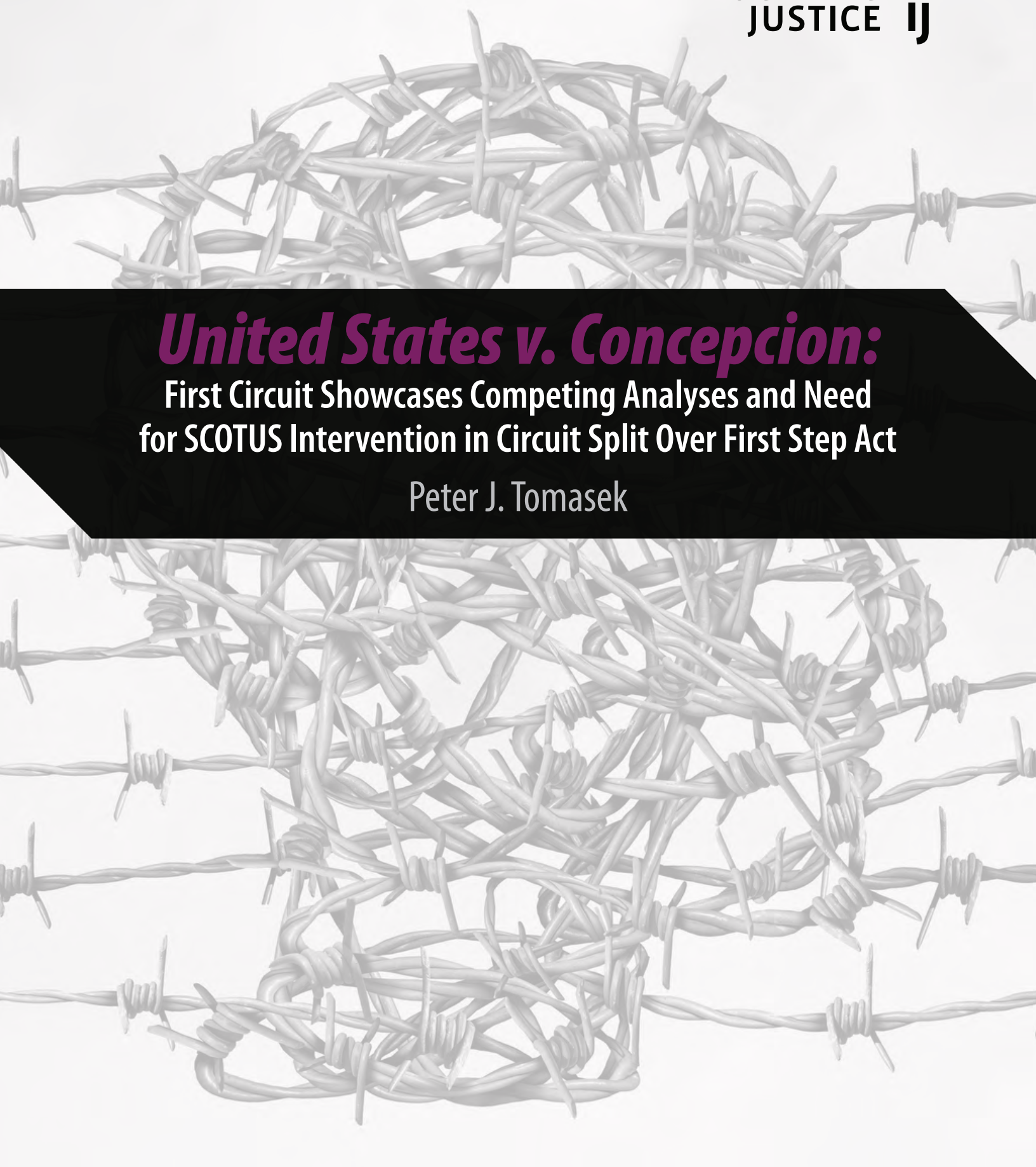

United States v. Concepcion:

First Circuit Showcases Competing Analyses and Need for SCOTUS Intervention in Circuit Split Over First Step Act

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TABLE OF CONTENTS

United States v. Concepcion: First Circuit Showcases Competing Analyses and Need for SCOTUS Intervention in Circuit Split Over First Step Act

I. Introduction

The First Step Act was lauded as the most significant criminal justice reform measure in decades. It came with high expectations when it was proposed by bipartisan lawmakers, and those high expectations continued when former President Donald J. Trump signed it into law in 2018.

To an extent, the First Step Act has lived up to those expectations. Almost immediately, nonviolent drug offenders were released, providing a long overdue remedy for years of harsh and racially disproportionate sentences for crack cocaine. But the implementation and enforcement of the First Step Act hasn't been without obstacles.

One of those obstacles—the scope of resentencing under section 404 of the First Step Act—finds itself as the subject of a growing circuit split. Under section 404, criminal defendants can move for a reduced sentence based on the Fair Sentencing Act, a 2010 law that addressed the disparity in sentencing between offenses involving crack cocaine and offenses involving powder cocaine.

Specifically, section 404 of the First Step Act states that a court "may … impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 … were in effect at the time the covered offense was committed."

Courts undoubtedly agree that that defendants can seek a reduced sentence under this provision. They disagree, however, as to whether this means that the defendant is entitled to plenary resentencing, meaning resentencing under current sentencing guidelines, or resentencing under the standards that applied at the time of the original sentencing. Because of the recent, more progressive trends in criminal justice reform, the consequences from this distinction can be significant.

The majority of jurisdictions may well be correct: The text of section 404 does not require nor permit plenary resentencing. But Congress enacted the First Step Act to make significant reforms to some of the most glaring inequities in the highly punitive federal sentencing framework, including the longstanding and racially disproportionate disparity between crack and powder cocaine.

For this reason, it is incumbent on Congress to amend the First Step Act to better reflect its intent that the First Step Act make possible the fashioning of the most complete relief possible. Because of the bipartisan nature of the First Step Act, that shouldn't be too much to ask.

II. The First Step Act's Retroactive Sentencing Provisions

Federal law imposes mandatory minimum prison sentences on criminal defendants convicted of certain drug-related offenses.[1] For most of the statutes, the mandatory minimum is set based on the kind and amount of drug involved.[2]

a. Federal mandatory minimums created a decades-old disparity between crack and powder cocaine.

For many years, the mandatory minimum for a criminal defendant who dealt powder cocaine was the same as a criminal defendant who dealt one one-hundredth—just one percent—of that amount in crack cocaine.[3]

As an example, this means that an offender convicted of possessing with intent to distribute 500 grams of powder cocaine would face the same mandatory minimum as an offender convicted of possessing with intent to distribute just five grams of crack cocaine.[4]

The powder-to-crack disparity has since come to be known as "[t]he most infamous mandatory minimum law passed by Congress…."[5] Although cocaine had been illegal in the United States for years, crack cocaine was a new method of packaging the drug when Congress passed the Sentencing Reform Act in 1984.[6]

Crack cocaine was created by mixing powder cocaine (cocaine hydrochloride), baking soda (sodium bicarbonate), and water.[7] The chemical interaction between these ingredients created a hard material similar to a rock, which is more commonly referred to as "crack."[8] Users would then vaporize the crack by applying heat and smoke it.[9]

During the 1980s, crack cocaine started to appear in urban areas across the country, including Los Angeles, Miami, New York, and beyond.[10] And by 1986, crack cocaine had become widely available in most large United States cities.[11]

Making matters worse, crack cocaine was also packaged in a relatively inexpensive way.[12] For around $100, someone could buy a gram of powder cocaine.[13] But, for $20 and sometimes even less, someone could buy a small vial of crack cocaine with a few crack rocks.[14] "The availability of small quantities of crack cocaine at an inexpensive price revolutionized inner-city drug markets."[15]

> "For many years, the mandatory minimum for dealing powder cocaine was the same as for just one percent of the amount of crack cocaine."

b. Congress passed the Fair Sentencing Act in 2010 to address the crack-to-powder sentencing disparity.

Things changed in 2010. In 2010, Congress enacted the Fair Sentencing Act in 2010, a new law that reduced the crack-to-powder disparity from a 100-to-1 ratio to an 18-to-1 ratio.[16] The Act took effect as of August 3, 2010, and, in *People v Dorsey,* the United States Supreme Court held that the Fair Sentencing Act's protections applied to every criminal defendant to face sentencing after that date.[17]

But it was also clear that the Fair Sentencing Act didn't apply retroactively.[18] "As a result," the United States Court of Appeals for the First Circuit has explained, "the Fair Sentencing Act left in place disparate sentences for crack cocaine offenses meted out before August 3, 2010."[19] This left it incumbent upon lawmakers to retroactively apply the Fair Sentencing Act in the future.

c. Congress retroactively applied the Fair Sentencing Act when it passed the First Step Act in 2018.

In 2018, despite the hyper-partisan nature of politics in Washington, D.C., Congress passed, and then President Trump signed into law, the First Step Act of 2018.[20] Section 404 of the Act retroactively applies specific parts of the Fair Sentencing Act to criminal defendants

who were sentenced before August 3, 2010, the Fair Sentencing Act's cut-off date.[21]

"Specifically, it provides that '[a] court that imposed a sentence for a covered offense may … impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act … were in effect at the time the covered offense was committed.'"[22] This discretionary relief is available to many criminal defendants convicted of offenses involving crack cocaine.

The First Step Act came with high expectations. As Hailey Fuchs explained in the New York Times, the Act "has been lauded as the most consequential criminal justice legislation in a generation."[23] And, as Fuchs also writes, the Act has actually come close to meeting those expectations.

"By and large," she says, "the First Step Act has met its goal of reducing federal sentences for nonviolent drug offenders, addressing a longstanding disparity in which crack cocaine convictions in particular led to far harsher penalties than other drug offenses and disproportionately increased imprisonment of Black men."[24]

Indeed, by the beginning of 2020—less than two years after President Trump signed the First Step Act into law—thousands of inmates have been released or resentenced under the law's retroactive application of the Fair Sentencing Act.[25] As of January 2020, nearly 2,400 inmates had their sentences reduced under that provision, a significant portion of the almost 2,700 inmates that the United States Sentencing Commission estimated to be eligible a year and a half earlier.[26]

Despite the First Step Act's early success, concerns are growing about the implementation of several of the law's provisions. For example, justice reform advocates across the country question whether the Bureau of Prisons has implemented the Act's earned time credits for prisoners who participate in recidivism-reducing programming and productive activities in a meaningful way.[27]

Courts across the country have likewise struggled with interpreting and applying the Act's other provisions in a meaningful way. One of the issues where courts differ is the scope of resentencing that is authorized under section 404 of the First Step Act.

III. The Scope of Resentencing under Section 404 of the First Step Act

a. There are "at least two possibilities" when it comes to the scope of resentencing under the First Step Act.

Federal courts across the United States have recognized that there are "at least two possibilities" when it comes to the scope of resentencing under section 404 of the First Step Act.[28]

On the one hand, a criminal defendant might be eligible for plenary resentencing.[29] This interpretation would mean that the defendants could have their guideline sentencing range recalculated under the current version of the Sentencing Guidelines Manual.[30]

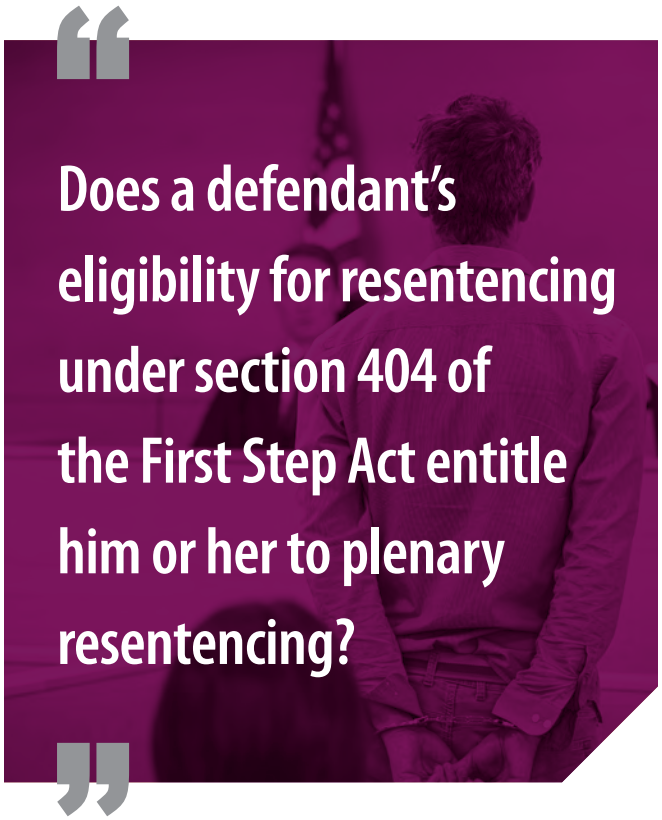
Alternatively, a criminal defendant might be eligible for a procedure where his or her guideline sentencing range remains the same as it was when he or she was previously sentenced.[31] While this interpretation would not permit courts to reevaluate the range under current guidelines, courts could still "vary downwardly."[32]

The issue, then, is relatively straightforward: Does a defendant's eligibility for resentencing under section 404 of the First Step Act entitle him or her to plenary resentencing? Federal appellate courts across the country have answered this question in different ways.

b. There is a growing circuit split on whether the First Step Act entitles defendants to plenary resentencing.

At least seven of the United States Courts of Appeal have already held, albeit in different contexts, that section 404 of the First Step Act does not entitle defendants to plenary resentencing. Those circuits include the Second Circuit[33], the Third Circuit[34], the Fifth Circuit[35], the Sixth Circuit[36], the Seventh Circuit[37], The Ninth Circuit[38], and the Eleventh Circuit[39].

Conversely, three United States Courts of Appeal have already held the opposite. Those include the the Fourth Circuit[40], the Sixth Circuit[41], and the D.C. Circuit[42]. (As you probably noticed, the Sixth Circuit has even dipped its toes in both pools.)



IV. The First Circuit's Analysis in *United States v. Concepcion*

The United States Court of Appeal for the First Circuit is the most recent federal appellate court to address whether plenary resentencing is, in fact, required by the First Step Act. In *United States v. Concepcion*, a criminal defendant moved for resentencing under the Fair Sentencing Act's provisions made retroactive by the First Step Act.[43]

The defendant, Carlos Concepcion, had pleaded guilty to possession with intent to distribute and distribution of crack cocaine in 2008.[44] In seeking resentencing under the First Step Act, Mr. Concepcion contended that the federal district court was required to both update and reevaluate various factors under current sentencing guidelines.[45]

Because Mr. Concepcion's criminal recorded included at least two prior felony convictions involving violence and/or controlled substances at the time of his 2008 sentencing, he was originally designated as a career offender.[46] Based on this designation and several other facts, Mr. Conception faced a guideline sentencing range of 262 to 327 months in prison.[47]

> **In seeking resentencing under the First Step Act, Mr. Concepcion contended that the federal district court was required to both update and reevaluate various factors under current sentencing guidelines.**

Since Mr. Concepcion would not be designated as a career offender under current sentencing provisions, he argued, he should not be considered as such when resentenced under the First Step Act.[48] If the district court accepted this argument (and others), Mr. Concepcion's sentencing guideline range would drop significantly, all the way down to 57 to 71 months.[49] The district court denied his motion, and Mr. Concepcion appealed.[50]

a. The First Circuit affirmed the denial of Mr. Concepcion's motion based on a two-part test.

Judge Bruce M. Selya authored the majority opinion, in which the First Circuit affirmed the district court's denial of Mr. Concepcion's motion. Rejecting the notion that resentencing under the First Step Act was as broad as Mr. Concepcion envisioned, Judge Selya opined that the proper First Step Act analysis "raises two questions: the binary question of whether a defendant should be resentenced and the conditional question of what the new sentence should be."[51]

A resentencing hearing then, Judge Selya explained, "entails a two-step inquiry."[52] "At the first step, the district court should determine whether resentencing of an eligible defendant is appropriate under the circumstances of the particular case."[53] This first step, however, is limited.[54]

At the first step, "the district court's discretion is cabined by the limited permission that Congress saw fit to grant under section 404(b)."[55] This means that "the district court must place itself at the time of the original sentencing and keep the then-applicable legal landscape intact, save only for changes specifically authorized by sections 2 and 3 of the Fair Sentencing Act."[56]

After completing this step, "[t]he court must then determine whether the defendant should be resentenced."[57] The determination whether resentencing is appropriate "must be based solely on the changes that sections 2 and 3 of the Fair Sentencing Act require to be made with respect to the defendant's original [guideline sentencing range]."[58]

If resentencing is not appropriate, Judge Selya explained, "the inquiry ends and any sentence reduction must be denied."[59] If resentencing is appropriate, though, the district court "may impose a reduced sentence under step two of the inquiry."[60] It is at this point, according to this First Circuit analysis, that a district court's broad discretion really kicks in.

"It is at this step that a district court may, in its discretion," Judge Selya's analysis continued, "consider other factors relevant to fashioning a new sentence."[61] These other factors cover a wide range of areas, including "conduct

that occurred between the date of the original sentencing and the date of resentencing," "guideline changes," and any other relevant factor.[62]

b. One judge dissented in part, arguing that this broad discretion exists at the first step of the analysis, too.

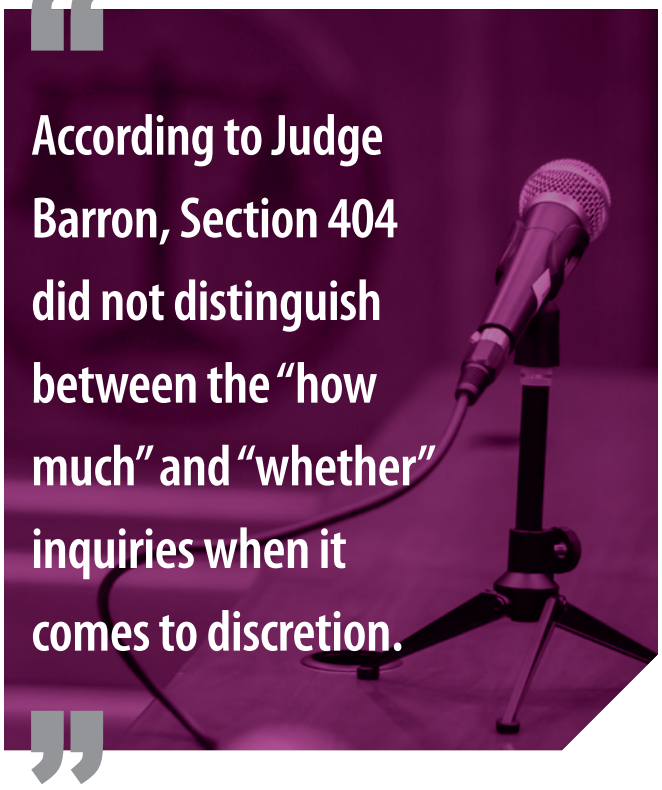
In his dissent, Judge David Jeremiah Barron addressed what he saw as a fundamental flaw in his colleagues' two-step approach. The broad discretion afforded to the district court under section 404 of the First Step Act, he explained, only applies to "how much the sentence should be reduced," not "whether to reduce the defendant's sentence."[63]

He elaborated as follows:

> Accordingly, under the majority's approach, no weight may be given at all in making that critical threshold judgment to
>
> (1) post-sentencing statutory or Guidelines changes unrelated to the crack-powder disparity,
>
> (2) the overturning of the defendant's prior convictions that had been relied on to determine his criminal history category, or even
>
> (3) the defendant's admirable post-sentencing conduct. And that is so not only when it comes to deciding what considerations may inform the setting of [the guideline sentencing range] to be used at the § 404(b) proceeding but also when it comes to deciding whether any reduction at all is warranted in the defendant's original sentence given the [guideline sentencing range] that applies at that proceeding to revisit that sentence.[64]

Differing from his colleagues' two-prong approach, Judge Barron's view was consistent with that of many other circuits—that section 404 of the First Step Act does not entitle defendants to plenary resentencing. Before explaining why he reached that outcome, however, he pointed out the reason why the two-step approach laid out by the majority was flawed.

First, he wrote, "[n]o other circuit distinguishes between the 'whether to reduce' and 'how much to reduce' determinations ... ."[65] Second, he continued, "§ 404(b)



supplies no textual support that I can see for distinguishing between these two types of discretionary determinations in the manner that the majority does."[66]

"Moreover," Judge Barron continued, "the background against which § 404(b) was enacted and the purposes that underlie that provision combine in my view to demonstrate the problems with the way the majority resolves the ambiguities in § 404(b)'s text…."[67]

To the contrary:

> [T]hat background and those purposes indicate … that this text should be construed to give the district court not only the discretion that the majority would afford it to account for intervening developments in deciding how much to reduce a sentence but also that same amount of discretion to account for those same intervening developments in making the threshold determination about whether to reduce the sentence at all.[68]

Ultimately, Judge Barron offered the following view:

> To sum up, then, I do not agree with the majority's bifurcated treatment of the temporal issue that § 404(b) requires us to resolve. In my view, when

confronted with an eligible defendant's § 404(b) motion, the district court must proceed as follows.

> The district court must first determine the statutory sentencing range and the [guideline sentencing range] to be used in assessing whether to reduce the defendant's sentence as requested. In making those determinations, moreover, the district court must rely on the relevant provisions of the Fair Sentencing Act as if they had been in effect when the offense was committed, while using the Guidelines that were operative at the time of the original sentencing proceeding (save for the potential caveats I have noted) and not those presently in effect.[69]

c. The "daylight" between the two First Circuit approaches, while perhaps small, is significant.

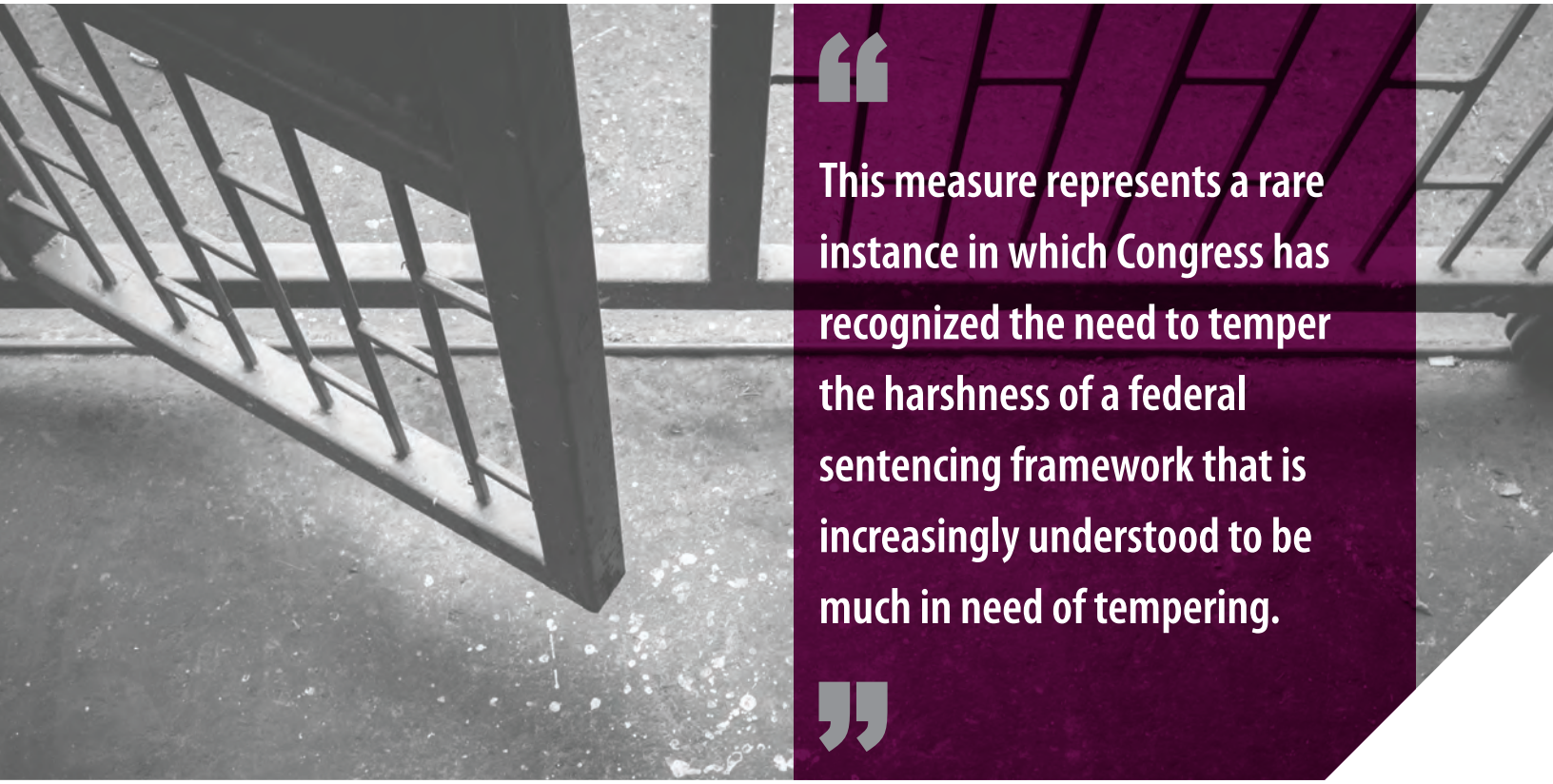
All in all, the approaches offered by the majority and the dissent aren't entirely different. The majority opinion observes exactly that: "there is not much daylight between the position that we take and the position taken by our dissenting brother."[70] And Judge Barron "agree[d] that there is not much 'daylight' between my approach and the majority's."[71]

But, as Judge Barron also explains, the "daylight" between the two views limits one of the First Step Act's primary purposes. "This measure represents a rare instance in which Congress has recognized the need to temper the harshness of a federal sentencing framework that is increasingly understood to be much in need of tempering," he explained.[72]

"Indeed," Judge Barron continued, "the First Step Act's very title signals Congress's interest in having more rather than less done in that regard going forward."[73] That is a sentiment that anyone involved in litigation regarding implementation and enforcement of First Step Act provisions can agree with.

d. The only approach not endorsed by the First Circuit would have resulted in the same outcome in the case.

Neither the majority nor the dissent in *United States v. Concepcion* address the alterative approach endorsed by the majority of circuits, which have held that plenary resentencing is not required by the First Step Act. While the outcome would remain the same—the district court ultimately denied relief in *Concepcion*, and the First Circuit ultimately affirmed—the approach is substantially different.



> **What the First Step Act does say is simply this: a district court may 'impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act… were in effect at the time the covered offense was committed.'**

The United States Court of Appeals for the Second Circuit demonstrated how that alternative approach applies (or, perhaps more accurately, ends the analysis) in *United States v. Moore*. In that case, the Second Circuit plainly held that the First Step Act "does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing."[74]

According to the Second Circuit, the First Step Act's remedial nature is much narrower. "What the First Step Act does say is simply this: A district court may 'impose a reduced sentence *as if sections 2 and 3 of the Fair Sentencing Act … were in effect at the time the covered offense was committed.*'"[75] "Thus," the Court held, "it was certainly correct for the district court to lower his offense level … under the 2008 Guidelines pursuant to which he was sentenced[.]"[76]

Anything beyond that, though, would have been improper: "But § 404(b) issues no directive to allow re-litigation of other Guidelines issues—whether factual or legal—which are unrelated to the retroactive application of the Fair Sentencing Act."[77] Had the First Circuit adopted the same approach, almost all of the discussion by the majority and the dissent would have been irrelevant.

V. Judge Barron's Dissent is Right… Sort Of

It's difficult to criticize the path that the majority of jurisdictions have taken when it comes to the scope of resentencing under section 404 of the First Step Act. After all, "[i]n analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it[.]"[78]

When it comes to the application of the Fair Sentencing Act of 2010, section 404(b) of the First Step Act provides as follows:

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

Examining that text even on its surface, it's hard not to agree with the majority of circuits. The United States Court of Appeals for the Fifth Circuit put it like this:

> It is clear that the First Step Act grants a district judge limited authority to consider reducing a sentence previously imposed. The calculations

> that had earlier been made under the Sentencing Guidelines are adjusted "as if" the lower drug offense sentences were in effect at the time of the commission of the offense. That is the only explicit basis stated for a change in the sentencing. In statutory construction, the expression of one thing generally excludes another. The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act—saying the new sentencing will be conducted "as if" those two sections were in effect "at the time the covered offense was committed"—supports that Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense.[79]

For the sake of this paper, let's assume that these jurisdictions are, in fact, correct: Section 404 of the First Step Act does not entitle defendants to plenary resentencing. Even if that is the correct legal outcome, is it the right one? For Judge Barron, the answer to that question is clearly no. And it's hard to disagree with him on that answer.

As Judge Barron explained, "[t]hrough this provision of the First Step Act, Congress addressed what had been one of the most glaring inequities in our highly punitive federal sentencing framework—the substantially disparate treatment, under both statutory law and the United States Sentencing Commission's Guidelines, accorded offenses involving crack cocaine relative to those involving powder cocaine."[80]

Indeed, courts across the country have recognized that "[t]he First Step Act 'make[s] possible the fashion[ing] [of] the most complete relief possible.'"[81] It is not possible for courts to fashion the most complete relief possible while also believing that district courts only have "limited authority to consider reducing a sentence previously imposed."[82]

But, for now, courts' figurative hands are tied by the language chosen by Congress—regardless of whether those words adequately reflect its intent. This is because, "in all statutory interpretation, '[courts'] inquiry begins with the statutory text, and ends there as well if the text is unambiguous.'"[83]

VI. Conclusion

Congress enacted the First Step Act to remedy decades of harsh and racially disproportionate sentencing practices that have plagued the United States and led to one of the highest incarceration rates in the world. The First Step Act's reforms were bipartisan, bold, and substantial.

As Judge Barron explained in *United States v. Concepcion:* "Through this provision of the First Step Act, Congress addressed what had been one of the most glaring inequities in our highly punitive federal sentencing framework--the substantially disparate treatment, under both statutory law and the United States Sentencing Commission's Guidelines, accorded offenses involving crack cocaine relative to those involving powder cocaine."[84]

Like with other statutes, the intent of Congress was better than the words it chose. And, for now, those words limit district court's abilities to impose reduced sentences only "as if sections 2 and 3 of the Fair Sentencing Act of 2010 … were in effect at the time the covered offense was committed"—nothing more, nothing less.

But "[t]he First Step Act 'make[s] possible the fashion[ing] [of] the most complete relief possible.'"[85] Congress must do what it takes to make sure that courts understand—and enforce—exactly that.

FOOTNOTES

[1] *Dorsey v. United States*, 567 U.S. 260, 263; 132 S.Ct. 2321; 183 L.Ed.2d 250 (2012).

[2] *Id.*

[3] *Id.*

[4] *Dorsey*, 567 U.S. at 263-264.

[5] Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (Oct. 2006), p 1, https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law.

[6] *Id.*

[7] Vagins, *supra* note 5, at 1.

[8] *Id.*

[9] *Id.*

[10] Vagins, *supra* note 5, at 1.

[11] *Id.*

[12] Vagins, *supra* note 5, at 1.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Dorsey*, 567 U.S. at 264, *citing* Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372.

[17] *Id.*; *see also id.* at 282 (holding that "the Fair Sentencing Act's new minimums apply to all of those [people] sentenced after August 3, 2010" to ensure "a reasonably smooth transition").

[18] *Dorsey*, 567 U.S. at 280-281.

[19] *See, e.g., United States v. Concepcion*, ___ F.3d ___, ___ (1st Cir. 2021); 2021 WL 960386, at *3.

[20] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194.

[21] *Concepcion*, ___ F.3d at ___; 2021 WL 960386, at *3.

[22] *Id.*, *citing* First Step Act § 404(b).

[23] Hailey Fuchs, *Law to Reduce Crack Cocaine Sentences Leaves Some Imprisoned,* New York Times (Aug. 1, 2020), https://www.nytimes.com/2020/08/01/us/politics/law-to-reduce-crack-cocaine-sentences-leaves-some-imprisoned.html.

[24] Fuchs, *supra* note 23.

[25] Fuchs, *supra* note 23.

[26] *Id.*

[27] Peter J. Tomasek, *First Step Act of 2018: Two Years Later, Interrogating Justice,* available at https://interrogatingjustice.org/prisons/first-step-act-of-2018-two-years-later/ (last visited Mar. 16, 2021).

[28] *United States v. Smith*, 954 F.3d 446, 452 (1st Cir. 2020).

[29] *Smith*, 954 F.3d at 452.

[30] *Id.*

[31] *Smith*, 954 F.3d at 452.

[32] *Id.*

[33] *United States v. Moore*, 975 F.3d 84, 90-92 (2d Cir. 2020) (holding that the First Step Act does not entail a plenary resentencing and does not obligate a district court to recalculate a defendant's guideline sentencing range unless it must do so under sections 2 and 3 of the Fair Sentencing Act of 2010).

[34] *United States v. Easter*, 975 F.3d 318, 326 (3d Cir. 2020) (holding that the defendant was not entitled to a plenary resentencing hearing at which he would be present under the First Step Act).

[35] See *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019) (holding that the First Step Act does not allow plenary resentencing).

[36] See *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019) (holding that the First Step Act only affords a district court the limited discretion to impose a reduced sentence, not to conduct a plenary resentencing).

[37] See *United States v. Hamilton*, 790 F.App'x 824, 826 (7th Cir. 2020) (holding that a district court did not plainly err when it declined to conduct a plenary resentencing in response to a defendant's motion for a reduced sentence under the First Step Act).

[38] See *United States v. Kelly*, 962 F.3d 470, 471 (9th Cir. 2020) (holding that the First Step Act does not permit a district court to conduct a plenary resentencing proceeding in which a defendant's career offender status can be reconsidered).

[39] See *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) (holding that the First Step Act does not authorize a district court to conduct a plenary resentencing).

[40] *See United States v. Chambers*, 956 F.3d 667, 668 (4th Cir. 2020) (holding that guideline sentencing errors must be considered during First Step Act resentencing).

[41] See *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) (holding that the First Step Act indicates that Congress contemplated close review of resentencing motions and requires a "complete review of the resentencing motion on the merits" even if not entitled to plenary resentencing).

[42] See *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020) (rejecting the notion that relief is not "available" under the First Step Act "only if" the Fair Sentencing Act would have impacted the defendant's sentence under the guidelines in place at the time).

[43] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *1.

[44] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *1.

[45] *Id.*

[46] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *2.

[47] *Id.*

[48] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *2.

[49] *Id.*

[50] *Id.* at *3.

[51] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[52] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[53] *Id.*

[54] *Id.*

[55] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[56] *Id.*

[57] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[58] *Id.*

[59] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[60] *Id.*

[61] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *8.

[62] *Id.* at *8-9.

[63] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *14.

[64] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *14.

[65] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *15.

[66] *Id.*

[67] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *15.

[68] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *15.

[69] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *16.

[70] *Concepcion,* ___ F.3d at ___; 2021 WL 960386, at *10.

[71] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *27.

[72] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *28.

[73] *Concepcion,* ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *28.

[74] *Moore*, 975 F.3d at 90-91.

[75] *Id.* at 91 (emphasis by *Moore* Panel).

[76] *Id.*

[77] *Moore*, 975 F.3d at 91.

[78] *Carter v. United States*, 530 U.S. 255, 271; 120 S.Ct. 2159; 147 L.Ed.2d 203 (2000) (citations and internal quotation marks).

[79] *Hegwood*, 934 F.3d at 418 (citation omitted).

[80] *Concepcion*, ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *11.

[81] *White,* 984 F.3d at 90 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421; 95 S.Ct. 2362; 45 L.Ed.2d 280 (1975)) (alterations by *White* Panel)).

[82] *Hegwood*, 934 F.3d at 418 (citation omitted).

[83] *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1265 (9th Cir. 2021) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183; 124 S.Ct. 1587; 158 L.Ed.2d 338 (2004)).

[84] *Concepcion*, ___ F.3d at ___ (Barron, J., *dissenting*); 2021 WL 960386, at *11.

[85] *White*, 984 F.3d at 90 (*quoting Albermarle Paper Co.*, 422 U.S. at 421) (alterations by *White* Panel)).