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Introduction

Seth Wood

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This issue of the *Department of Justice Journal of Federal Law and Practice* is devoted to sentencing and punishment. It includes articles addressing a wide range of subjects, including the interpretation and application of the First Step Act, preparing a persuasive sentencing memorandum, protecting the record, responding to sentencing issues in cybercrime matters, and others.

As the *Justice Manual* states, sentencing is a “critical stage in a case.”¹ Indeed, the Department’s mission statement includes seeking “just punishment for those guilty of unlawful behavior” and ensuring “fair and impartial administration of justice for all Americans.”² The *Justice Manual* also emphasizes that “prosecutors play an indispensable role in advocating for just sentences.”³ Prosecutors must be “familiar with the guidelines generally and with the specific guideline provisions applicable to the case.”⁴ Furthermore, they should “endeavor to ensure the accuracy and completeness of the information upon which the sentencing decisions will be based” and “offer recommendations with respect to the sentence to be imposed.”⁵

The Supreme Court also has emphasized the individualized nature of sentencing proceedings: “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”⁶

Additionally, on a practical level, a large number of appeals involve sentencing issues. According to the United States Sentencing

¹ JUSTICE MANUAL 9-27.710 cmt.

² *About DOJ*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> (last visited Sept. 24, 2021).

³ JUSTICE MANUAL 9-27.710 cmt.

⁴ *Id.*

⁵ *Id.* (citing JUSTICE MANUAL 9-27.730).

⁶ *Gall v. United States*, 552 U.S. 38, 52 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

Commission, approximately 49% of criminal appeals in Fiscal Year 2020 involved only sentencing issues.⁷ Another 14% of appeals challenged the underlying convictions and sentences—raising the percentage of appeals that involved sentencing issues to 63%.⁸

We hope that the articles in this issue will assist the Department's attorneys as they represent the United States in these critical proceedings.

⁷ U.S. SENTENCING COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 176.

⁸ *Id.*

Fixing the Categorical Approach “Mess”

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I. Introduction and overview

Under current federal law, if you point a gun at someone to steal her car, you have committed a “crime of violence” and are subject to a mandatory increased sentence under 18 U.S.C. § 924(c) based on the use of the gun.¹ But if you point a gun at someone to kidnap him, you have not committed a “crime of violence” and are not subject to the section 924(c) boost.²

If you commit an aggravated assault by intentionally beating a person to the brink of death in most states, you have committed a “violent felony” that will be assessed, upon a violation of the federal felon-in-possession statute, in determining whether you are an “armed career criminal” subject to a 15-year mandatory minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA).³ But not, according to the Third Circuit, if you do exactly the same

¹ Carjacking, 18 U.S.C. § 2119, is a “crime of violence” under section 924(c). *See, e.g.*, *United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018); *United States v. Felder*, 993 F.3d 57, 79–80 (2d Cir. 2021); *United States v. Evans*, 848 F.3d 242 (4th Cir. 2017); *United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019); *Estell v. United States*, 924 F.3d 1291 (8th Cir. 2019); *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017) (per curiam).

² *See, e.g.*, *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (kidnapping in violation of 18 U.S.C. § 1201(a) is not a crime of violence under section 924(c)), *vacated on other grounds*, 138 S. Ct. 1980 (2018); *United States v. Walker*, 934 F.3d 375 (4th Cir. 2019) (same); *United States v. Gillis*, 938 F.3d 1181, 1203–10 (11th Cir. 2019) (same ruling in applying similar provision in solicitation statute, 18 U.S.C. § 373).

³ *See, e.g.*, *United States v. Manzanares*, 956 F.3d 1220 (10th Cir. 2020) (New Mexico aggravated assault with a deadly weapon, N.M. STAT. ANN. § 30-3-2(A), and aggravated battery, N.M. STAT. ANN. § 30-3-5(C), qualify as ACCA violent felonies).

thing in, and are prosecuted for it by, the Commonwealth of Pennsylvania.⁴

The list of such strange anomalies these days is rather endless. If you commit a standard burglary—breaking into a residence in the middle of the night—you committed the offense of “burglary” that qualifies as an ACCA predicate, so long as you did it in various states, including Colorado, Georgia, Indiana, Kentucky, Louisiana, and Texas.⁵ But probably not if you did precisely the same thing in other states, including Florida, Illinois, Missouri, Nebraska, and Pennsylvania.⁶ And in all of these places, even this is not certain; the final result depends on exactly which statutory charge the local authority decided to press for your nocturnal misconduct.⁷

⁴ *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (Pennsylvania conviction for first-degree aggravated assault, in violation of 18 PA. CONS. STAT. § 2702(a)(1), is not a “violent felony” under ACCA).

⁵ *See United States v. Jones*, 951 F.3d 1138 (9th Cir. 2020) (Colorado second-degree burglary of a dwelling, COLO. REV. STAT. ANN. § 18-4-203(2)(a), is an ACCA violent felony); *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016) (Georgia burglary in violation of O.C.G.A. § 16-7-1(a) qualifies under ACCA); *United States v. Foster*, 877 F.3d 343 (7th Cir. 2017) (per curiam) (Indiana conviction for Class B burglary of dwelling, IND. CODE § 35-43-2-1, is an ACCA violent felony); *United States v. Malone*, 889 F.3d 310 (6th Cir. 2018) (Kentucky second-degree burglary, KY. REV. STAT. ANN. §§ 511.010(3), 511.030, qualifies under ACCA); *United States v. Montgomery*, 974 F.3d 587, 592–93 (5th Cir. 2020) (Louisiana simple burglary of an inhabited dwelling, LA. REV. STAT. ANN. § 14:62.2(A), falls within ACCA); *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc) (Texas burglary, TEX. PENAL CODE ANN. § 30.02(a), qualifies as an ACCA predicate).

⁶ *See United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016) (Florida burglary in violation of FLA. STAT. ANN. §§ 810.02(1)(b)(1), 810.011(2), does not qualify under ACCA); *United States v. Glispie*, 978 F.3d 502 (7th Cir. 2020) (Illinois residential burglary, 720 ILL. COMP. STAT. ANN. § 5/19-3, does not qualify); *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc) (Missouri second-degree burglary, MO. ANN. STAT. § 569.170, does not qualify); *United States v. Driscoll*, 892 F.3d 1127 (10th Cir. 2018) (Nebraska burglary statute, NEB. REV. STAT. ANN. § 28-507, does not qualify under ACCA); *United States v. Peppers*, 899 F.3d 211, 234–36 (3d Cir. 2018) (burglary in violation of Pennsylvania law, 18 PA. CONS. STAT. ANN. § 3502, does not qualify).

⁷ *See, e.g., United States v. Silva*, 944 F.3d 993 (8th Cir. 2019) (the parties agreed that Mississippi burglary in violation of MISS. CODE ANN. § 97-17-23

Committed multiple armed robberies? You may be a “career offender” under the Sentencing Guidelines (the Guidelines) and subject to significant increased penalties, but again, it does not matter what you did; it matters where you did it and what you were charged with. If you were charged with a federal crime under the preeminent federal robbery statute, the Hobbs Act, that does not count, according to a number of circuit courts;⁸ if you were charged with a state offense, it depends on the state where you committed the gunpoint robbery and what charge the prosecutor decided to bring.

All of these oddities and so many more are the product of the “categorical approach,” a unique theory of statutory interpretation that warps the application of federal criminal provisions, particularly those involving recidivist sentencing, and is also frequently applied in immigration law in defining the prior offenses that disqualify an alien from immigration benefits.⁹

The present article focuses on the application of the categorical approach in federal criminal law. Any opinions expressed are only

is generic burglary under ACCA, while burglary in violation of Miss. Code ANN. § 97-17-33(1) is not).

⁸ See, e.g., *United States v. Green*, 996 F.3d 176, 179–183 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799–802 (7th Cir. 2021); *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

⁹ Under 8 U.S.C. § 1101(a)(43), part of the Immigration and Nationality Act (INA), the term “aggravated felony” is defined for purposes of federal immigration law to encompass numerous offenses. The provision includes 21 subparts, describing myriad offenses from murder to fraud to perjury and much more. A prior conviction for an “aggravated felony” can be a basis for removal, bar eligibility for many forms of relief from deportation, and require expedited procedures and mandatory detention. When the government alleges that a conviction qualifies as an “aggravated felony” under the INA, “we generally employ a ‘categorical approach’ to determine whether the state offense is comparable to an offense listed in the INA.” *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The Supreme Court has held that some parts of the definition, however, refer to case-specific circumstances to which the categorical approach does not apply. *Nijhawan v. Holder*, 557 U.S. 29, 37–38 (2009).

those of the author, not those of the Department of Justice (Department).

So what exactly is the categorical approach? Under a number of recidivist sentencing provisions, most prominently ACCA, 18 U.S.C. § 924(e), and the career offender provision, U.S.S.G. § 4B1.1, courts must determine whether defendants incurred prior convictions for the type of offense described in the sentencing provision. For instance, applying ACCA requires a determination of whether a defendant has prior convictions for a “violent felony” or a “serious drug offense,” and each of these terms is defined in the statute. In other statutes, that the instant offense occurred in relation to a “crime of violence” must be proven, most notably in 18 U.S.C. § 924(c), which bars the possession, use, or carrying of a firearm in relation to a “crime of violence”; or it must be established that the instant offense was a “crime of violence.”¹⁰

With respect to many such provisions, including those cited in the preceding paragraph, courts must apply a “categorical approach” in determining whether defendants’ crimes meet the pertinent definition (“violent felony,” “crime of violence,” etc.). Under this approach, the facts of the offense at issue do not matter; what matters is whether the statute at issue in either the previous conviction or the instant offense categorically meets the pertinent federal definition. For instance, part of the definition of “violent felony” in ACCA provides that a prior offense qualifies if it “has as an element the use, attempted use, or threatened use of physical force against the person of another” (referred to as the “elements clause” or “force clause”). Under the categorical approach, a prior conviction qualifies if the statute of conviction at issue categorically requires, in every instance, proof of the use, attempted use, or threatened use of physical force against the person of another.

¹⁰ See, e.g., 18 U.S.C. § 25 (use of a minor to commit a crime of violence). Applying the categorical approach is most commonly required in the application of ACCA, section 924(c), and the career offender guideline. But it also appears in myriad other contexts, such as application of the “three strikes” statute, 18 U.S.C. § 3559(c), which refers to a “serious violent felony,” the definition of which is now also pertinent in sentencing of defendants under the main drug trafficking statute, 21 U.S.C. §§ 841(b)(1)(A), (B), given that the First Step Act incorporated the term in the definition of prior offenses that result in higher statutory terms under section 841.

If the statute of conviction at issue is overbroad, that is, if it applies to conduct that both falls within and outside the federal definition, then no conviction under the statute will qualify. To repeat the previous example, a crime will not count as a “violent felony” under the elements clause of ACCA, quoted above, if the statute may be violated without proof of physical force. That the defendant may have earned his prior conviction by actually using physical force against another person is irrelevant under the categorical approach.

The Supreme Court stated, “Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction ‘rested upon nothing more than the least of the acts’ criminalized,” before we “determine whether even those acts are encompassed by the generic federal offense.”¹¹ Or as the First Circuit put it, “[I]f a crime involves a taking of \$1 to \$1000, we must assume that a conviction was for taking \$1.”¹²

If the statute is “divisible,” however, that is, if it presents alternative elements, the court applies the “modified categorical approach” to determine whether the defendant was convicted of a divisible portion of the statute that meets the pertinent federal definition. In conducting this inquiry, the court is still barred from considering the actual facts and is, instead, limited to reviewing a specific set of judicial documents (so-called “*Shepard* documents”) to decide whether the defendant was convicted of the divisible part that meets the federal definition.¹³ “The key,” the Supreme Court stated,

¹¹ *Moncrieffe*, 569 U.S. at 190–91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (cleaned up).

¹² *United States v. Starks*, 861 F.3d 306, 324 (1st Cir. 2017).

¹³ Under *Shepard v. United States*, 544 U.S. 13 (2005), with respect to a trial, a court may consider the charging document and the jury instructions to determine what elements the jury necessarily found; and with respect to a guilty plea, the court “is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Id.* at 16. This restriction reflects the Supreme Court’s goal to avoid the constitutional issue that would be presented were the sentencing court, rather than a jury, to determine facts that increase a statutory maximum sentence. *Id.* at 24–26; see *Descamps v. United States*, 570 U.S. 254, 269 (2013) (referencing “the categorical approach’s Sixth Amendment underpinnings”). The Supreme Court has further explained that

“is elements, not facts.”¹⁴ In another case, the Court pronounced, “Facts . . . are mere real-world things—extraneous to the crime’s legal requirements. . . . And ACCA, as we have always understood it, cares not a whit about them.”¹⁵

The categorical approach also applies where a federal statute “enumerates” specific crimes that qualify for a sentencing enhancement. For instance, ACCA specifies that “burglary,” “arson,” “extortion,” and “use of explosives” are “violent felonies.” In these instances, the label given to a statute of conviction by a legislature is

a court, in examining a statute, must distinguish between “elements,” which are divisible, and “means” of committing an offense, which are not. An entire separate article could be written on the difficulty of distinguishing between “elements” and “means.” While the Supreme Court predicted that divining the distinction between “elements” and “means” will prove “easy” in “many” cases, *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016), that is proving to be a very questionable proposition. See, for instance, *United States v. Reyes*, 866 F.3d 316 (5th Cir. 2017), in which the court held (2–1) that the Illinois aggravated battery statute is divisible and that the offense of aggravated battery with a deadly weapon is a crime of violence under the Guidelines, and each of the three judges applied a different analysis in resolving the elements versus means question. Further, in *Shular v. United States*, 140 S. Ct. 779 (2020), the Court stated that there are different categorical approaches that apply to the different types of predicates (“violent felony” and “serious drug offense”) in ACCA. The more stringent approach applies to violent crimes, which are the main subject of this article. The application of the categorical approach has not proven as problematic in application to the much broader definition of “serious drug offense” that applies in ACCA.

¹⁴ *Descamps*, 570 U.S. at 261.

¹⁵ *Mathis*, 136 S. Ct. 2248; see also *United States v. Davis*, 875 F.3d 592, 604 (11th Cir. 2017) (“the true facts matter little, if at all, in this odd area of the law”). All circuits explain the categorical approach similarly. See, e.g., *United States v. Faust*, 853 F.3d 39, 50–53 (1st Cir. 2017); *United States v. Bordeaux*, 886 F.3d 189, 193 (2d Cir. 2018); *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016); *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018); *United States v. Enrique-Ascencio*, 857 F.3d 668, 676 (5th Cir. 2017); *Richardson v. United States*, 890 F.3d 616, 619–21 (6th Cir. 2018); *Van Cannon v. United States*, 890 F.3d 656, 662–63 (7th Cir. 2018); *United States v. Naylor*, 887 F.3d 397, 399–400 (8th Cir. 2018) (en banc); *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018); *United States v. Kendall*, 876 F.3d 1264, 1267–69 (10th Cir. 2017); *United States v. Vail-Bailon*, 868 F.3d 1293, 1296–97 (11th Cir. 2017) (en banc); *United States v. Haight*, 892 F.3d 1271, 1279 (D.C. Cir. 2018) (Kavanaugh, J.).

irrelevant. Rather, the federal sentencing court must first define the “generic” version of the offense, based on the consensus of states and treatises. Then, it must apply the categorical approach to determine if the particular statute of conviction meets that generic definition. Again, the facts of the defendant’s earlier crime are irrelevant.

The modern application of this categorical approach began in 1990, in *Taylor v. United States*,¹⁶ in the context of one of those ACCA enumerated offenses—burglary. That case presented a question of whether two of the defendant’s previous state convictions for burglary qualified as “burglary” under the “enumerated offenses” clause of ACCA. The Court held first that “burglary” in ACCA refers to a generic offense, defined as “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”¹⁷ The Court then held that, in deciding whether a prior conviction met this definition, “§ 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”¹⁸ In reaching this result, the Court stressed the statutory language of ACCA, the legislative history, and the “daunting” challenges that a fact-finding process would entail.¹⁹

In *Mathis v. United States*, the Court summarized, “Our decisions have given three basic reasons for adhering to an elements-only inquiry.”²⁰ First, the Court stated, ACCA’s text favors that approach by referring to “previous convictions” instead of previous acts.²¹ “Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns.”²²

And third, an elements-focus avoids unfairness to defendants. Statements of “non-elemental fact” in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no

¹⁶ 495 U.S. 575 (1990).

¹⁷ *Id.* at 598.

¹⁸ *Id.* at 600.

¹⁹ *Id.* at 600–01.

²⁰ 136 S. Ct. at 2252.

²¹ *Id.*

²² *Id.*

incentive to contest what does not matter under the law; to the contrary, he “may have good reason not to”—or even be precluded from doing so by the court. When that is true, a prosecutor’s or judge’s mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.²³

Supreme Court justices continue to insist on applying the categorical approach to the provisions discussed here and occasionally speak up to defend it. In the immigration context, the Court stated in 2015, “By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law.”²⁴ And more recently, Justice Breyer, while acknowledging that the method is “seemingly complicated” and “would appear sometimes to lead to counterintuitive results,” stated, “The primary reason for choosing this system lies in practicality. Immigration judges and sentencing judges have limited time and limited access to information about prior convictions.”²⁵

But judicial criticism of the categorical approach has become an avalanche, as judges, including members of the Supreme Court, recognize that the approach presents profound problems: It fosters a huge amount of complex litigation to determine the elements (and divisible elements) of a great number of criminal statutes; and it produces inconsistent and anomalous results. A person may commit exactly the same type of armed robbery in two different states, for instance, and one counts as a predicate violent crime but the other does not because state one has a narrowly defined statute that always requires force as an element, and state two has a broader statute that might be violated without force (even though that is not what the defendant actually did).

At bottom, the approach subjects an offender to criminal penalties not based on what he did, but on whether *someone else* could violate the same statute he did but do it in a less violent way. As Judge Harvie Wilkinson III wrote, the approach “involves an exhaustive

²³ *Id.* at 2253 (citations omitted).

²⁴ *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015).

²⁵ *Pereida v. Wilkinson*, 141 S. Ct. 754, 770–71 (2021) (Breyer, J., dissenting).

review of state law as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic.”²⁶ Another judge wrote “to express dismay at the ever-expanding application of the categorical approach,” observing that

two defendants who, in their past, independently committed identical criminal acts in two different states and have essentially the same criminal history will find that the applicability of the ACCA to their current cases depends not on their past criminal conduct but on the phrasing of the different state criminal statutes.²⁷

It is hard to imagine a more abnormal approach to sentencing criminal offenders.

To be sure, for a long time after *Taylor*, none of this was too problematic because the definitions of a violent crime in the key provisions—ACCA, section 924(c), and the recidivism provisions of the Guidelines—all included a “residual clause” as well as an “elements

²⁶ *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring). The Supreme Court has stated that “our focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense.” *Moncrieffe*, 569 U.S. at 191 (addressing the categorical approach in the context of an immigration statute) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In *Duenas-Alvarez*, the Court stated that the categorical approach “requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” 549 U.S. at 193. That concept occasionally limits the more extreme possible applications of the approach. See, e.g., *United States v. Patterson*, 853 F.3d 298, 304 (6th Cir. 2017) (rejecting effort to “[c]oncoct[] hypothetical and unrealistic examples divorced from the case law”). But many courts hold that the “realistic probability” rule is inapplicable where a statute explicitly defines a crime more broadly than the pertinent federal definition, whether there has been an actual prosecution under the broader definition or not. See *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), in which the majority and dissenting opinions set forth the debate on that issue.

²⁷ *United States v. Chapman*, 866 F.3d 129, 136–37 (3d Cir. 2017) (Jordan, J., concurring).

clause,” such as the residual clause in 18 U.S.C. § 16: “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” That provision would readily scoop up most violent crimes and prevent the most anomalous results.

But the Supreme Court struggled for years to define and confine this residual definition²⁸ before throwing in the towel, finding it unconstitutionally vague in 2015 with respect to the definition of “violent felony” in ACCA.²⁹ That meant that a violent crime under these provisions could qualify only under the “elements clause,”³⁰ resulting in a tidal wave of new litigation regarding predicate crimes and a host of bizarre results.

The kidnapping example cited earlier is typical. This is obviously a paradigmatic violent crime that essentially always involves violence or the threat of violence, and there can be no doubt that Congress intended to subject an offender to the increased section 924(c) penalty for using a gun to commit it. But the federal kidnapping statute applies to one who “seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away” a person,³¹ and because “inveigling” or “decoying” may be accomplished without force, the government is compelled to concede that kidnapping is not categorically a “crime of violence” under section 924(c). Because it might be committed without violence, no kidnapping offense qualifies, even if the only ones the government prosecutes involve actual violence.³²

²⁸ See *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. 1 (2011).

²⁹ See *Johnson v. United States*, 135 S. Ct. 2551 (2015) (ACCA); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (section 16(b)); *United States v. Davis*, 139 S. Ct. 2319 (2019) (section 924(c)).

³⁰ For instance, the elements clause in section 16(a) defines a “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a).

³¹ 18 U.S.C. § 1201(a).

³² In *Quarles v. United States*, 139 S. Ct. 1872 (2019), addressing the generic definition of “burglary” under ACCA, the Supreme Court suggested a little give in the categorical approach, at the least with regard to enumerated offenses. It cautioned that statutes should not be interpreted in a manner

Other examples abound. The Fourth Circuit held that conspiracy to commit murder in aid of racketeering, a violation of 18 U.S.C. § 1959(a)(5), is not a crime of violence under the career offender guideline, U.S.S.G. § 4B1.2.³³ The Tenth Circuit held that Oklahoma first-degree manslaughter does not qualify as “manslaughter” under the three strikes statute, 18 U.S.C. § 3559.³⁴ The Fifth and Ninth Circuits reached similar decisions with regard to other murder provisions.³⁵ The Fourth Circuit held that second-degree rape in North Carolina is not a crime of violence under the Guidelines.³⁶ The Ninth Circuit reached the same conclusion regarding a New Jersey aggravated assault crime, even though in the actual case the defendant stabbed a man in the chest.³⁷

that would eliminate most state crimes of the same type from the generic definition selected by Congress, stating, “That result not only would defy common sense, but also would defeat Congress’ stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies. We should not lightly conclude that Congress enacted a self-defeating statute.” *Id.* at 1879. The impact of this declaration is not yet known.

³³ *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018).

³⁴ *United States v. Leaverton*, 895 F.3d 1251 (10th Cir. 2018) (interpreting OKLA. STAT. tit. 21, § 711(2)).

³⁵ *United States v. Hernandez-Montes*, 831 F.3d 284 (5th Cir. 2016) (Florida attempted second-degree murder, FLA. STAT. ANN. §§ 777.04(1), 782.04(2), does not qualify as a crime of violence under section 2L1.2, as, unlike the generic definition of murder, the statute does not require a specific intent to kill); *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder, WASH. REV. CODE ANN. § 9A.32.050, covers felony murder and is therefore overbroad in relation to the 4B1.2 definition of “crime of violence” and does not qualify).

³⁶ *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape, N.C. GEN. STAT. ANN. § 14–27.3, does not qualify as a crime of violence under U.S.S.G. § 4B1.2, as the statute did not require the use of physical force and could be predicated instead on the insufficiency of purported consent).

³⁷ *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015) (New Jersey aggravated assault in violation of N.J. STAT. ANN. § 2C:12–1(b)(1) does not qualify as a crime of violence under U.S.S.G. § 2L1.2 as the generic definition of aggravated assault does not incorporate the mens rea of

Thus, defense counsel usually celebrate applying the categorical approach. The Immigrant Legal Resource Center explains the process:

What is the defense goal? The person's conviction is evaluated not by what they did, but by the most minimal, least egregious conduct that has a realistic probability of being prosecuted under the criminal statute. This is a great advantage. The defense goal is (a) to identify some conduct that violates the criminal statute but falls outside the generic definition, and (b) to show that there is a "realistic probability" that this conduct actually is prosecuted under the criminal statute.³⁸

The critics are now out in force, including in the Supreme Court. Justice Kennedy called on Congress to address "the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme. It could not have been Congress' intent for a career offender to escape his statutorily mandated punishment 'when the record makes it clear beyond any possible doubt that [he] committed'" an ACCA predicate offense.³⁹ He added, "Congress also could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."⁴⁰ In a memorable dissenting opinion in the same case, Justice Alito analogized the development of the categorical approach to the tale of a Belgian woman who misprogrammed her GPS device for a 38-mile drive and proceeded to drive 900 miles and across several countries before realizing her error, concluding, "Programmed in this way, the Court set out on a course that has increasingly led to results that Congress could not have intended."⁴¹

"extreme indifference recklessness," which may suffice under the New Jersey statute).

³⁸ Katherine Brady, IMMIGR. LEGAL RES. CTR., *How to Use the Categorical Approach Now* 10 (2019), https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf.

³⁹ *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring) (citations omitted).

⁴⁰ *Id.*

⁴¹ *Id.* at 2268 (Alito, J., dissenting).

The en banc Fifth Circuit stated: “The well-intentioned experiment that launched fifteen years ago has crashed and burned.”⁴² In a recent concurring opinion, citing many of these opinions of fellow judges, Judge Amul Thapar, joined by four other judges, declared, “The time has come to dispose of the long-baffling categorical approach.”⁴³ He explained that the categorical approach leads to arbitrary results that vary depending on statutory drafting, the place where the defendant committed the offense, and the Circuit that adjudicated the instant offense. He further explained the difficulty of administering the categorical approach:

Each categorical-approach case (and there is no shortage of them) instead requires the judge to (1) mull through any number of hypothetical ways to commit a crime that have nothing to do with the facts of the prior conviction; (2) mine electronic databases for state court cases (precedential or not) depicting non-violent ways of commission; and (3) scrutinize those state court cases, some of which are old and predate the categorical approach, to determine their import.⁴⁴

Judge William H. Pryor Jr. (a recent acting chair of the Sentencing Commission), began a recent concurring opinion (joined by four others) as follows:

How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It’s nuts. And Congress needs to act to end this ongoing judicial charade.⁴⁵

Elsewhere, Judge N. Randy Smith, dissenting from a ruling that second-degree murder in violation of 18 U.S.C. § 1111 is not a section

⁴² *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018).

⁴³ *United States v. Burreis*, 912 F.3d 386, 407 (6th Cir. 2019) (en banc) (Thapar, J., concurring).

⁴⁴ *Id.* at 409.

⁴⁵ *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc).

924(c) crime of violence, quoted the film *Zoolander*: “I feel like I am taking crazy pills.”⁴⁶

Another Ninth Circuit judge stated:

I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach. . . . The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results. . . . It is past time for someone with the power to fix this mess to do so.⁴⁷

So how, exactly, do we fix this mess? Here are some suggestions.⁴⁸

⁴⁶ *United States v. Begay*, 934 F.3d 1033, 1042 (9th Cir. 2019) (quoting *ZOOLANDER* (Paramount Pictures 2001)). Many other judges have been equally vocal, if not as colorful. *See, e.g., United States v. Scott*, 990 F.3d 94, 126 (2d Cir. 2021) (en banc) (Park, J., concurring on behalf of five judges, quoting numerous other judges, and stating, “As a growing number of judges across the country have explained, the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice.”); *United States v. Williams*, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring) (expressing “concern that the categorical approach, along with its offspring, the modified categorical approach, is pushing us into a catechism of inquiry that renders these approaches ludicrous.”); *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019) (“In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.”) (footnote omitted); *United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Concurring in a decision holding that a Tennessee aggravated assault provision qualified under the “crime of violence” definition in the pre-2016 version of U.S.S.G. § 2L1.2, Judge Owens wrote, “I continue to urge the Commission to simplify the Guidelines to avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls.”); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1058 (9th Cir. 2017) (Judge Bybee, on a question of divisibility, labeled his opinion “concurring in part and dissenting in part, but frustrated with the whole endeavor.”).

⁴⁷ *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., concurring).

⁴⁸ I acknowledge that the categorical approach is often applied in the application of mandatory minimum sentencing provisions, such as those in ACCA and section 924(c), and there is much criticism of such sentencing

II. Federal predicates

The answer should be easy where the predicate at issue is a federal crime, say where the section 924(c) crime is premised on a kidnapping in violation of federal law, or the prior conviction on which the career offender application or some other recidivism provision is based is a federal conviction. Congress can simply list the federal crimes that qualify. There is no reason to spend considerable resources debating whether Hobbs Act robbery, carjacking, or a host of other obviously violent crimes include overbroad elements or could conceivably be committed in a nonviolent way. Congress should simply provide a definition of “crime of violence” that presents a list of the federal statutory crimes that qualify. For good measure, the same should be done to define drug offenses that serve as predicates in a number of recidivism provisions.

Even better, Congress should present a single definition and list of “crimes of violence.” At present, there are dozens of criminal statutes that refer to the concept of a violent crime and a number of different definitions. The definition of “crimes of violence” in section 16 is incorporated in many statutes; the similar definition in section 924(c) is incorporated in others; and yet other statutes include their own definitions. This simply adds to the litigation burden and confusion, but it could be resolved by creating a single list that is incorporated in all relevant provisions. And if Congress wished to add or remove from

provisions, including from the newly elected President. That criticism is beyond the scope of this article. This article assumes that some version of the provisions will remain in force, and even if they do not, there will still be a need to identify prior offenses that warrant increased recidivist sentencing. And there will always be an imperative to strive for consistent sentencing, in which like offenders are treated similarly. In that endeavor, in my opinion, better approaches than the much-maligned categorical approach should be employed.

Still, the possibility must be recognized that reforming the categorical approach has been difficult because the primary enhancements that employ the approach are often mandatory and quite severe. Further, the debate has implications under immigration law, and Congress has been unable to find common ground on immigration for many years.

the list any particular provision, it could do that in the individual statute.

III. Guideline provisions

The principal guideline requiring definitions for “crime of violence” and “controlled substance offense” is the career offender guideline, section 4B1.2. That provision calls for enhanced punishment where the instant offense is a crime of violence or controlled substance offense and the defendant has at least two prior convictions for such crimes. Currently, the definition of “crime of violence” is most problematic, presenting an elements clause and then an additional list of “enumerated” offenses, some of which are defined and some of which are not, leading to more litigation.

With regard to federal predicates, the guideline could be amended to simply incorporate the statutory definition of “crime of violence,” if it is amended as suggested above to present a list of qualifying federal crimes.

The application of the guideline to state predicates is more problematic. But it has never been apparent why the categorical approach applies to the Guidelines at all. Over the decades, appellate courts consistently applied the categorical approach to the Guidelines after the Supreme Court’s action in *Taylor* with respect to ACCA, but that was not necessarily appropriate, particularly after the Guidelines were declared advisory in 2005. Indeed, the Sentencing Commission itself never expressly adopted the categorical approach in the application of any provision. Sentencing courts are permitted to make all manner of factual conclusions regarding a defendant’s history as long as they rely on reliable evidence; why should assessing criminal history be any different? Indeed, the categorical approach, which rejects any consideration of the actual facts of a defendant’s prior conduct, is antithetical to the theory of the Guidelines, which call for sentencing judges to apply the Guidelines to defendants’ actual conduct and not focus solely on the number or elements of counts of conviction.⁴⁹ And the constitutional concern that animated the

⁴⁹ William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990) (the Chair and General Counsel of the Commission at the time of implementation of the Guidelines explained, “The Commission ultimately settled on a system that blends the constraints of the offense of conviction

categorical approach, regarding judges making factual findings increasing a statutory sentence, is not present when applying the advisory Guidelines.⁵⁰

Thus, in an October 30, 2015, letter to the Sentencing Commission, the Department recommended supplementing the categorical approach when applying the Guidelines with the adoption of “a conduct-based backup.”⁵¹ The Department explained

Rather than replacing the categorical approach entirely, this conduct-based backup would apply fact-finding to those cases where the categorical approach is insufficient to determine that the defendant did or did not commit an enumerated offense. Under this method, a court may efficiently identify as a crime of violence any offense for which a defendant was convicted whose elements satisfy the Commission’s definition of a crime of violence. The court may then further inquire into the facts only in those matters in which the crime of conviction is not categorically a crime of violence, but reliable evidence establishes that the defendant in fact engaged in conduct that amounts to a crime of violence as defined by the Commission. Sentencing courts should be permitted to consider any reliable evidence, including court and law enforcement records and witness testimony, in the same manner that it may consider any such evidence in making any other factual determination under the Guidelines. *See* USSG §6A1.3(a) (“In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.”). Such an approach would maintain the implementation

with the reality of the defendant’s actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.”).

⁵⁰ *United States v. Booker*, 543 U.S. 220 (2005).

⁵¹ Letter from Jonathan J. Wroblewski, Dir., Off. of Policy and Legis., to Patti B. Saris, Chair, U.S. Sent’g Comm’n (Oct. 30, 2015).

of the categorical approach in the majority of cases, while also minimizing the troubling issue of vast sentencing disparities based on the jurisdiction in which the defendant was convicted.⁵²

The Sentencing Commission did not adopt the suggestion at that time, but it continued its review of the matter.⁵³ Ultimately, on December 20, 2018, the Commission proposed amendments that would eliminate the categorical approach when applying the Guidelines, though it did not go as far as the government had suggested. The Commission lost a quorum shortly thereafter, and thus, has not collected further comment on this matter or reached a conclusion.

Under the proposed amendments, the Commission would allow consideration of actual conduct in assessing whether a defendant previously committed a violent crime or controlled substance offense. The Commission stated:

⁵² *Id.* The Department proposed that this language be included in the guideline commentary: “In determining whether a person has incurred such a conviction, the court should first examine the elements of the offense of conviction, including the version of an offense involving alternative means or alternative elements that was the basis for the conviction, as set forth in judicial records such as a charging document, jury instructions, a plea colloquy, or a judgment. If those elements include and are no broader than the conduct described in an enumerated offense, the court should conclude that the person was convicted of an enumerated offense. If this approach does not suffice to establish whether the person was convicted of an enumerated offense, the court should then consider any reliable evidence, as set forth in §6A1.3(a), in determining by a preponderance of the evidence whether the conduct leading to the prior conviction met the definition of an enumerated offense as set forth in Section xxx.” *Id.*

⁵³ The Commission, in 2016, did largely remove the categorical approach from the application of section 2L1.2, which applies to illegal reentry offenses. Previously, that guideline provided for enhanced penalties where a defendant incurred convictions before removal for specified crimes of violence, drug trafficking offenses, and other crimes, often requiring application of a categorical approach to determine which predicates qualified. Amendment 802 (Nov. 1, 2016) largely ended this, by basing enhancements instead for prior felony offenses on the length of sentence imposed, a far easier to apply standard. The revised guideline did, however, retain the categorical approach in defining what prior misdemeanors result in an enhancement.

The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders.⁵⁴

The Commission proposed to amend its definition of “crime of violence” and “controlled substance offense” to allow a court to examine conduct that satisfied an element or “alternative means for meeting an element” of an offense that qualifies under either the elements clause or the list of enumerated offenses.⁵⁵

⁵⁴ See U.S. SENT’G COMM’N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 23 (2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf.

⁵⁵ It may be argued that this expansion offends the Commission’s statutory authorization, but that argument is not persuasive. In 28 U.S.C. § 994(h), directing the Commission to create the career offender guideline, the statute stated that the Commission should assure a lengthy sentence for those convicted of a “crime of violence” or specified drug trafficking offenses. The statute did not define “crime of violence,” and if the omnibus definition in 18 U.S.C. § 16 is applied (now reduced to an elements clause), it is apparent that the Sentencing Commission’s formulation, from the very outset, has gone well beyond that, particularly in including enumerated offenses. The Commission stated early on that its definition of crime of violence was “derived” from, but not completely based on, ACCA, 18 U.S.C. § 924(e). U.S.S.G. app. C, amend. 268. This appears permissible. The Third Circuit so held: “Subsection 994(h) therefore required the Commission to give near-maximum terms to certain offenders; it did not by its terms prevent the Commission from deciding that others might also merit near-maximum terms. Moreover, the legislative history confirms that Congress intended subsection 994(h) as a floor for the career offender category, not as a ceiling.” *United States v. Parson*, 955 F.2d 858, 867 (3d Cir. 1992).

The proposed amendment, however, suggests that, in determining the defendant's conduct, the court should be limited to the judicial documents identified in *Shepard*: the charging document, the jury instructions, the judge's formal rulings of law or findings of fact in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant, or any other explicit factual finding by the trial judge to which the defendant assented.

This is a good start, but it is not fully sufficient because the government's ability to establish the nature of the defendant's prior conviction will still rely on the quality of court records, which can vary wildly depending on the jurisdiction involved, how much information necessarily was included in the court record of a particular case, and the passage of time. The government should not be precluded from presenting additional reliable evidence, consistent with U.S.S.G. § 6A1.3(a), if available, including actual witness testimony, just as it may do when litigating any other necessary finding under the Guidelines, to show that the defendant engaged in violent conduct.

IV. State predicates relevant to federal statutory provisions

Eliminating the categorical approach from the application of statutory sentencing provisions faces a particular hurdle that does not apply to Guidelines litigation: the Sixth Amendment bar against finding facts that increase a statutory maximum sentence.⁵⁶ This problem is most acute with regard to ACCA, which imposes an enhanced minimum and maximum penalty for specified firearm offenses based on prior convictions for a "violent felony" or "serious drug offense," which may include state as well as federal crimes. In particular, applying ACCA to a state violent crime necessitates, under current law, applying the categorical approach to determine whether the crime fits within the generic definition of one of the enumerated offenses (burglary, arson, etc.) or satisfies the elements clause

⁵⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000). In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that application of the Guidelines as mandatory violated this principal, and to remedy that, it declared the Guidelines advisory. Therefore, as stated earlier, determination of facts relevant to a guideline calculation does not face the same hurdle.

(presents as an element the use, attempted use, or threatened use against the person of another).⁵⁷

The most commonly suggested fix, akin to the “conduct-based backup” proposed above with regard to the Guidelines, is to permit the government, where a prior conviction does not categorically qualify under the current approach, to charge and prove beyond a reasonable doubt that an earlier offense involved violent conduct.⁵⁸ That approach will allow the government to determine whether appropriate punishment and incapacitation of a repeat violent offender warrants the expenditure of resources to prove the additional pertinent facts.

⁵⁷ As stated earlier, to the extent that ACCA status relies on previous federal offenses, the ready solution to the need for a categorical approach is simply for Congress to list the applicable predicates. With regard to “serious drug offenses,” the categorical approach has not presented nearly the same difficulty even as to state offenses, as the term is defined broadly as any state crime “involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance [(as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))], for which a maximum term of imprisonment of ten years or more is prescribed by law,” and courts agree that the term “involving” allows expansive application. *See, e.g.*, *United States v. Whindleton*, 797 F.3d 105, 108–09 (1st Cir. 2015); *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003); *United States v. Gibbs*, 656 F.3d 180, 188 (3d Cir. 2011) (holding that a conviction for wearing body armor while committing a felony may “involve” drug manufacturing, distribution, or possession when the underlying felony is a drug offense); *United States v. Brandon*, 247 F.3d 186, 190–91 (4th Cir. 2001); *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016); *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007).

⁵⁸ *See, e.g.*, *Quarles v. United States*, 139 S. Ct. 1872, 1880–81 (2019) (Thomas, J., concurring) (suggesting that the categorical approach be abandoned in favor of jury determinations of whether the offender’s conduct fit the generic crime at issue); *Ovalles v. United States*, 905 F.3d 1231, 1258–62 (11th Cir. 2018) (en banc) (Pryor, J., concurring) (same); *United States v. Burris*, 912 F.3d 386, 409 (6th Cir. 2019) (en banc) (Thapur, J., concurring) (“I join others in proposing an alternative approach. That approach would permit judges to deem a prior conviction a crime of violence if the underlying criminal conduct was actually violent. If the government can prove that the state court record establishes violent conduct, end the inquiry there.”) (citation omitted).

V. Variances

Until corrections are made, prosecutors should keep in mind that appropriate sentences may still be achieved in the most egregious cases, even where applying the categorical approach offends common sense, by seeking variances outside the guideline range as permitted by the statutory maxima for all offenses of conviction.

In *United States v. Carter*, while finding that a particular offense qualified as a crime of violence under the categorical approach, the Seventh Circuit also explained at length that courts should consider variances based on a defendant's actual conduct in those cases where applying the categorical approach, which focuses on the hypothetical conduct of other people, would produce an odd result. Judge David Hamilton wrote in part:

[W]e also remind district courts that the classification of prior convictions under the Sentencing Guidelines can produce abstract disputes that bear little connection to the purposes of sentencing. As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant's criminal history even where strict categorical classification of a prior conviction might produce a different guideline sentencing range.⁵⁹

In a dissenting opinion in an immigration case, Justice Breyer, while explaining the categorical approach at length, made the same point: “[I]n the ACCA context, a sentencing judge, even where ACCA is inapplicable, has some discretion in determining the length of a sentence. If he finds that the present defendant in fact burgled, say, a dwelling and not a boat, he can take that into account even if the sentencing enhancement does not apply.”⁶⁰

⁵⁹ *United States v. Carter*, 961 F.3d 953, 954 (7th Cir. 2020).

⁶⁰ *Pereida v. Wilkinson*, 141 S. Ct. 754, 771 (2021) (Breyer, J., dissenting).

VI. Conclusion

Sentencing criminal offenders should be fair and consistent. Similarly situated offenders should receive similar sentences that do not rest on such vagaries as whether the statutes under which they were previously prosecuted also proscribe less violent conduct. Federal sentencing law should aim to identify the most violent repeat offenders, to sanction such lawless behavior and protect the public. And criminal adjudication should be as efficient as possible. The categorical approach, which applies to significant, frequently applied criminal provisions, often fails all of these goals. It would improve the criminal justice system to remedy this.

About the Author

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Persuasive Written Sentencing Advocacy: Packing a Punch

*Kelly A. Zusman
Criminal Chief
District of Oregon*

I. Why write?

There are several advantages to giving the court a written preview of your sentencing arguments. Most federal judges are used to a written preview system. They are generally ill-prepared for surprises and ill-suited to deciding complicated guideline computation issues on the fly. Writing also forces us to think ahead about the sentencing hearing and prepare and organize our thoughts. A well-written sentencing memo can pave the way to convincing the court to see the case from the government's perspective, and oftentimes, from that of the victims. A powerful sentencing memo can overcome, or at least temper, a defendant's focus on his own hardships and that of his beleaguered family members. This article will walk you through the process of pulling together a powerful and persuasive sentencing memo.

A. Preparation: We want to start strong

Sentencing advocacy begins *before* the presentence report (PSR) is written. Reach out to the probation officer assigned to write the PSR. If you've already written a factual description for a motion or internal memo, offer to provide a copy to the PSR writer. You could also invite the writer to view the evidence with you and encourage her to ask questions. Each answer is an opportunity to advocate.

Once you receive a copy of the draft PSR, review it carefully and thoroughly. Call the probation officer to discuss any errors, omissions, and concerns so that the officer is not surprised. Prepare a letter (or pleading, if required in your district) responding to the draft that covers the following:

- Correct any factual errors or omissions in the PSR;
- Double check the sentencing guideline calculations and correct any errors or omissions; and

- If the PSR recommends a downward departure or variance over your objection, marshal facts to counterbalance the stated justifications.

B. An effective outline

After meeting with our judges to discuss sentencing memoranda, we created a template that uses this structure:

- (1) Introduction
- (2) Factual Background
 - a. The Offense Conduct
 - b. The Charges
 - c. The Plea Agreement & Guideline Computations
 - d. Argument
 - i. Contested Guideline Issues
 - ii. Government's Recommended Sentence
- (3) Restitution & Forfeiture
- (4) Conclusion

1. The introduction

A persuasive memo begins with an opener that tells the reader why the government is seeking a particular sentence. Usually, this means we lead with our best factual highlights. Regardless of whether your case involves the production of child pornography or mortgage fraud, beginning the memo with the crime itself is far more likely to engage your reader than the all too common empty opener, "Comes now, the United States of America, by and through"

Here are a few examples of powerful introductions:

- After ingratiating himself with a single mother struggling with addiction, defendant gained access to her two-year old twin daughters. He tortured and sexually abused those girls and videotaped his abuse. A jury found him guilty of seven counts of producing child pornography, each of which carries a 30-year statutory maximum. For reasons detailed below, the Court should impose seven consecutive 30-year sentences.
- "2MP5s w/50 rounds each! Eugene is going on the fucking map." Defendant scrawled these words on a note and tacked it to the

door of St. Mary's Catholic Church last September. Several bullets littered the ground below the door. The note was part of a series of threatening messages left on the church's voicemail during the preceding weeks and the congregation was terrified. Defendant's threats were specific and violent, and they had their intended effect. Consequently, this case amply merits a mid-range 24-month guideline sentence.

- Bull trout are protected under the Endangered Species Act, and no one is supposed to catch and kill them. Defendant did just that, and he trespassed onto tribal property several times to do so. He walked past signs warning against poaching and photographed himself with his illegal trophies. He has earned the 12-month low-end guideline sentence identified in the PSR.
- "The banks will never know." That's what Defendant told the straw purchasers who submitted false real estate loan applications. The applications overstated the borrowers' income, understated their liabilities, and mischaracterized their intent to occupy the properties. And the lies mattered; every single borrower eventually defaulted, causing the bank that issued the loans to lose millions of dollars. As a mortgage broker, defendant abused his position to churn profits for himself at the bank's expense. Defendant profited richly from this scheme, he recruited others, and his crimes nearly led to the bank's demise. Because defendant and others like him should be deterred from engaging in this type of egregious conduct, this Court should impose a 48-month, high-end advisory guideline sentence.

2. The factual background

Tell the story of the crime, not the investigation. Police reports, FBI 302s, and DEA-6s tell the investigation's story. But that is not what matters to the court at sentencing. Focus on what this defendant *did* to prompt his arrest, and generally, move through these details in chronological order.

Most crimes are inherently interesting, which is helpful when we want to grab the court's attention and get it enthused about the prospect of imposing a custodial sentence. Highlight the facts that underscore the seriousness of the offense (like victim impacts) or the

need for deterrence (like financial fraud). Punctuate these details with images:

- An example from a carjacking/murder case:

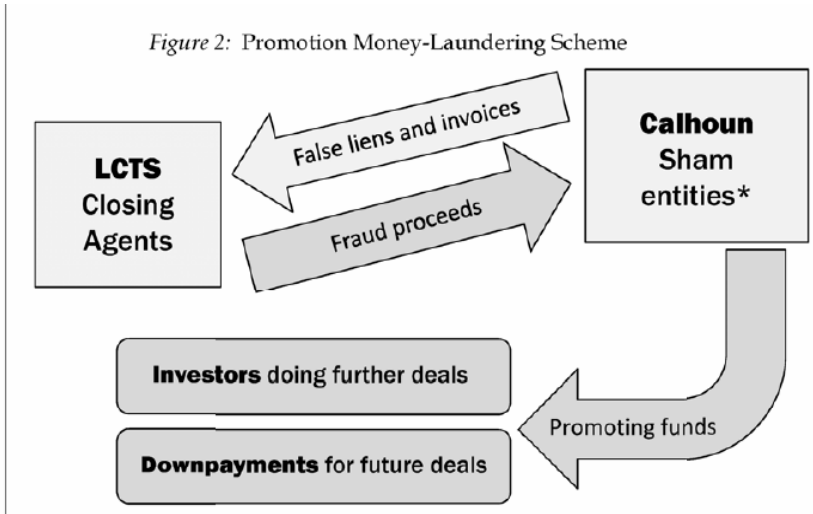
3:25 p.m. – Lara purchased Midnite sleeping pills and bottled water at a Target in Salem, Oregon. Here is a receipt and still shot from the video surveillance of Lara as he left the store with his purchases:



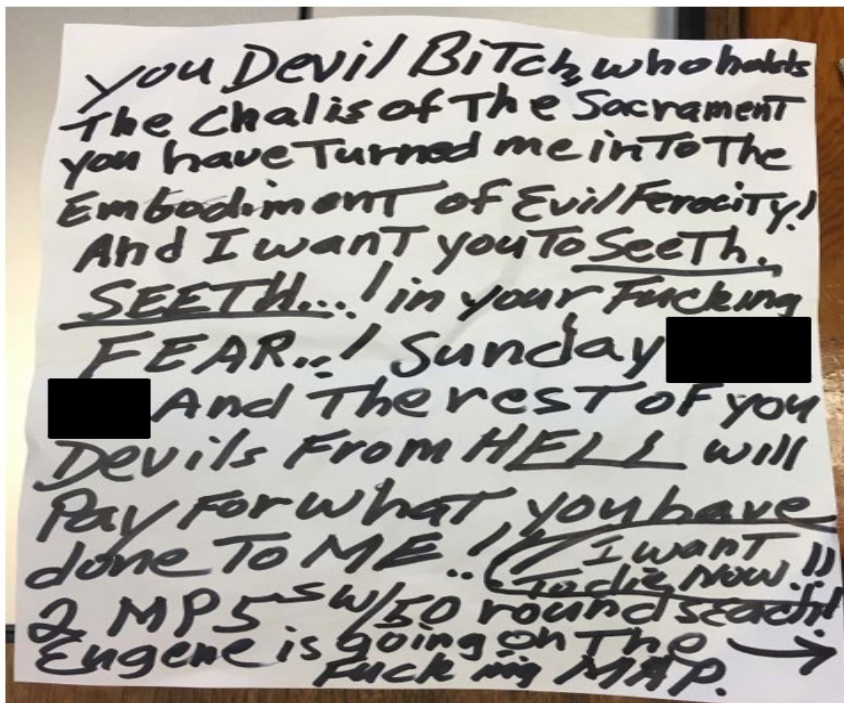
- Another example from the bull trout poaching case:



- Images are particularly helpful when explaining a complex fraud scheme:



- This image conveyed more than just the threatening words; it demonstrated the anger animating the words used:



3. The charges

This section should be succinct: Defendant is charged in a __ count indictment with ___.

4. The plea agreement & guideline computation

Briefly describe the conviction counts and any agreements on guideline adjustments, like acceptance of responsibility. Then, for the guideline computation, we use a summary chart that puts the key guideline components together for the court in one spot:

Enhancement	Agreed Guideline Calculations
Base— USSG § 2G2.2	22
Specific Offense Characteristics— U.S.S.G. § 2G2.2(b)(2) (Prepubescent minor)	+2
Specific Offense Characteristic—U.S.S.G § 2G2.2(b)(3)(F) (distribution)	+2
Specific Offense Characteristics— U.S.S.G. § 2G2.2(b)(4) (Sadistic conduct)	+4
Specific Offense Characteristics— U.S.S.G. § 2G2.2(b)(6) (use of a computer)	+2
Specific Offense Characteristics— U.S.S.G. § 2G2.2(b)(7)(D) (Over 600 images)	+5
	-4
Total offense level	30
Resulting Guideline Range	108-135 months

5. The argument

Contested sentencing issues

Start with the plain language of the guideline and any pertinent application notes. Many of the answers to defense objections will be in the guideline manual.

Then bolster your guideline analysis with some illustrative cases. If you have not used the U.S. Sentencing Commission’s website for this, you are missing out. There is a goldmine of legal research on frequently disputed guideline topics, like fraud loss and role in the offense. I usually start with the USSC.gov website before turning to a broader Westlaw/LEXIS search.

The government’s recommended sentence

A properly calculated guideline range becomes the court’s theoretical starting point. Since the Guidelines were declared “advisory” rather than mandatory, the statutory sentencing factors in

18 U.S.C. § 3553(a) have taken on heightened significance.¹ This section of the memo is where we explain to the court *why* a particular sentence is appropriate. In many districts, like Oregon, simply identifying the applicable guideline range is not enough. Instead, we must advocate for that sentence by highlighting the more egregious details and focusing on the effect the crime had on its victims.

To that end, as AUSA Kevin Ritz likes to say, “because” is a magic word. It forces us to articulate why a particular sentence is warranted. How should the court resolve the parties’ competing narratives?

First, lead with why we are right. For example, fraud cases are often ripe for arguments underscoring a defendant’s greed and the need for deterrence:

Defendant took a callous attitude towards his victims. Despite hearing about their mounting medical bills, defendant nevertheless continued to assure his victims that their investments were safe, and he urged several to *increase* their stakes. Because he continued to siphon money even after learning of the FBI’s investigation, a strong message is needed to deter him and others like him from committing similar fraudulent acts in the future. A 46-month prison term takes into account the nature and seriousness of the offense and the “life-destroying impacts” these types of frauds have on their victims.²

By contrast, firearm and violent crime cases raise public safety concerns particularly from defendants who have criminal histories that suggest an increasingly violent trend. For example:

Defendant has a significant criminal history that involves both firearms and domestic violence. Defendant’s criminal history includes three recent convictions that involved firearms, making this his fourth firearm conviction. He has harmed several domestic violence victims, including NK, his most recent girlfriend. When he was arrested for possessing a gun in this case, he was on post-prison supervision for

¹ See *United States v. Booker*, 543 U.S. 220, 226–27 (2005).

² *United States v. Christensen*, 732 F.3d 1094, 1104 (9th Cir. 2013).

unlawful delivery of heroin and on probation for a 2017 firearm misdemeanor. While on pretrial release in this case, Defendant remained undaunted: he was arrested again for unlawful firearm possession. Because prior sentences of 6–36 months have failed to capture his attention, a 57-month sentence is warranted.

You may also be able to take advantage of the Sentencing Commission’s new Interactive Data Analysis tool.³ This tool can give you a sense for the types of sentences that your crime and guideline base offense level generate within your district or circuit. You can use this information to show the court that the sentence you are seeking is in line with similar sentences received in similar cases in your area.

After we have made our best pitch for our recommended sentence, it is time to turn to the defense argument and explain why it is wrong. For instance, “Probation is an inappropriate disposition in this case because”

There is no need to savage a defendant, but we do want to ensure that our victims’ views are heard. Through your victim-witness specialists, encourage the victims to submit impact statements, and if they do, be sure to quote them in your argument section to explain why the defense’s sympathetic appeals are unpersuasive.

Sex offenses can be particularly daunting for victims who want nothing more to do with their abuser. If they are unable or unwilling to participate in sentencing, scour the record for any emails, texts, or voice messages where they discuss their injuries. In a heartbreaking sex trafficking case involving a traumatized 15-year old girl, we were able to successfully use several of her text messages to the defendant to show the impact his crime had on her. She wrote to him that she didn’t understand why he wanted her to sleep with “old dudes” when he said he loved her. She was confused when she told him she didn’t feel well and he responded, “You don’t work, you don’t eat.”

6. Restitution & forfeiture

Our former Forfeiture Chief often told the story of the couple convicted of a massive and successful fraud scheme. They each received five-year sentences and took the news with little emotion. Once our forfeiture lawyer stood up and explained that, in addition to

³ *Interactive Data Analyzer*, U.S. SENT’G COMM’N, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> (last visited Sept. 13, 2021).

their terms of imprisonment, she would be forfeiting their mansion, vacation homes, cars, and bank accounts, the couple broke down in tears. It is a sad commentary when people value their ill-gotten gains over their freedom, but it's true. Forfeiture is an important part of the criminal conviction and it too serves as a powerful deterrent.

In most victim cases, restitution is mandatory. In complex fraud cases, discerning precise losses may be difficult to accomplish within the 90-day statutory period. What is important, however, is to ensure that you have a judicial order of forfeiture within 90 days from the date of sentencing, even if the exact amount will be determined later. Failure to secure a forfeiture order within 90 days could be fatal.⁴

7. Conclusion

This section should be short: “Based on the foregoing, the government recommends that this Court impose a sentence of ___ months’ imprisonment, followed by a __-year term of supervised release subject to the standard conditions, plus ___ (any special conditions); and order restitution in the amount of ___ to the victim(s) identified in the PSR.”

C. Edit

Don’t just write it and file it. Your reputation and that of your office may be positively or negatively affected by what you file and write, so make sure it is good and as error-free as possible. Ideally, you will have a fellow AUSA or a capable paralegal critically review your written work. A fresh set of eyes can catch mistakes that the author simply cannot see, even after multiple reviews.

If that is not a viable option, think of editing like exercise—even five minutes is better than nothing at all. Here are a few things to look for:

- **Tone:** strike a balance. Ardent advocacy is good. Zealotry is not. If your defendant raped and tortured children, there is little need for embellishment. Stick to the facts and let the court take it from there. But if your defendant has a string of low-level felonies and misdemeanors (suggesting a need for a sentence that disrupts his behavior), and he is addicted to drugs and afflicted with various illnesses, you may have to dig in and

⁴ See *Dolan v. United States*, 560 U.S. 605 (2010).

advocate if you have any realistic hope of seeing a custodial sentence. Attack the arguments, not the defendant or his attorney.

- Answer the why. Make sure your memo explains how and why we reached our sentencing recommendation. For most judges, “low-end of the guideline range” will be insufficient.
- Have you given your full-throated support to the victims? Include relevant portions of their victim-impact statements or let the court know that some of them plan to attend the sentencing and speak.
- Check for typos, especially the usual culprits like trial/trail, United/Untied. Make sure the guideline citations are accurate, so the court does not have to hunt for the correct provisions. The same applies to case citations. And please spell the judge’s name correctly.
- Most paragraphs and sentences should be short; a single paragraph should not fill an entire page. Find natural break points for bulky paragraphs (topic shifts) and break long unwieldy sentences into smaller, more digestible chunks. Ideally, a judge should be able to read only the first sentence of each paragraph and still get the gist of your argument.

II. Summation

A good defense attorney is going to approach a sentencing hearing like a job interview with props. She will ask family members to speak on the defendant’s behalf, she will focus the court on the hardship that will befall defendant’s family if he is incarcerated, and she will arouse the court’s sympathy for her client. There is nothing we can or should do to prevent any of this, but we should never allow the presentation to be one-sided. The sentencing hearing is also *our* opportunity to tell the story of the crime from the perspective of the government and the victims. And you can do a lot to set your own stage by preparing and filing a thorough, accurate, and persuasive sentencing memo.

About the Author

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Introduction to the First Step Act

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I. Introduction

President Trump signed the First Step Act (the Act) of 2018 into law on December 21, 2018, on the eve of the longest federal government shutdown in United States history.¹ The Act, which will likely impact nearly a third of the federal prison population over the next 10 years,² has two main goals: to reduce overly long federal sentences and to improve conditions in federal prison. It fundamentally alters federal sentencing law by reducing mandatory minimum sentences for certain drug traffickers with prior drug convictions, expanding the scope of safety-valve relief from mandatory minimum sentences, eliminating stacked 25-year mandatory minimum 18 U.S.C. § 924(c) sentences, and authorizing retroactive application of portions of the Fair Sentencing Act of 2010, which reduced the crack and powder cocaine sentencing disparities.³

Additionally, the Act aims to improve prison conditions. Most notable is the expanded availability of compassionate release. Under the Act, prisoners can now directly request compassionate release from courts. Previously, only the Bureau of Prisons (BOP) could make such requests. This created an onslaught of prisoner litigation and intense legal wrangling about what constitutes an “extraordinary and compelling reason” warranting release.

The Act is the first piece of significant criminal justice reform legislation in over a decade, and it enjoyed widespread bipartisan

¹ NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

² See Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018).

³ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

support. Jared Kushner,⁴ the Act's champion, assembled an eclectic coalition of supporters, including celebrities like Kim Kardashian West, liberal and conservative legislators, and advocacy groups ranging from the prison reform advocacy group #cut50 to members of the Tea Party. Reasons for supporting the legislation varied dramatically: Liberal groups were frustrated with narcotics penalties that disproportionately impacted people of color; conservatives objected to the high price tag of incarcerating nonviolent drug offenders posing little threat to public safety.⁵

Notably, although the Act directly impacts the Department of Justice (Department), it did not comment on the draft legislation as it generally does.⁶ This non-participation, paired with roll-out during a lengthy government shutdown, an avalanche of Covid-19-pandemic-related compassionate release litigation, and widespread judicial disagreement about various aspects of the Act, made implementation more challenging than it otherwise might have been.

This article focuses on title IV of the Act, which made several changes to federal sentencing law, as well as some of the Act's other provisions that pertain to sentencing. It does not provide a comprehensive analysis of every aspect of the Act, and some changes (such as the prohibition on using restraints on pregnant inmates) are beyond the scope of this article.

II. A short history of the First Step Act's passage

Georgia Rep. Doug Collins sponsored the initial version of the First Step Act.⁷ Among other things, the Collins proposal focused primarily on recidivism reduction via an Attorney General-developed and BOP-

⁴ See Jared Kushner, *Jared Kushner: Fifteen Lessons I Learned From Criminal-Justice Reform*, TIME (April 24, 2019).

⁵ See Brian Bennett, *How Unlikely Allies Got Prison Reform Done—With an Assist From Kim Kardashian West*, TIME (Dec. 21, 2018).

⁶ Attorney General Sessions had historically been opposed to criminal justice reform. See Kushner, *supra* note 4. In July 2018, the Department wrote a letter outlining concerns regarding earlier versions of the proposed legislation. See Chris Fain Lehman, *Exclusive: In Letter to Trump, DOJ Blasts FIRST STEP Act*, WASH. FREE BEACON (Aug. 1, 2018).

⁷ See FIRST STEP Act, H.R. 5682, 115th Cong. (2018).

implemented risk and needs assessment system for all federal prisoners.⁸

The bill was referred to, and voted out of, the House Committee on the Judiciary on a 25–5 vote on May 22, 2018. The bill passed the House of Representatives by a 360–59 vote the same day.⁹ Many congressional members were troubled by the bill’s failure to include meaningful sentencing reform provisions.¹⁰

The bill wound its way to the Senate, but the Senate did not vote on H.R. 5682 or S. 2795—a companion bill sponsored by Senator John Cornyn—until December 2018. The delay was due to disagreement about the scope of the First Step Act. Senate Democrats were unwilling to support the measure without the type of meaningful sentence reform like those proposed in the failed Obama-era Sentencing Reform and Corrections Act of 2015.¹¹

After months of negotiations, in November 2018, Senators Grassley and Durbin proposed a new bill (S. 3649, later revised to S. 3747), incorporating the correctional reforms from S. 2795/H.R. 5682 and adding new sentencing reform provisions. It garnered more than 40 cosponsors.¹²

On December 13, 2018, then Senate Majority Leader Mitch McConnell reversed his earlier claim that he would not proceed on a vote on the First Step Act until 2019. To solicit comments and bring the matter to a final vote, McConnell substituted the content of the First Step Act (S. 3747) into S. 756.¹³

Several senators proposed amendments. Most notably, Tom Cotton and John Kennedy introduced a controversial amendment to expand the types of convictions disqualifying inmates from earning good-time

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See* H.R. 5682, 115 CONG. REC. (2018); Molly Gill, *Threading the Needle: The FIRST STEP Act, Sentencing Reform, and the Future of Criminal Justice Reform Advocacy*, 31 FED. SENT’G REP., no. 2, 2018, at 107, 107 (2018); Jamiles Lartey, *Trump’s Prison Reform: Republicans on Side But Some Progressives Hold Out*, GUARDIAN (June 5, 2018).

¹² *See* S. 3747 115th Cong. (2018).

¹³ With this seldom used procedural move known as “amendment in the nature of a substitute,” the content of the First Step Act (FSA) was substituted into a substantively unrelated bill called the Save Our Seas Act.

credits and triggering victim notification requirements.¹⁴ Proponents of the Kennedy–Cotton proposals claimed that these reforms were necessary to protect victims, but bill backers viewed the move as a last-minute derailment effort. The Senate rejected the Cotton–Kennedy Amendments in a 37–62 vote.

On December 18, 2018, the revised First Step Act passed the U.S. Senate as S. 756 on a bipartisan 87–12 vote. The House approved the bill with the Senate revisions on December 20, 2018 (358–36).¹⁵ President Trump signed the Act on December 21, 2018,¹⁶ and it became Public Law 115–391.¹⁷

III. Title IV’s sentencing reforms and other incarceration issues

A. Title IV—sentencing reform

Title IV of the First Step Act made four significant changes to federal sentencing law. Specifically, it:

- reduced the mandatory minimum sentences for certain drug traffickers with prior drug convictions (section 401);
- expanded the scope of the safety valve, which permits courts to sentence eligible drug offenders without regard to statutory mandatory minimums (section 402);
- eliminated “stacking” 25-year mandatory minimum sentences for “second or subsequent” 18 U.S.C. § 924(c) convictions charged in the same indictment as the first (section 403); and
- authorized courts to apply certain sections of the Fair Sentencing Act of 2010—which reduced the sentencing disparity for crack and power cocaine offenses—retroactively (section 404).¹⁸

This section summarizes each reform in turn.

¹⁴ S. Amend. 4109, 115 Cong. Rec. (2018); *see also* Seung Min Kim, *Cotton to Demand Vote in Effort to Further Restrict Criminal Justice System Overhaul*, WASH. POST (Dec. 12, 2018).

¹⁵ First Step Act of 2018, 132 Stat. 5194.

¹⁶ Presidential Statement on Signing the First Step Act of 2018, 2018 DAILY COMP. PRES. DOC. 860 (Dec. 21, 2018).

¹⁷ JAMES, *supra* note 1.

¹⁸ *See id.* at 8–9.

1. Section 401. Reducing enhanced sentences for repeat drug trafficking offenders

Section 401 of the First Step Act reduces the statutory mandatory minimum sentences that certain recidivist drug offenders face in two ways: (1) it changes the *type* of prior conviction that triggers the increased mandatory minimums in 18 U.S.C. § 841(b)(1)(A) and (B); and (2) it reduces the *length* of the enhanced mandatory minimums that repeat offenders are subjected to under 18 U.S.C. § 841(b)(1)(A).

Before the First Step Act, drug trafficking offenders faced higher mandatory minimum sentences under 18 U.S.C. § 841(b)(1)(A) and (B) if they had a prior conviction for a “felony drug offense.”¹⁹ The mandatory minimum under subsection (A) was 20 years if the defendant had a prior “felony drug offense” and life imprisonment if he had two or more prior “felony drug offenses.”²⁰ The mandatory minimum under subsection (B) was 10 years if the defendant had a prior conviction for a “felony drug offense.”²¹

Section 401 of the First Step Act changed the type of prior conviction that can trigger enhanced penalties under 21 U.S.C. § 841(b)(1)(A) and (B) from a “felony drug offense” to a “serious drug felony” or “serious violent felony.”²² This reduces the types of drug crimes that qualify as a predicate, as a “serious drug felony” is defined more narrowly than a “felony drug offense.”

Specifically, a “felony drug offense” is broadly defined as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”²³ A “serious drug felony,” however, covers a smaller set of crimes. Namely, it includes “offenses described in” 18 U.S.C. § 924(c)(2) for which “the offender served a term of imprisonment of more than 12 months” and “the

¹⁹ See 21 U.S.C. § 841(b)(1)(A)–(B) (2017).

²⁰ See 21 U.S.C. § 841(b)(1)(A) (2017).

²¹ See 21 U.S.C. § 841(b)(1)(B) (2017).

²² See First Step Act of 2018, § 401, 132 Stat. at 5220–21; see also 21 U.S.C. § 841(b)(1)(A)–(B).

²³ See 21 U.S.C. § 802(44) (defining “felony drug offense”).

offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense."²⁴

Though section 401 therefore decreases the types of predicate *drug* offenses that trigger the enhanced penalties, it also introduces an entirely new category of qualifying convictions: serious violent felonies.²⁵ So, in that way, it expands the types of prior convictions that trigger enhanced penalties.

In addition, section 401 lowered the mandatory minimums that repeat offenders face under section 841(b)(1)(A).²⁶ Now, under section 841(b)(1)(A), the mandatory minimum penalty increases from 10 years to 15 years (not 20) if the defendant has a prior conviction for a "serious violent felony" or a "serious drug felony," and to 25 years (not life) if he has two such prior convictions.²⁷ Under section 841(b)(1)(B), however, the enhanced penalty remains the same; only the type of qualifying conviction changed. So, under section 841(b)(1)(B), the mandatory minimum increases from 5 to 10 years if the defendant has a prior conviction for a "serious violent felony" or "serious drug felony."²⁸

Note that Congress did not change the type of predicate conviction that triggers enhanced penalties under section 841(b)(1)(C)–(E).²⁹ As a result, only a "serious drug felony" or a "serious violent felony" triggers an enhanced penalty under the most serious drug-trafficking provisions (section 841(b)(1)(A) and (B)), but any "felony drug offense" triggers the heightened penalties under the less serious drug-trafficking provisions (section 841(b)(1)(C)–(E)).³⁰

²⁴ See 21 U.S.C. § 802(57) (defining "serious drug felony").

²⁵ The term "serious violent felony" includes an offense described in 18 U.S.C. § 3559(c)(2) (the "three strikes" statute), and any offense that would be a felony violation of 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) if it were committed in the special maritime and territorial jurisdiction of the United States. See 21 U.S.C. § 802(58).

²⁶ See First Step Act of 2018, § 401, 132 Stat. at 5220–21.

²⁷ See 21 U.S.C. § 841(b)(1)(A).

²⁸ See 21 U.S.C. § 841(b)(1)(B).

²⁹ See 21 U.S.C. § 841(b)(1)(C)–(E).

³⁰ See *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019) ("[T]he First Step Act did not alter the definition of 'felony drug offense[s]' that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)(C). It did, however, impact 21 U.S.C. § 841(b)(1)(A) & (B), changing qualifying convictions under

Section 401(c) makes clear that these amendments do not apply retroactively to defendants sentenced before the enactment of the First Step Act. That section states, in pertinent part, that the amendments apply only “if a sentence for the offense has not been imposed as of” the date of enactment of the Act (December 21, 2018).³¹ As noted below, section 403 of the First Step Act includes an identical retroactivity provision.³²

The circuits are split as to whether to apply the new penalties to a defendant who was originally sentenced before the First Step Act but is resentenced after its enactment because his sentence was vacated on appeal or on collateral review. The Third Circuit has held that, in such a case, the defendant cannot benefit from the new penalties, as he had “a sentence” imposed at the time of enactment.³³ The Sixth and Seventh Circuits have held that the new penalties apply at resentencing where the defendant’s original sentence was vacated *before* enactment of the First Step Act, as the defendant was not subject to a valid sentence at the time of enactment.³⁴ The Sixth Circuit, however, subsequently held that a defendant cannot benefit from the new penalties where his original sentence was imposed before the First Step Act’s enactment date and then was vacated *after* that date.³⁵ The Fourth Circuit, in an unpublished decision, has gone

these sections from ‘felony drug offense[s]’ to ‘serious drug felon[ies]’ as defined by the First Step Act.”) (citation omitted).

³¹ See First Step Act of 2018, § 401(c), 132 Stat. at 5221 (“APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.”).

³² See First Step Act of 2018, § 403(b), 132 Stat. at 5222.

³³ See *United States v. Hodge*, 948 F.3d 160, 162–64 (3d Cir. 2020).

³⁴ See *United States v. Henry*, 983 F.3d 214, 222–24 (6th Cir. 2020); *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc); *United States v. Bethany*, 975 F.3d 642, 650 (7th Cir. 2020).

³⁵ See *United States v. Jackson*, 995 F.3d 552, (6th Cir. 2021). For example, the First Step Act’s modified penalties would apply to a defendant sentenced in 2017, whose sentence was vacated in November 2018—but not to a defendant sentenced in November 2018, whose sentence was vacated in 2019. The 7th Circuit’s opinion in *Uriarte* also observed that the latter scenario

further—holding that a defendant may benefit from the new penalties even if his original sentence was vacated after the statute’s enactment.³⁶

2. Section 402. Broadening of existing safety valve

The “safety valve” provision in 18 U.S.C. § 3553(f) authorizes district courts to sentence some drug offenders below an otherwise applicable statutory mandatory minimum if certain criteria are met. A defendant who meets the criteria also gets a 2-level reduction in his offense level calculation under section 2D1.1(b)(18) of the Sentencing Guidelines regardless of whether he was subject to a statutory mandatory minimum.³⁷ Section 402 of the First Step Act expanded the criteria to qualify for this “safety valve.”³⁸

Before the First Step Act, a defendant could qualify for this “safety valve” if:

- (1) He did not have more than 1 criminal history point;
- (2) He did not use or threaten violence or possess a firearm or other dangerous weapon during the offense;
- (3) The offense did not result in death or serious bodily injury to any person;
- (4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise; and
- (5) The defendant truthfully provided to the government all information and evidence he has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.³⁹

Section 402 of the First Step Act expands the first requirement, allowing some defendants with more than one criminal history point to gain relief under the safety valve.⁴⁰ The first requirement now

might produce a different result, although it did not decide that issue. 975 F.3d at 602 n.3.

³⁶ See *United States v. Bethea*, 841 F. App’x. 544, 549–52 (4th Cir. 2021).

³⁷ U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(18) (U.S. SENT’G COMM’N 2018).

³⁸ See First Step Act of 2018, § 402, 132 Stat. at 5221.

³⁹ See 18 U.S.C. § 3553(f) (2017).

⁴⁰ See First Step Act of 2018, § 402, 132 Stat. at 5221.

provides that an otherwise eligible defendant may receive safety-valve relief if:

- (1) The defendant does not have—
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines.⁴¹

Criterion (2)–(5) remain unchanged.⁴² While this amendment significantly expands safety-valve eligibility, the use of the word “and” in section 3553(f)(1) has caused some confusion.

Some defendants have argued that the word “and” means that a defendant is eligible for the safety valve so long as he does not meet *all three* conditions: (A), (B), *and* (C).⁴³ The government has responded that the lead-in clause (“the defendant does not have”) indicates that this provision should be read as a checklist—that is, a defendant is eligible for the safety valve if he does not have (A), (B), *or* (C).⁴⁴ In addition, it seems highly unlikely that Congress would have intended to make a defendant ineligible only if he has the precise combination of criminal history points necessary to meet all of (A), (B), *and* (C).⁴⁵ That would mean, for instance, a defendant who committed one serious violent felony (for example, murder) and a number of minor offenses could be eligible, as long as he does not have at least one more conviction for an offense scoring two points or more. It would

⁴¹ See First Step Act of 2018, § 402, 132 Stat. at 5221; see also 18 U.S.C. § 3553(f)(1)(A)–(C).

⁴² See First Step Act of 2018, § 402 132 Stat. at 5221. Section 402 also adds to the end of § 3553(f) that “[i]nformation disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense,” and defines “violent offense.” First Step Act of 2018, § 402 132 Stat. at 5221.

⁴³ See, e.g., Brief for Appellee at 15–18, *United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021) (No. 19-14650).

⁴⁴ See Brief for Appellant at 13–15, *United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021) (No. 19-14650).

⁴⁵ See *id.* at 16–17.

also render subparagraph (A) superfluous, as any defendant who has both a “prior 3-point offense” under (B) *and* “a prior 2-point offense” under (C) would necessarily have “more than 4 criminal history points” under (A).⁴⁶

The circuit courts that have considered this issue are divided: The Eleventh Circuit has held that the “and” in § 3553(f)(1) is disjunctive because reading “and” disjunctively “avoids rendering subsection (A) superfluous”; by contrast, the Ninth Circuit has held that that “and” is conjunctive and a defendant “must have all three” criteria in (A), (B), and (C) “before § 3553(f)(1) bars him or her from safety-valve relief.”⁴⁷

3. Section 403. Sentencing changes for second and subsequent 18 U.S.C. § 924(c) offenses

Section 403 modified the penalties imposed for second and subsequent convictions under 18 U.S.C. § 924(c), which prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a “crime of violence” or “drug trafficking crime.”⁴⁸ Before the First Step Act, a defendant who committed a second or subsequent section 924(c) offense was subjected to a mandatory minimum 25-year consecutive sentence—even if the subsequent offense occurred as part of a single series of events charged in one indictment.⁴⁹ If the firearm involved in the second or subsequent conviction was “a machinegun or destructive device, or [was] equipped with a firearm silencer or muffler,” he was subject to a mandatory life sentence.⁵⁰ In common parlance, these provisions “stack” higher penalties on top of the sentence for a defendant’s first section 924(c) conviction.

As amended by section 403 of the First Step Act, the mandatory 25-year or life sentence applies only if the defendant has a prior section 924(c) conviction that became final before the current section

⁴⁶ See *id.* at 19–20.

⁴⁷ See *United States v. Garcon*, 997 F.3d 1301, 1305–06 (11th Cir. 2021); *United States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021).

⁴⁸ See First Step Act of 2018, § 403(a), 132 Stat. at 5221–22.

⁴⁹ See 18 U.S.C. § 924(c)(1)(C)(i) (2017); see also *Deal v. United States*, 508 U.S. 129 (1993) (holding that a jury conviction on one count in an indictment may render a conviction on a following count in the same indictment to be a “subsequent conviction” for which the defendant may be subject to the increased mandatory minimum in section 924(c)(1)).

⁵⁰ See 18 U.S.C. § 924(c)(1)(C)(ii) (2017).

924(c) violation.⁵¹ “In other words, the 25-year [or life] repeat-offender minimum no longer applies where a defendant is charged simultaneously with multiple § 924(c)(1) offenses. Now, to trigger the 25-year minimum, the defendant must have been convicted of a § 924(c)(1) offense in a prior, separate prosecution.”⁵²

This change does not apply retroactively to defendants whose sentences were imposed before the First Step Act.⁵³ As with section 401, however, there is a circuit split as to whether it applies to defendants who were initially sentenced before enactment but are resentenced after enactment because their original sentences were vacated on appeal or on collateral review.

4. Section 404. Retroactive application of the Fair Sentencing Act

Before the First Step Act was enacted in 2018, Congress enacted the Fair Sentencing Act in 2010 to reduce the sentencing disparity between crack cocaine and powder cocaine offenses.⁵⁴ It did so by “increas[ing] the drug amounts [necessary to trigger] mandatory minimums for crack trafficking offenses.”⁵⁵ For instance, section 2 of the Fair Sentencing Act raised the amount of crack cocaine necessary to trigger a 10-year mandatory minimum from 50 grams to 280 grams and the amount necessary to trigger a 5-year mandatory minimum from 5 grams to 28 grams.⁵⁶ Section 3 eliminated the 5-year mandatory minimum penalty for simple crack possession.⁵⁷ These

⁵¹ See First Step Act of 2018, § 403(a), 132 Stat. at 5221–22 (amending section 924(c)(1)(C) by striking “second or subsequent conviction under this subsection” and inserting “violation of this subsection that occurs after a prior conviction under this subsection has become final.”); see also 18 U.S.C. § 924(c)(1)(C).

⁵² *United States v. Gomez*, 960 F.3d 173, 176–77 (5th Cir. 2020).

⁵³ See First Step Act of 2018, § 403(b), 132 Stat. at 5222.

⁵⁴ See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372; *Dorsey*, 567 U.S. at 269.

⁵⁵ *Dorsey*, 567 U.S. at 269.

⁵⁶ See Fair Sentencing Act § 2(a)(1)–(2), 124 Stat. at 2372; 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii).

⁵⁷ Fair Sentencing Act § 3, 124 Stat. at 2372.

amended penalties applied only to defendants who were sentenced on or after the effective date of the Fair Sentencing Act.⁵⁸

Section 404 of the First Step Act now gives district courts discretion to apply sections 2 and 3 of the Fair Sentencing Act retroactively.⁵⁹ Specifically, section 404 permits, but does not require, a district court “that imposed a sentence for a covered offense” to “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.”⁶⁰ The statute defines a “covered offense” as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010.”⁶¹

For further exploration of the application of section 404, readers can refer to Jonathan Colan’s article in this issue.⁶²

B. Recidivism, reentry, and release

While title IV of the Act focuses on sentencing reform, other sections of the Act provide avenues for certain prisoners to seek to reduce their sentences. For instance, the Act affords time credits to inmates who participate in recidivism reduction programs, expands home confinement for certain elderly and terminally ill offenders, and permits prisoners file their own motions for compassionate release.

1. Title I—recidivism reduction

Title I of the First Step Act, codified at 18 U.S.C. § 3631 *et seq.*, aims to reduce recidivism by incentivizing prisoners to participate in “evidence-based recidivism reduction programs” and other “productive activities.”⁶³ Among other things, it requires the Attorney General to develop a new “risk and needs assessment system,” which the BOP

⁵⁸ *Dorsey*, 567 U.S. at 264.

⁵⁹ See *United States v. Jones*, 962 F.3d 1290, 1297 (11th Cir. 2020), *cert. denied*, 2021 WL 1951888 (U.S. May 17, 2021).

⁶⁰ See First Step Act of 2018, § 404(b), 132 Stat. at 5222. *But see* *United States v. Collington*, 995 F.3d 347 (4th Cir. 2021) (holding that district courts abuse their discretion if they decline to reduce an eligible movant’s sentence to the new lower statutory maximum).

⁶¹ See First Step Act of 2018, § 404(a), 132 Stat. at 5222.

⁶² See generally Jonathan D. Colan, *A Brief History of Section 404’s Crack Sentencing Reform*, 69 DOJ J. FED. L. & PRAC., no. 5, 2021, at 57.

⁶³ See generally First Step Act of 2018, § 101, 132 Stat. at 5195–5208.

will use to classify each inmate as having minimum, low, medium, or high risk for recidivism.⁶⁴ The new system will also provide guidance on the type and amount of “evidence-based recidivism reduction programs” that is appropriate for each prisoner.⁶⁵

If inmates participate in these programs, they are afforded time credits to reduce the time they serve in prison as well as other benefits.⁶⁶ For instance, eligible prisoners may earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.⁶⁷ Inmates convicted of certain offenses, listed in 18 U.S.C. § 3632(d)(4)(D), are not eligible to receive time credits.⁶⁸

2. Title V—Second Chance Act of 2007 reauthorization

Title V of the First Step Act reauthorizes the Second Chance Act of 2007, which provides grants to state, local, and tribal governments, as well as to nonprofit organizations, to support programs aimed at reducing recidivism.⁶⁹ For example, it reauthorizes appropriations for grant programs that evaluate and improve academic and vocational education in prisons, provide technology career training for prisoners, and improve drug treatment programs in prisons.⁷⁰

In addition, as part of the Second Chance Act, Congress authorized the Attorney General to create a “pilot program” in fiscal years 2009 and 2010 to “determine the effectiveness of removing eligible elderly offenders from BOP facilities and placing them on home detention until the expiration of the prison term to which the offender was

⁶⁴ See 18 U.S.C. § 3632(a).

⁶⁵ See 18 U.S.C. § 3632(b).

⁶⁶ 18 U.S.C. § 3632(d).

⁶⁷ 18 U.S.C. § 3632(d)(4).

⁶⁸ 18 U.S.C. § 3632(d)(4)(D).

⁶⁹ See First Step Act of 2018, § 501–508, 132 Stat. 5194, 5222–29; The Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

⁷⁰ See The First Step Act of 2018: An Overview, at 12–13.

sentenced.”⁷¹ Title V of the First Step Act reestablishes this pilot program for fiscal years 2019 through 2023.⁷²

While title V reauthorizes this program, section 603(a) of the First Step Act expands the eligibility criteria. As amended by the First Step Act, the program is now available to “eligible terminally ill offenders,” in addition to certain elderly offenders.⁷³ And the First Step Act broadens the definition of “eligible elderly offender.”⁷⁴ Originally, the Second Chance Act defined “eligible elderly offender” as an offender in BOP custody who was “not less than 65” years old and who had “served the greater of 10 years or 75 percent of the term of imprisonment to which the offender was sentenced.”⁷⁵ The First Step Act reduced the eligible age to 60 and the amount of time that the offender must have served to “2/3 of the term of imprisonment to which the offender was sentenced.”⁷⁶

Note that while the Second Chance Act (both as initially drafted and as amended by the First Step Act) provides that “the Attorney General *may* release some or all eligible” elderly and terminally ill offenders from BOP facilities to home confinement—it does not require the release of eligible offenders or grant any authority to federal courts to order the BOP to release a prisoner.⁷⁷

⁷¹ 42 U.S.C. § 17541(g)(1)(A), (g)(3) (2008). The Second Chance Act was originally codified at 42 U.S.C. § 17541. In 2017, it was transferred to 34 U.S.C. § 60541, where it is today.

⁷² See First Step Act of 2018, § 504(b), 132 Stat. at 5233. See also 34 U.S.C. § 60541(g)(3).

⁷³ See 34 U.S.C. § 60541(g)(1)(A) (2019). This change was made in § 603(a) of the First Step Act, not in Title V, but it is referenced in this section because it pertains to the reauthorization of the Second Chance Act. See First Step Act of 2018, § 603(a), 132 Stat. at 5238.

⁷⁴ See First Step Act of 2018, § 603(a), 132 Stat. at 5238.

⁷⁵ 42 U.S.C. § 17541(g)(5)(A) (2008).

⁷⁶ 34 U.S.C. § 60541(g)(5)(A) (2019).

⁷⁷ See 42 U.S.C. § 17541(g)(1)(B) (2008); 34 U.S.C. § 60541(g)(1)(B) (2019); see also *United States v. Calderon*, 801 F. App'x 730, 731–32 (11th Cir. 2020) (holding the district court lacked jurisdiction over prisoner's motion for early release under the Second Chance Act of 2007, as amended by the First Step Act, because “the Second Chance Act does not authorize a federal court to order the BOP to release a prisoner—the Act only states the Attorney General ‘*may*’ release eligible elderly offenders. . . . Moreover, the Second Chance Act makes no mention of federal courts and does not grant any authority to the federal courts.”).

3. Title VI—miscellaneous criminal justice

Title VI of the First Step Act made a number of different criminal justice reforms, including—but not limited to—expanding the pilot program for elderly and terminally ill prisoners discussed above,⁷⁸ amending 18 U.S.C. § 3621(b) to require the BOP to house prisoners in facilities as close as possible to their primary residences,⁷⁹ and amending 18 U.S.C. § 3624(c)(2) to require the BOP to place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under that statute.⁸⁰

One notable change in title VI—which has perhaps created the most litigation—is the expansion of compassionate release. The “compassionate release” statute authorizes a district court to reduce a prisoner’s sentence if, after considering the applicable 18 U.S.C. § 3553(a) factors, it finds that “extraordinary and compelling reasons warrant such a reduction” and that reduction is “consistent with the applicable policy statements issued by the Sentencing Commission.”⁸¹ Before the First Step Act, only the BOP could move for compassionate release on a defendant’s behalf.⁸² Section 603(b) of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow defendants to move for compassionate release on their own behalf after they exhaust their administrative remedies.⁸³

As noted, section 3582(c)(1)(A) requires that a sentence reduction be consistent with “applicable policy statements issued by the Sentencing Commission.” Congress has directed the Commission to issue a policy statement “describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be

⁷⁸ See First Step Act of 2018, § 603(a), 132 Stat. at 5238.

⁷⁹ See First Step Act of 2018, § 601, 132 Stat. at 5237.

⁸⁰ See First Step Act of 2018, § 602, 132 Stat. at 5238.

⁸¹ 18 U.S.C. § 3582(c)(1)(A).

⁸² See 18 U.S.C. § 3582(c)(1)(A) (2017).

⁸³ See First Step Act of 2018, § 603(b), 132 Stat. at 5239; 18 U.S.C. § 3582(c)(1)(A) (2020) (stating a defendant may move for compassionate release on his own behalf after he “has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier”).

applied and a list of specific examples.”⁸⁴ The Commission did so in section 1B1.13 of the Sentencing Guidelines, which defines “extraordinary and compelling reasons” as limited to the defendant’s medical condition, age, family circumstances, or “other reasons” “[a]s determined by the Director of the Bureau of Prisons.”⁸⁵

Because the Sentencing Commission has not had a quorum, section 1B1.13 has not been updated since the enactment of the First Step Act. As a result, the policy statement has some outdated language, including a statement that a reduction in sentence “may be granted only upon motion by the Director of the Bureau of Prisons.”⁸⁶ A circuit split has developed over whether section 1B1.13 is applicable to defense-filed motions for compassionate release.⁸⁷

IV. Conclusion

In sum, the First Step Act includes a number of meaningful changes to federal sentencing law. But it has also caused significant confusion in the courts about how some of its changes should be implemented. To truly see what the long-term impact of the Act will be, stay tuned.

⁸⁴ 28 U.S.C. § 994(t).

⁸⁵ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT’G COMM’N 2004).

⁸⁶ *Id.* at n.4.

⁸⁷ The Eleventh Circuit has held that “1B1.13 is an applicable policy statement that governs all motions under Section 3582(c)(1)(A),” including prisoner-filed motions. *See United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021). Other circuits, however, have held that section 1B1.13 is not applicable to defense-filed motions. *See United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020); *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388 (5th Cir. 2021); *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021).

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A Brief History of Section 404's Crack Sentencing Reform

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I. Introduction

The First Step Act of 2018¹ was “a rare bipartisan effort,” addressing, among other criminal justice reforms, those left behind by the Fair Sentencing Act of 2010’s previous reforms attempting to fix the disparity between crack and powder cocaine amounts triggering mandatory statutory imprisonment terms.² Efforts to pass the bill brought together such diverse voices as Senator Charles Grassley (R-Iowa), Trump White House advisor Jared Kushner, singer Kanye West, and entertainer-turned-criminal-justice-activist Kim Kardashian.³

Speaking in support of the First Step Act’s final passage, co-sponsor Democratic Senator Dick Durbin (D-Ill.) lamented the vote he had cast 25 years before to enact drug laws containing a “100-to-1 sentencing disparity between crack cocaine and powder cocaine” that “resulted in mandatory sentences.”⁴ The reform to be contained in section 404 of the First Step Act would “make certain that in the

¹ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 [hereinafter First Step Act].

² *How criminal justice overhaul will affect life for inmates*, PBS NEWS HOUR (PBS television broadcast, Dec. 21, 2018) (the new law will “lower mandatory minimum sentences . . . retroactively chang[ing] sentencing disparities for drug crimes”).

³ Jeremy Diamond & Alex Rogers, *How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul*, CNN (Dec. 21, 2018, 3:49 PM), <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html>; Annie Karni, *The Senate Passed the Criminal Justice Bill. For Jared Kushner, It’s a Personal Issue and a Rare Victory.*, NY TIMES, Dec. 15, 2018, at A17.

⁴ 164 Cong. Rec. S7020-02, S7021, 2018 WL 6004155 (Nov. 15, 2018) (statement of Sen. Durbin).

future those who were sentenced under the old 100-to-1 disparity . . . could petition . . . for a reconsideration of their sentencing on an individual basis.”⁵ He acknowledged that under the provision, “[t]here will be no guarantee that [such movants] will be released, but they will have the opportunity to petition in those situations.”⁶ He called the reform “a step in the right direction.”⁷

Many defendants soon benefited with the Department of Justice’s (Department) support.⁸ Edward Douglas was released when his section 404 motion was supported by prosecutors because the statutory penalties for his 140-gram crack offense would be reduced from a mandatory life term to a minimum 10-year term under the First Step Act’s retroactive application of the Fair Sentencing Act.⁹ After serving almost 16 years, he was “one of the first inmates,” the press reported, “freed under a new federal law that eases drug sentences for federal inmates . . . serving decades for selling small amounts of crack.”¹⁰

The legal skirmishes over the application of section 404 in less clear cases concerned how to put its reform spirit into action. Should only those affected by the 100-1 crack/powder disparity in mandatory statutory sentencing benefit, or was the law meant to reduce all crack sentences?

⁵ *Id.* at S7022.

⁶ *Id.*

⁷ *Id.*

⁸ An October 2020 report stated that 8.7% of granted section 404 motions were actually filed by the government. U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT, Table 3 (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf> [hereinafter U.S. Sentencing Commission Report].

⁹ Government’s Response to Motion for Reduced Sentence Under Section 404 of The First Step Act at 2, *United States v. Douglas*, No. 02-CR-20040 (C.D. Ill. Jan. 10, 2019), ECF No. 150.

¹⁰ Jon Schuppe, *‘My daddy’s home’: The first days out of prison for a man released from a life sentence*, NBC NEWS, (Jan. 21, 2019), <https://www.nbcnews.com/news/us-news/my-daddy-s-home-first-days-out-prison-man-released-n960286>.

The First Step Act's unusual drafting history¹¹ produced some awkward and ambiguous language; indeed, Justice Elana Kagan asked at an oral argument concerning section 404, "[I]sn't this statute kind of incoherent from the get-go?"¹²

Congress's chosen title for section 404, "APPLICATION OF FAIR SENTENCING ACT,"¹³ seems simple enough. Yet, this article shows that how one applies the Fair Sentencing Act in section 404 proceedings has caused substantial litigation and divided the courts.

Because the law regarding section 404's application is still rapidly developing, this article documents the paths section 404 has traveled and the arguments behind them. There are certain to be unresolved issues when this is published, but showing the law's current trajectories may point towards the law's ultimate landing spot.

II. Section 404 extended the event horizon of 2010's crack/powder disparity reform

"Crack and powder cocaine are two forms of the same drug."¹⁴ Though "[t]he active ingredient in powder and crack cocaine is the same," "[p]owder cocaine . . . is generally inhaled through the nose"

¹¹ See Emily M. Smachetti & Alix I. Cohen, Introduction to the First Step Act, 69 DOJ J. FED. L. & PRAC., no. 5, 2021, at 39.

¹² Transcript of Oral Argument at 69, *Terry v. United States*, 141 S. Ct. 1858 (2021). For one example of imprecise drafting, section 402(a)'s use of the word "and" has led to conflicting court decisions concerning whether a defendant must have an almost impossibly precise cocktail of prior convictions to be disqualified from "safety valve" relief from otherwise applicable statutory mandatory minimum sentences. Compare *United States v. Garcon*, 997 F.3d 1301, 1306 (11th Cir. 2021) (holding that "that the 'and' in 18 U.S.C. § 3553(f)(1)(A)–(C) is disjunctive and [the defendant is] not eligible for safety valve relief"), with *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021) (holding "that § 3553(f)(1)'s 'and' is unambiguously conjunctive" and the defendant is eligible for safety valve relief), petition for rehearing en banc filed (9th Cir. Aug. 5, 2021). See Smachetti & Cohen, *supra* note 11, at 46–47. It has been stated that "The First Step Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Lopez*, 998 F.3d at 448 (Smith, J., concurring in part, dissenting in part, and concurring in the judgment) (internal quotation omitted).

¹³ First Step Act § 404.

¹⁴ *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

but “may also be mixed with water and injected.”¹⁵ “Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water,” and “[t]he resulting solid is divided into single-dose ‘rocks’ that users smoke.”¹⁶ “Although chemically similar,” crack and powder cocaine historically have been “handled very differently for sentencing purposes.”¹⁷

A. The Anti-Drug Abuse Act of 1986 and the Fair Sentencing Act of 2010

This disparity “originated in the Anti-Drug Abuse Act of 1986.”¹⁸ That law “created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses,” tied to what Congress considered “major drug dealers” who would be subject to the ten-year mandatory minimum and “serious traffickers” who would be subject to the five-year mandatory minimum.¹⁹ These tiers are reflected in 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B). “The 1986 Act use[d] the weight of the drugs involved in the offense as the sole proxy to identify ‘major’ and ‘serious’ dealers.”²⁰ “The 1986 Drug Act, however, treated crack cocaine crimes as far more serious” than powder cocaine crimes.²¹

Crack was new to public attention and considered more addictive, more associated with violence, more harmful to users including the unborn children of pregnant users, more prevalent among teenagers, and more available because of its relatively low cost.²² “Based on these assumptions, the 1986 Act adopted a ‘100-to-1 ratio’ that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.”²³

Congress thus applied section 841(b)(1)(A)’s ten-year mandatory minimum to offenses involving only 50 grams of crack (as compared to 5,000 grams of powder) and section 841(b)(1)(B)’s five-year mandatory

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 95; see Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207.

¹⁹ *Kimbrough*, 552 U.S. at 95.

²⁰ *Id.*

²¹ *Dorsey v. United States*, 567 U.S. 260, 266 (2012).

²² See *Kimbrough*, 552 U.S. at 95–96.

²³ *Id.* at 96.

minimum to offenses involving only 5 grams of crack (as compared to 500 grams of powder).²⁴ Offenders whose drug amounts fell below the threshold to trigger section 841(b)(1)(B) or who were not charged or convicted for any specified drug amount were subject to the penalty provided in 21 U.S.C. § 841(b)(1)(C), which contained no mandatory minimum imprisonment term.

Repeat offenders with requisite prior felony drug convictions—as many section 841 offenders had—would face enhanced mandatory statutory penalties.²⁵ One qualifying prior offense could raise a section 841(b)(1)(A) defendant’s statutory range to 20 years to life, and a section 841(b)(1)(B) defendant’s statutory range to 10 years to life. Two qualifying prior offenses would subject a section 841(b)(1)(A) defendant to a mandatory life term. Thus, even though many defendants facing the five- or ten-year mandatory minimums had either completed their terms or were close to completing their terms at the time the First Step Act took effect approximately eight years after the Fair Sentencing Act, there were still many defendants continuing to serve longer enhanced mandatory terms, including life terms, under the 1986 Act’s provisions.

Further still, section 841(b)’s tiered statutory penalties affected even those whose sentences were not directly tied to the mandatory minimum sentences provided in sections 841(b)(1)(A) and (B). Anyone qualifying as a career offender under the federal Sentencing Guidelines had his guideline imprisonment range calculated based on his statutory maximum term.²⁶ Thus, even defendants sentenced to guideline-based terms, not the statutory mandatory minimums, faced dramatically different sentences under section 841(b)(1)(A)’s and section 841(b)(1)(B)’s disproportionate crack and powder triggering amounts.

In the ensuing decades, a growing consensus, even within the law enforcement community, “strongly criticized Congress’ decision to set

²⁴ *Dorsey*, 567 U.S. at 266; *see also* *Terry v. United States (Terry I)*, 141 S. Ct. 1858, 1860 (2021) (regarding Congressional fears that “a ‘crack epidemic’ was . . . fueling a crime wave”).

²⁵ *See* 21 U.S.C. § 851 (describing procedures for imposing enhanced penalties).

²⁶ *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENT’G COMM’N 2018) [hereinafter U.S.S.G.].

the crack-to-powder mandatory minimum ratio at 100-to-1.”²⁷ The original rationales were no longer considered to be backed up by reliable data, and the disparity in sentencing was seen to fall heavily on African American defendants.²⁸ After repeatedly recommending reducing the disparity in crack and powder amounts triggering section 841(b)(1)(A) and section 841(b)(1)(B), the United States Sentencing Commission took it upon itself to address what it could by amending the guideline offense levels for crack offenses.²⁹

Congress finally acted in 2010 by enacting the Fair Sentencing Act.³⁰ Section 2 “increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the 10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively).”³¹ Section 3 “eliminated the 5-year mandatory minimum for simple possession of crack.”³²

The Fair Sentencing Act took effect on August 3, 2010.³³ In *Dorsey v. United States*, the Supreme Court held that the amended, higher crack amounts necessary to trigger section 841(b)(1)(A)(iii)’s and section 841(b)(1)(B)(iii)’s mandatory minimum sentences would apply to all defendants sentenced after the effective date of the law, even if they committed their offenses before that date.³⁴ By drawing the line at the date of sentencing, “[t]wo individuals with the same number of prior offenses who each engaged in the same criminal conduct involving the same amount of crack” would not “receive radically different sentences” when they were sentenced after the reform went into effect.³⁵ The Supreme Court recognized, however, that this created a different disparity—one between defendants sentenced before the effective date of the Fair Sentencing Act and those sentenced afterwards. “But those disparities, reflecting a line-drawing

²⁷ *Dorsey*, 567 U.S. at 268.

²⁸ See *Kimbrough*, 552 U.S. at 97–98; see also *Terry*, 141 S. Ct. at 1864 n.1 (Sotomayor, J., concurring in part and concurring in judgment).

²⁹ See *Kimbrough*, 552 U.S. at 99–100.

³⁰ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 [hereinafter Fair Sentencing Act].

³¹ *Dorsey*, 567 U.S. at 269; see Fair Sentencing Act § 2(a).

³² *Dorsey*, 567 U.S. at 269; see Fair Sentencing Act § 3.

³³ Fair Sentencing Act § 9; see *Dorsey*, 567 U.S. at 270.

³⁴ *Dorsey*, 567 U.S. at 281–82.

³⁵ *Id.* at 276–77.

effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date)."³⁶ The reform to the 100-1 crack/powder disparity in mandatory minimum sentencing was thus not applied retroactively to defendants sentenced before August 3, 2010, who remained in prison serving longer sentences than similarly situated defendants sentenced after the Fair Sentencing Act.

B. The First Step Act of 2018

Congress remedied that new disparity by enacting section 404 of the First Step Act, titled "APPLICATION OF FAIR SENTENCING ACT" and granting a district court "that imposed a sentence for a covered offense" the discretion to "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."³⁷

Section 404 defined a "covered offense," to mean "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010."³⁸ Retroactive application of the Fair Sentencing Act's higher triggering crack amount thresholds was thus made possible for defendants sentenced before August 3, 2010. That purpose was evident in Congress's instruction that "[n]o court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010."³⁹

Congress directed, however, that "[n]othing in this section shall be construed to *require* a court to reduce any sentence pursuant to this section."⁴⁰ Finally, even eligible movants only got one bite at the apple. District courts have no authority to consider motions by defendants who had made "a previous motion . . . under this section to

³⁶ *Id.* at 280.

³⁷ First Step Act § 404(b); *see Terry*, 141 S. Ct. at 1861–62 (recognizing the First Step Act's retroactive application of the Fair Sentencing Act's reforms to "the statutory minimums in place before 2010").

³⁸ First Step Act § 404(a).

³⁹ First Step Act § 404(c).

⁴⁰ *Id.* (emphasis added).

reduce the sentence” and such motion had been “denied after a complete review of the motion on the merits.”⁴¹

The ensuing litigation over the meaning of section 404 addressed the definition of a “covered offense” and the scope of a district court’s discretion to “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect.”⁴²

III. General theory of covered offenses

Section 404(a) defines a “covered offense”—one eligible to be considered for relief—as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010.”⁴³ Congress tied the definition of a covered offense to the effects of the Fair Sentencing Act. Something about a defendant’s offense needed to be different now, after the effective date of the Fair Sentencing Act, than it was before that date. (Never mind that whether the Fair Sentencing Act originally applied to a defendant’s case depended not on when the offense was committed but on when the defendant was sentenced.)⁴⁴ Plainly, its “statutory penalties” would need to have been “modified.” Litigants and the courts, however, had a difficult time determining the antecedent for the pronoun “which” in the phrase “the statutory penalties for *which*.” Grammarians around the country began diagramming the sentence.

A. The Department looked to the statutory penalties for the violation

Initially, the government took the view that “[w]hether an offense qualifies as a ‘covered offense’ . . . depends on the defendant’s conduct.”⁴⁵ The operative word in the statutory definition of a covered offense was “violation.” A “covered offense” was “a violation of a Federal criminal statute” when “the statutory penalties for which

⁴¹ *Id.*

⁴² First Step Act § 404(b).

⁴³ First Step Act § 404(a).

⁴⁴ *Dorsey*, 567 U.S. at 281–82. *See supra* notes 11–12 regarding the First Step Act’s unusual drafting history and imprecise word choices.

⁴⁵ Reply Brief for Appellant United States at *4, *United States v. Davis*, 961 F.3d 181 (2d Cir. 2020) (No. 19-874).

[violation] were modified by section 2 or 3 of the Fair Sentencing Act of 2010.”⁴⁶

According to this view, the statute’s reference to a “violation” must have referred not to the conviction but to the actions constituting the “failure to adhere to legal requirements.”⁴⁷ When Congress wishes to refer to “prior convictions, rather than prior criminal activity,” it uses the term “conviction,” not “violation.”⁴⁸ Indeed, the definition refers to “a violation . . . that was committed before August 3, 2010.”⁴⁹ Only violative conduct can be “committed.” One does not “commit” a conviction.

The government argued, therefore, that it was the facts of the defendant’s violation, not the elements of his offense of conviction, that determined whether the statutory penalties had been modified by the Fair Sentencing Act. For example, a defendant who violated 21 U.S.C. § 841(a) by conspiring to distribute between “420 and 784 grams of crack cocaine per week” had not been sentenced for a violation whose statutory penalties had been modified by the Fair Sentencing Act.⁵⁰ When he was sentenced in 2005, before the effective date of the Fair Sentencing Act, he would have been subject to the statutory penalties provided in 21 U.S.C. § 841(b)(1)(A)(iii) for an offense involving “50 grams or more” of crack.⁵¹ After section 2 of the Fair Sentencing Act raised the threshold amount necessary to trigger section 841(b)(1)(A)’s and (B)’s mandatory minimum sentences, that same defendant would still have been subject to the statutory penalties provided in 21 U.S.C. § 841(b)(1)(A)(iii) for an offense now involving “280 grams or more” of crack.⁵² Such a defendant would not have been left behind when Congress drew a line differentiating crack

⁴⁶ First Step Act § 404(a).

⁴⁷ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985); *see also* *Richardson v. United States*, 526 U.S. 813, 818 (1999) (a “violation” is “an act or conduct that is contrary to law”); *see* Reply Brief for the United States at *12, *United States v. Davis (Davis I)*, 961 F.3d 181 (2d Cir. 2020) (No. 19-874).

⁴⁸ *Sedima*, 473 U.S. at 489 n.7.

⁴⁹ First Step Act § 404(a).

⁵⁰ *See* Brief for the United States re: Alfonso Allen, at 26–27, *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020) (No. 19-10758).

⁵¹ *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2006).

⁵² *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2012).

defendants sentenced before the Fair Sentencing Act from those sentenced afterwards.⁵³

Indeed, when the Supreme Court, in *Dorsey*, examined how the Fair Sentencing Act modified the statutory penalties for the defendants in that case, the Court examined the penalties triggered by their conduct, not by their charged pre-Fair Sentencing Act statutory thresholds.⁵⁴

The relevant modification that the Fair Sentencing Act made was to the amounts that triggered sections 841(b)(1)(A)'s and (B)'s statutory penalties, not to the penalties themselves. Because the only modifications the Fair Sentencing Act made were to the crack amounts triggering the same unmodified penalties, the defendant's actual violative conduct triggering one penalty or another (that is, how much crack he was responsible for) would have to be determinative of whether any penalties were modified.⁵⁵

B. The Fourth Circuit looked to the statutory penalties for the statute

The first published circuit decision directly addressing the issue rejected the government's interpretation. In *United States v. Wirsing*,⁵⁶ the Fourth Circuit relied primarily on the last antecedent rule—"that modifiers attach to the closest noun."⁵⁷ "Because 'Federal criminal statute' appears closer to 'statutory penalties for which' than does 'violation,' it is more natural to attach 'penalties' to 'statute' than to 'violation.'"⁵⁸ That is, the Fair Sentencing Act modified sections 841(b)(1)(A)'s and (B)'s penalties.

⁵³ See *Dorsey*, 567 U.S. at 280.

⁵⁴ See *id.* at 270–71 (discussing how Corey Hill's 53-gram sale amount and Edward Dorsey's 5.5-gram sale amount would be sentenced under the Fair Sentencing Act's new thresholds and not the pre-Fair Sentencing Act's charged thresholds of 50 grams or more or five grams or more); see also Joint Appendix for Petitioner Dorsey at 9, *Dorsey v. United States*, 567 U.S. 260 (2012) (No. 11-5683) (indictment charging "five grams or more"); Joint Appendix for Petitioner Hill at 6, *Dorsey v. United States*, 567 U.S. 260 (2012) (No. 11-5721) (indictment charging "50 grams or more").

⁵⁵ See Brief for the United States at 16–17, *United States v. Williams*, 820 F. App'x 998 (11th Cir. 2020) (No. 19-13399).

⁵⁶ *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019).

⁵⁷ *Id.*

⁵⁸ *Id.*

The *Wirsing* panel was not troubled by any redundancy in having the phrase “for which” refer to the “Federal criminal statute,” which yielded the construction—“the statutory penalties for which [statute]”—explaining that the additional modifier “statutory” was needed in the phrase “statutory penalties” to distinguish between statutory penalties and Sentencing Guideline penalties.⁵⁹

The court acknowledged that “[s]ection 2 of the Fair Sentencing Act only modified quantities,” not the penalties triggered by those quantities.⁶⁰ It nevertheless held that “any inmate serving a sentence for pre-August 3, 2010 violations of 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii) . . . is serving ‘a sentence for a covered offense,’” and therefore eligible to seek a reduction because “both of [those provisions] were modified by Section 2 of the Fair Sentencing Act.”⁶¹ It reasoned that “Congress’s clear intent was to apply the Fair Sentencing Act to pre-Fair Sentencing Act offenders” and that there “is no indication that Congress intended a complicated and eligibility-limiting determination at the ‘covered offense’ stage of the analysis.”⁶²

A steady stream of other circuits soon followed *Wirsing*’s approach, deeming it sufficient that sections 841(b)(1)(A)(iii) and (B)(iii) had been modified by the Fair Sentencing Act, rendering all those sentenced under those provisions before August 3, 2010, eligible for First Step Act reductions,⁶³ even if their crack amounts exceeded the new 280-gram or 28-gram thresholds in sections 841(b)(1)(A)(iii) and (B)(iii) as respectively modified by section 2 of the Fair Sentencing Act.⁶⁴

⁵⁹ *Id.* at 186.

⁶⁰ *Id.* at 184.

⁶¹ *Id.* at 184–185.

⁶² *Id.* at 186.

⁶³ See *United States v. Smith*, 954 F.3d 446, 448 (1st Cir. 2020); *Davis I*, 961 F.3d at 187–90; *United States v. Jackson (Jackson I)*, 964 F.3d 197, 202 (3d Cir. 2020); *United States v. Jackson (Jackson II)*, 945 F.3d 315, 320 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2699 (2020); *United States v. Boulding*, 960 F.3d 774, 779–81 (6th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019).

⁶⁴ See *Davis*, 961 F.3d at 190–91 (rejecting the relevance of *Davis*’s admission to “at least 1.5 kilograms” of crack); *Boulding*, 960 F.3d at 776 (“*Boulding* [was] responsible for 650.4 grams of crack cocaine”); *Shaw*, 957 F.3d at 738

The Third Circuit acknowledged the windfall this could create, advantaging crack defendants sentenced before the Fair Sentencing Act’s reforms over those sentenced afterwards.⁶⁵ It recognized that an appellant who stipulated to a 33.6-gram crack amount and sentenced under section 841(b)(1)(B)(iii) (for five grams or more) before 2010 would be eligible for a reduction unavailable to a defendant who pleaded to that same amount and was sentenced under that same provision (now for 28 grams or more) after 2010.⁶⁶ The court was “confident that district court judges will exercise their sound discretion in a way that avoids precipitating [such] unfair disparities.”⁶⁷

The Second Circuit similarly relied on the district courts’ “discretion to deny relief where it is not appropriate.”⁶⁸ It explained that, even “if it is unfair to afford some pre-Fair Sentencing Act defendants a procedural opportunity that is unavailable to similar post-Fair Sentencing Act defendants, we doubt whether it would be consistent with the First Step Act’s overarching purposes to solve that problem by ‘leveling down’—that is, by withholding the opportunity from everyone alike.”⁶⁹

C. The Eleventh Circuit looked to the statutory penalties for the offense

The Eleventh Circuit’s approach in the four cases consolidated in *United States v. Jones* dealt with part of this potential windfall problem by dividing eligibility for relief into two separate questions: First, whether a defendant’s offense was a “covered offense” under section 404(a), authorizing the district court to consider granting relief; and second, what relief, if any, did section 404(b) authorize

(defendants responsible for 33.8 grams and 32.7 grams of crack, respectively, “[b]oth quantities exceed[ing] the [new] 28-gram threshold”); *Jackson II*, 945 F.3d at 319 (defendant was “responsible for 402.2 grams of crack, meaning that he exceeded even the new 280-gram requirement”).

⁶⁵ *Jackson I*, 964 F.3d at 204.

⁶⁶ *Id.* at 200, 204.

⁶⁷ *Id.*; see also *Boulding*, 960 F.3d at 782 (preferring that “all potentially worthy defendants receive the Congressionally provided relief” and relying on the district courts’ discretion “to deny relief completely, or to tailor relief to fit the facts of the case”) (internal quotation omitted).

⁶⁸ *Davis I*, 961 F.3d at 191.

⁶⁹ *Id.*

based on the statutory penalties triggered “as if” the Fair Sentencing Act’s amended thresholds applied to the defendant’s case.⁷⁰

The *Jones* panel explained its focus on the movant’s violation: “In the definition of ‘covered offense,’ the penalties clause directly follows the concise and integrated clause ‘a violation of a Federal criminal statute.’ The clause refers to a single thing—a type of violation.”⁷¹

Although it agreed with the government’s view that the proper antecedent was the complete phrase “a violation of a Federal criminal statute,” it rejected the government’s argument that this required the district court to look at “all the movant’s conduct underlying the statutory violation, not only the finding of drug quantity that triggered the statutory penalty.”⁷² “That argument impermissibly isolates the word ‘violation’ from its context, which establishes that a covered offense is an offense.”⁷³

“A violation of a federal criminal statute is commonly called an ‘offense,’” and “[o]ffenses are made up of elements.”⁷⁴ “[T]he specific elements . . . that matter for eligibility under the First Step Act are the two drug-quantity elements in sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii) because section two of the Fair Sentencing Act modified only offenses that include one of those drug-quantity elements.”⁷⁵ Because the Fair Sentencing Act modified the threshold amount element that triggered those subsections’ mandatory minimum sentences, “[t]he actual drug-quantity involved in the movant’s offense is irrelevant as far as the element and the offense are concerned.”⁷⁶ The actual quantity involved was only one possible “means of satisfying the drug-quantity element”; “it does not define the offense.”⁷⁷

Although defining a covered offense by the elements that triggered the statutory penalties in sections 841(b)(1)(A)(iii) or (B)(iii) would

⁷⁰ United States v. Jones, 962 F.3d 1290, 1303 (11th Cir. 2020); *see infra* section V.A.

⁷¹ *Jones*, 962 F.3d at 1299.

⁷² *Id.* at 1299, 1301.

⁷³ *Id.* at 1301 (emphasis removed).

⁷⁴ *Id.* at 1298, 1301.

⁷⁵ *Id.* at 1301.

⁷⁶ *Id.* (emphasis removed).

⁷⁷ *Id.*

generally lead to the same covered offense determination as *Wirsing's* focus on the fact that those two statutory provisions themselves had been modified,⁷⁸ the Eleventh Circuit's approach left room for some covered offenses to nonetheless be ineligible for relief, as more fully explained in section V.A., *infra*. For covered offense purposes, what mattered was that the district court could consult the record—"including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment"—to determine the elements of the offense "necessary to trigger the statutory penalty."⁷⁹

After the Eleventh Circuit's *Jones* decision, the Department abandoned its previous position and adopted *Jones's* approach with respect to section 404(a).⁸⁰

D. The Supreme Court ultimately confirmed the Eleventh Circuit's interpretation

The Supreme Court had its first opportunity to address section 404 in *Terry v. United States*, when it resolved a circuit split over whether offenses originally sentenced pursuant to 21 U.S.C. § 841(b)(1)(C) qualified as covered offenses, eligible to be considered for sentence reductions. It said, "They do not."⁸¹ That issue is discussed further in section IV.B., *infra*. To answer the question, however, the Court first laid to rest the dispute over section 404(a)'s sentence structure.

The Court adopted the Eleventh Circuit's approach that, in applying section 404(a)'s covered offense definition, the phrase "'statutory penalties' references the entire, integrated phrase 'a violation of a Federal criminal statute' . . . [a]nd that phrase means 'offense.'"⁸²

⁷⁸ *Id.* at 1300 (noting that the Eleventh Circuit's approach "leads to the same end result as the interpretation by [its] sister circuits, but it does so in a way that is consistent with the text and structure of section 404 of the First Step Act").

⁷⁹ *Id.* at 1301.

⁸⁰ See *United States v. White*, 984 F.3d 76, 86 (D.C. Cir. 2020) (noting the government's supplemental authority letter).

⁸¹ *Terry I*, 141 S. Ct. at 1860.

⁸² *Id.* at 1862 (citing *Jones*, 962 F.3d at 1298; Black's Law Dictionary 1300 (11th ed. 2019)).

Although the government had prevailed in this case before the Eleventh Circuit,⁸³ where it argued that offenses originally sentenced under section 841(b)(1)(C) were not covered offenses, it switched sides in the case and argued on behalf of the movant in its merits briefs.⁸⁴

Justice Clarence Thomas, writing for the Court, accused both the government and the petitioner of “sleight of hand” in arguing that the “statutory penalties” being modified meant the “penalty scheme” or “penalty statute,” respectively.⁸⁵ Refusing to “convert nouns to adjectives and vice versa,” the Court reiterated that “‘statutory penalties’ references the entire phrase ‘a violation of a Federal criminal statute’” and “thus directs our focus to the statutory penalties for petitioner’s offense, not the statute or statutory scheme.”⁸⁶

The Supreme Court has thus established that initial eligibility to be considered for a sentence reduction under section 404 depends on “whether the Fair Sentencing Act modified the statutory penalties for petitioner’s offense.”⁸⁷

IV. Special theory of covered offenses

As a practical matter, any offense for which a defendant was sentenced before August 3, 2010, pursuant to 21 U.S.C. §§ 841(b)(1)(A)(iii) or (B)(iii), is a covered offense. In other words, any defendant sentenced before the Fair Sentencing Act for a crack offense charging 50 grams or more or five grams or more of crack was sentenced for a covered offense. The easy case is a defendant charged and sentenced for only just such an offense.

Harder cases involve defendants charged with an offense alleging such stated amounts of crack *and* other controlled substances (which independently triggered sections 841(b)(1)(A)’s or (B)’s penalties) or defendants charged and sentenced pursuant to section 841(b)(1)(C) (for less than five grams or unspecified amounts of crack). If defendants in either of these classes had been charged and convicted

⁸³ *United States v. Terry (Terry II)*, 828 F. App’x 563 (11th Cir. 2020) *cert. granted*, 141 S. Ct. 975 (2021).

⁸⁴ *See Terry I*, 141 S. Ct. at 1862.

⁸⁵ *Id.* at 1863.

⁸⁶ *Id.* (emphasis removed).

⁸⁷ *Id.* at 1862.

for the same offenses after the Fair Sentencing Act, they would have received no benefit at all from its modification of section 841(b)(1)(A)(iii)'s or (B)(iii)'s triggering crack amounts. Although the Supreme Court in *Terry* held that defendants sentenced pursuant to section 841(b)(1)(C) are not eligible for reductions, the circuit courts have thus far concluded that Congress intended that pre-reform, multi-object, crack and other drug defendants have an opportunity to ask for re-sentencings not available to identically situated defendants sentenced after the Fair Sentencing Act's reforms.

A. Multi-object offenses triggering both crack and other drug penalties are covered offenses

All agree that a defendant sentenced under 21 U.S.C. § 841(b)(1)(A) for conspiring to possess with intent to distribute five kilograms or more of powder cocaine, before the Fair Sentencing Act, cannot be considered for a section 404 sentence reduction.⁸⁸ The Fair Sentencing Act did not modify section 841(b)(1)(A)(ii)'s statutory penalties for powder cocaine offenses. His conviction for five kilograms of powder cocaine triggered section 841(b)(1)(A)'s penalties before the Fair Sentencing Act and still would today.

The same is true for a defendant charged and convicted for a single count of conspiring to possess with intent to distribute *both* five kilograms or more of powder cocaine *and* 50 grams or more of crack cocaine. Section 841(b)(1)(A)'s statutory penalties would have applied before the Fair Sentencing Act and still would today.

In *United States v. Gravatt*, however, the Fourth Circuit held that such a pre-2010 defendant satisfied *Wirsing's* criteria that “[a]ll defendants who are serving sentences for violations of 21 U.S.C. §§ 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under that Act.”⁸⁹ The court recognized that the Fair Sentencing Act modified the penalties only for Gravatt's crack object and not those for his powder object.⁹⁰ It

⁸⁸ By the terms of 21 U.S.C. § 846, “[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

⁸⁹ *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020) (quoting *Wirsing*, 943 F.3d at 186).

⁹⁰ *Gravatt*, 953 F.3d at 263.

reasoned that section 404(c) provides express limitations disqualifying a movant from relief, and “nothing in the text of the Act requir[es] that a defendant be convicted of a single violation of a federal criminal statute whose penalties were modified by section 2 or section 3 of the Fair Sentencing Act.”⁹¹

Section 404(c), a separate provision coming after section 404(a)’s threshold definition of covered offenses eligible for relief in the first instance, provides that “[n]o court shall entertain a motion made under this section” if the movant’s sentence “was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act” or if the defendant had previously had a motion “denied after a complete review of the motion on the merits.”⁹² The *Gravatt* panel construed those provisions as limitations on covered offenses and “decline[d] to expand the limitations crafted by Congress.”⁹³

Even operating under its different covered offense calculus, the Eleventh Circuit reached the same result as the Fourth Circuit, despite stating in *Jones* that section 404(a)’s covered offense definition “refers to the crack-cocaine offenses for which sections 841(b)(1)(A)(iii) and (B)(iii) provide the penalties” because “they are the only provisions that the Fair Sentencing Act modified.”⁹⁴ Using its offense-elements-based approach, the Eleventh Circuit rejected the government’s argument that the defendant’s powder object still triggered section 841(b)(1)(A)(ii)’s unmodified penalties.⁹⁵

The court explained that “the ‘statutory penalties for’ a drug-trafficking offense include all the penalties triggered by every drug-quantity element of the offense, not just the highest tier of penalties triggered by any one drug-quantity element.”⁹⁶ The First Step Act “casts a wide net at the eligibility stage,” “conditioning

⁹¹ *Id.* at 264.

⁹² First Step Act § 404(c).

⁹³ *Gravatt*, 953 F.3d at 264.

⁹⁴ *Jones*, 962 F.3d at 1300.

⁹⁵ *United States v. Taylor*, 982 F.3d 1295, 1300 (11th Cir. 2020). The Eighth Circuit has recently adopted *Taylor*’s analysis. *See United States v. Spencer*, 998 F.3d 843, 845 (8th Cir. 2021).

⁹⁶ *Taylor*, 982 F.3d at 1300 (quoting First Step Act, § 404(a)).

eligibility on the movant's offense, rather than on his actual conduct."⁹⁷

The court offered as an example that, just as a defendant responsible for 75 kilograms of crack cocaine—far more than enough to trigger the same penalties after the Fair Sentencing Act's reforms—would still be eligible for section 404 relief, a defendant responsible for 100 kilograms of powder cocaine would be eligible if his offense also included as an object 10 grams of crack cocaine.⁹⁸ “Before the Fair Sentencing Act, the crack-cocaine element (5 or more grams of crack cocaine) of this hypothetical offense triggered the intermediate category of penalties; after the Fair Sentencing Act, that same crack-cocaine element triggers the lowest tier of penalties for cocaine-related offenses.”⁹⁹ The statutory penalties for the crack element of his offense were modified, “even if the movant ultimately would be subject to the same statutory sentencing range as a consequence of another drug-quantity element of the offense.”¹⁰⁰

The Fifth Circuit dismissed the government's objection that this would lead to “absurd results” with a “defendant[] sentenced solely for [a] powder-cocaine offense[]” not being eligible for any reduction while another defendant would be eligible for a reduction if “his ‘more serious offense’ *also* involved crack cocaine.”¹⁰¹ “We do not see an absurdity. To the contrary, the possibility follows the text of the Fair Sentencing Act and of the First Step Act. Eligibility extends exclusively to offenses involving crack cocaine, but eligibility is not limited to offenses involving exclusively crack cocaine.”¹⁰² In the case before it, Jonathan Winters would not have been eligible to receive a reduction in the sentence for his conspiracy offense if it had only involved 304.5 kilograms of powder cocaine, but he was eligible because it also involved 1,368.55 grams of crack cocaine.¹⁰³

After the Fifth Circuit's decision in *Winters* and a similar decision from the Eighth Circuit, the Department adopted the consensus view that Section 404(a) encompasses a conspiracy to traffic crack cocaine even if an object of the conspiracy involving a controlled substance

⁹⁷ *Id.*

⁹⁸ *Id.* at 1300–01.

⁹⁹ *Id.* at 1301.

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Winters*, 986 F.3d 942, 948–49 (5th Cir. 2021).

¹⁰² *Id.* at 949.

¹⁰³ *See id.* at 944.

other than crack cocaine independently dictated the same or a greater statutory penalty range.¹⁰⁴

B. Crack offenses sentenced under 21 U.S.C. § 841(b)(1)(C), without a mandatory minimum or powder cocaine disparity, are not covered offenses

Section 404's still-developing application became clearer when the Supreme Court, in *Terry*, determined that pre-2010 offenses sentenced under section 841(b)(1)(C) are not eligible for reductions.¹⁰⁵ Yet the path to this "straightforward result," arising from what the unanimous Court described as the "clear text" of the statute,¹⁰⁶ was rocky.

Previously, in *Dorsey*, the Supreme Court noted that Congress's purpose in the Fair Sentencing Act was to remedy Congress's earlier decision "to set the crack-to-powder mandatory minimum ratio at 100-to-1."¹⁰⁷ Congress did so by "increas[ing] the drug amounts triggering mandatory minimums for crack" in sections 841(b)(1)(A)(iii) and (B)(iii), thus "lowering the 100-to-1 crack-to-powder ratio to 18-to-1."¹⁰⁸

Section 841(b)(1)(C)'s text was not amended. It had no crack amount threshold to modify, as it applies equally to any unspecified amount of any controlled substance. Nor does it contain any mandatory minimum imprisonment term. Before the Fair Sentencing Act, a defendant convicted for possessing with intent to distribute three grams of either crack or powder cocaine, or a defendant charged for an unspecified amount of either crack or powder, would have faced the same statutory penalties. Similarly, defendants sentenced for three grams or no specified amount of either crack or powder would face the same statutory penalties whether sentenced before or after the Fair Sentencing Act's reforms became effective.

¹⁰⁴ See *United States v. Reed*, 7 F.4th 105, 110 (2nd Cir. 2020) (noting and agreeing with the government's new position).

¹⁰⁵ *Terry I*, 141 S. Ct. 1864.

¹⁰⁶ See *id.* at 1863–64.

¹⁰⁷ *Dorsey*, 567 U.S. 268–69.

¹⁰⁸ *Id.* at 269.

Yet, the circuits split on the issue. The First Circuit, in *United States v. Smith*, adopted the broadest version of the Fourth Circuit’s *Wirsing* approach to covered offenses.¹⁰⁹ Not only did section 404(a)’s phrase “the statutory penalties for which” refer back to the “Federal criminal statute,” but the relevant statutes were not the crack penalty subsections, sections 841(b)(1)(A)(iii) or (B)(iii), but “either § 841 as a whole, or § 841(a), which describes all the conduct necessary to violate § 841.”¹¹⁰ The court reasoned that section 2 of the Fair Sentencing Act “raised, and hence ‘modified,’ the thresholds for crack-cocaine offenses under § 841(b)(1),” the provision that “sets forth all the ‘statutory penalties’ for § 841(a)(1).”¹¹¹

The Fourth Circuit quickly reached the same result by holding that “the Fair Sentencing Act ‘modified’ Subsection 841(b)(1)(C) by altering the crack cocaine quantities to which its penalty applies.”¹¹² The court rejected the idea that Congress “limit[ed]” section 404 First Step Act relief “to statutes imposing mandatory minimums or to offenders sentenced to mandatory minimums,” noting that its expansive *Wirsing* holding applied to all sections 841(b)(1)(A)(iii) and (B)(iii) crack offenders “regardless of whether the statutory amendments would change the application of a mandatory minimum to a particular offender.”¹¹³ It reasoned further that,

by increasing the drug weights to which the penalties in Subsections 841(b)(1)(A)(iii) and (B)(iii) applied, Congress also increased the crack cocaine weights to which Subsection 841(b)(1)(C) applied and thereby modified the statutory penalty for crack cocaine offenses in Subsection 841(b)(1)(C) in the same way that Congress modified the statutory penalties in Subsections 841(b)(1)(A)(iii) and (B)(iii).¹¹⁴

The Third Circuit created a split when it issued *United States v. Birt*.¹¹⁵ The court asserted that “[t]he point of the First Step Act was to ameliorate certain penalties, including mandatory minimums,

¹⁰⁹ *Smith*, 954 F.3d at 448–49 (citing *Wirsing*, 943 F.3d at 185).

¹¹⁰ *Id.* at 449.

¹¹¹ *Id.* at 450.

¹¹² *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020).

¹¹³ *Id.* at 817.

¹¹⁴ *Id.* at 816.

¹¹⁵ *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020).

attached to drug dealing.”¹¹⁶ *Dorsey* had referred to the Fair Sentencing Act’s modification of sections 841(b)(1)(A)(iii)’s and (B)(iii)’s mandatory minimum sentence triggers without making any reference to section 841(b)(1)(C), implicitly “recognizing that § 841(b)(1)(C), which imposes no mandatory minimum, was not modified.”¹¹⁷

The *Birt* panel rejected the First Circuit’s conclusion in *Smith* that section 841(b)(1)’s penalty provisions in general were modified because, under that approach, “[e]very defendant convicted under § 841(a) could seek resentencing regardless of whether the subsection under which he was convicted was changed in any way.”¹¹⁸ That would include “a defendant convicted of a crime entirely unrelated to crack cocaine.”¹¹⁹

The court also rejected the idea that, by modifying section 841(b)(1)(B)(iii)’s triggering amount to increase the number of people relieved from its mandatory sentences and thus relegated down to section 841(b)(1)(C)’s no-minimum range, Congress had modified the statutory penalties for pre-Fair Sentencing Act defendants originally sentenced pursuant to section 841(b)(1)(C). “*Birt* cannot point to any circumstance under which someone convicted under (b)(1)(C) would have faced different penalties before and after the passage of the Fair Sentencing Act.”¹²⁰

Similarly, the Eleventh Circuit had previously ruled that a covered offense must refer to an offense whose elements triggered the statutory penalties in sections 841(b)(1)(A)(iii) or (B)(iii) because “they are the only provisions that the Fair Sentencing Act modified.”¹²¹ Subsequently, in *United States v. Terry*, the Eleventh Circuit held that “[t]he Fair Sentencing Act did not expressly amend § 841(b)(1)(C),” noting, “as *Jones* made clear, [that] §§ 841(b)(1)(A) and 841(b)(1)(B) were the only provisions modified.”¹²²

¹¹⁶ *Id.* at 263.

¹¹⁷ *Id.* at 264–65 (discussing *Dorsey*, 567 U.S. at 269).

¹¹⁸ *Id.* at 261–63.

¹¹⁹ *Id.* at 263.

¹²⁰ *Id.* at 264.

¹²¹ *Jones*, 962 F.3d at 1300.

¹²² *Terry II*, 828 F. App’x at 565.

The Supreme Court granted review of *Terry*, and though the Department had defended the Eleventh Circuit’s decision in opposing certiorari,¹²³ it switched positions and filed a merits brief agreeing with the petitioner’s view that “offenders sentenced under Section 841(b)(1)(C) before the Fair Sentencing Act are eligible under Section 404 to seek reduced sentences.”¹²⁴

As previously discussed, the Supreme Court, in *Terry*, resolved the interpretation of section 404(a)’s definition of a “covered offense” in line with the Department’s original grammatical argument that the antecedent of “the statutory penalties for which were modified” was the “integrated phrase ‘a violation of a Federal criminal statute.’”¹²⁵ This led the Court to conclude that the operative question was, as the Eleventh Circuit held in *Jones* and the Department then adopted, “whether the Fair Sentencing Act modified the statutory penalties for petitioner’s offense,” as defined by its “elements.”¹²⁶

The Court explained that the elements of a section 841(b)(1)(C) offense “were (1) knowing or intentional possession with intent to distribute, (2) some unspecified amount of a schedule I or II drug.”¹²⁷ “[T]he statutory penalties for that offense were 0-to-20 years, up to a \$1 million fine, or both, and a period of supervised release. After 2010, these statutory penalties remain exactly the same. The Fair Sentencing Act thus did not modify the statutory penalties for petitioner’s offense.”¹²⁸

Rejecting both the Department’s new position and the petitioner’s argument as to how the amendments to the threshold quantity triggering section 841(b)(1)(B)(iii)’s mandatory minimum penalty “modified” § 841(b)(1)(C), the Court held “that § 2(a) of the Fair Sentencing Act modified the statutory penalties only for subparagraph (A) and (B) crack offenses—that is, the offenses that triggered mandatory-minimum penalties.”¹²⁹

¹²³ Brief for the United States in Opposition at 9, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904), 2020 WL 9909508, at *9.

¹²⁴ Brief for the United States at 22, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904), 2021 WL 2313645, at *22.

¹²⁵ *Terry I*, 141 S. Ct. at 1862. See section III.A., *supra*.

¹²⁶ *Terry*, 141 S. Ct. at 1862.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1862–63 (footnote omitted).

¹²⁹ *Id.* at 1864.

As if responding in advance to the surprised coverage of the decision’s rejection of relief to section 841(b)(1)(C) offenders,¹³⁰ the Court noted that the result was “hardly surprising because the Fair Sentencing Act addressed ‘cocaine sentencing disparity,’ § 2, 124 Stat. 2372, and subparagraph (C) had never differentiated between crack and powder offenses.”¹³¹

V. Section 404 relief’s principled uncertainty

District courts “may not modify a term of imprisonment once it has been imposed,” except as provided in 18 U.S.C. § 3582(c).¹³² One provided exception allows district courts to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.”¹³³ Here, section 404(b) states that 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.”¹³⁴ Section 404 states explicitly, “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”¹³⁵

Initially, whether section 404 alone authorizes a sentence reduction,¹³⁶ subject to no statutory provision other than itself, was described as a “mostly semantic” debate.¹³⁷ Section 404 was applied as the statute that otherwise “expressly permit[s]” the modification of an imposed sentence pursuant to § 3582(c)(1)(B).¹³⁸ At most, the import

¹³⁰ Jon Schuppe, *Supreme Court ruling on crack sentences ‘a shocking loss,’ drug reform advocates say*, NBC News, (June 15, 2021), <https://www.nbcnews.com/news/us-news/supreme-court-ruling-crack-sentences-shocking-loss-drug-reform-advocates-n1270801>.

¹³¹ *Terry I*, 141 S. Ct. at 1863.

¹³² 18 U.S.C. § 3582(c).

¹³³ 18 U.S.C. § 3582(c)(1)(B).

¹³⁴ First Step Act § 404(b).

¹³⁵ First Step Act § 404(c).

¹³⁶ See Reply Brief of Appellant Alfonso Allen at 24, *United States v. Jones*, 962 F.3d 1290 (2020) (No. 19-10758), 2019 WL 2424211, at *24.

¹³⁷ *United States v. Sutton*, 962 F.3d 979, 985 (7th Cir. 2020).

¹³⁸ See *United States v. Concepcion*, 991 F.3d 279, 286–87 (1st Cir. 2021); *United States v. Holloway*, 956 F.3d 660, 661 (2d Cir. 2020); *United States v.*

of section 3582(c)(1)(B) is the acknowledgment that the relief provided by section 404 is only that “expressly permitted” and no more.¹³⁹ Yet section 3582(c)(1)(B) “does no more than point us back to where we began: the First Step Act’s text.”¹⁴⁰

The Eleventh Circuit recently observed, however, that section 404(b)’s grant of authority to “impose a reduced *sentence*” is more expansive than section 3582(c)(1)(B)’s permission to only “modify [a] . . . *term of imprisonment*.”¹⁴¹ Section 404 must therefore be “a self-contained, self-executing, independent grant of authority,” authorizing modifications beyond the term of imprisonment, such as the addition of a new term of supervised release, “so long as the *overall* ‘sentence’ is in fact ‘reduced.’”¹⁴²

A. What are the rules of section 404 time travel?

Physicists suggest there is a limit to what a time-traveler could do in the past.¹⁴³ The circuit courts are not as sure. They have taken somewhat divergent positions as to whether “the First Step Act takes only sections 2 and 3 of the Fair Sentencing Act back in time”¹⁴⁴ or whether anything “preclude[s] the court from applying intervening case law.”¹⁴⁵

Easter, 975 F.3d 318, 323 (3d Cir. 2020); *Wirsing*, 943 F.3d at 183; *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019); *United States v. Mannie*, 971 F.3d 1145, 1148 (10th Cir. 2020); *Jones*, 962 F.3d at 1297 (11th Cir. 2020).

¹³⁹ *Concepcion*, 991 F.3d at 287 (“a sentencing court evaluating a section 404(b) motion may modify a sentence only to the extent ‘expressly permitted’ by the First Step Act,” citing section 3582(c)(1)(B)).

¹⁴⁰ *United States v. Kelley*, 962 F.3d 470, 477 (9th Cir. 2020).

¹⁴¹ *United States v. Edwards*, 997 F.3d 1115, 1116–17 (11th Cir. 2021).

¹⁴² *Id.* at 1118.

¹⁴³ Matthew S. Schwartz, *Paradox-Free Time Travel Is Theoretically Possible, Researchers Say*, NPR, (September 27, 2020),

<https://www.npr.org/2020/09/27/917556254/paradox-free-time-travel-is-theoretically-possible-researchers-say> (“Researchers [at the University of Queensland report] . . . that even if you made a change in the past, the timeline would essentially self-correct, ensuring that whatever happened to send you back in time would still happen.”).

¹⁴⁴ *Concepcion*, 991 F.3d at 286.

¹⁴⁵ *United States v. Chambers*, 956 F.3d 667, 671–72 (4th Cir. 2020).

Every circuit to have addressed the issue agrees, at least in theory, that section 404 proceedings are not plenary re-sentencings.¹⁴⁶ Despite that agreement, however, the circuits have developed varying approaches. The seemingly prevailing view is that the lack of plenary resentencing means that “the district court looks to the law as it existed at the time the defendant committed the offense, save for one change: the Fair Sentencing Act’s amendments.”¹⁴⁷

Under this approach, section 404 “tells the court to alter just one variable in the original sentence, not all variables. It asks the court to sentence [a movant] ‘as if’ the crack-cocaine sentencing range had been reduced under the Fair Sentencing Act of 2010, not as if other changes had been made to sentencing law in the intervening years.”¹⁴⁸

The Fifth Circuit explained in *Hegwood* that, because section 404 granted only the “limited authority” to reduce an existing sentence, not to conduct a plenary resentencing, “[t]he 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.”¹⁴⁹ “The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 . . . 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.”¹⁵⁰ The Eleventh Circuit, in a case that did not squarely present the issues, stated that a “district court . . . is not free to change the defendant’s original guidelines calculations that are unaffected by sections 2 and 3 [or] to

¹⁴⁶ *Concepcion*, 991 F.3d at 288–89; *United States v. Moore (Moore I)*, 975 F.3d 84, 90 (2d Cir. 2020); *Easter*, 975 F.3d at 326; *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019); *United States v. Alexander*, 951 F.3d 706, 708 (6th Cir. 2019); *Kelley*, 962 F.3d at 478–79; *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020).

¹⁴⁷ *United States v. Maxwell*, 991 F.3d 685, 689–90 (6th Cir. 2021) (discussing circuits in agreement with this approach but noting disagreement).

¹⁴⁸ *Id.* at 689.

¹⁴⁹ *Hegwood*, 934 F.3d at 418. Several circuits have cited and followed *Hegwood’s* analysis and “as if” recalculation procedure. See *Concepcion*, 991 F.3d at 286 (First Circuit); *Maxwell*, 991 F.3d at 689–90 (Sixth Circuit); *Kelley*, 962 F.3d at 475 (Ninth Circuit); *Denson*, 963 F.3d at 1089 (Eleventh Circuit).

¹⁵⁰ *Hegwood*, 934 F.3d at 418.

reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3."¹⁵¹

Under this view, if a defendant would not have otherwise been able to retroactively apply subsequent changes in the law affecting the application of the Sentencing Guidelines before the First Step Act, nothing in section 404 granted that authority. For example, before the First Step Act, a crack offender seeking an 18 U.S.C. § 3582(c)(2) sentence reduction, based on amendments to the crack guideline ranges, could not overcome bars to such relief resulting from his career offender designation by collaterally challenging the predicate offenses underlying that designation based on subsequent developments in the case law.¹⁵² Neither a crack offender sentenced after 2010's Fair Sentencing Act reforms nor a pre- or post-2010 powder or other drug offender can apply new decisions to revisit his career offender status. Section 404 did not expressly add any new authority for such a collateral challenge by pre-Fair Sentencing Act crack offenders. Several circuits have thus ruled that a movant cannot use a section 404 proceeding to revisit the basis for his career offender guideline range.¹⁵³ "The First Step Act is not a vehicle to evade limits that the law elsewhere imposes."¹⁵⁴

The Fourth Circuit initially seemed to adopt *Hegwood's* approach, relying on section 3582(c)(1)(B)'s limitation on the district court's authority to modify existing terms of imprisonment only "to the extent . . . permitted by statute" and citing *Hegwood's* holding that the district court may therefore "alter[] the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act."¹⁵⁵

¹⁵¹ *Denson*, 963 F.3d at 1089.

¹⁵² *United States v. Charles*, 843 F.3d 1142, 1147 (6th Cir. 2016) ("a § 3582(c)(2) motion is not the proper vehicle for making such an argument"); see also *United States v. Folk*, 954 F.3d 597, 604 (3d Cir.), cert. denied, 141 S. Ct. 837 (2020) ("join[ing] our sister circuits and hold[ing] that an incorrect career-offender enhancement under the advisory guidelines is not cognizable under § 2255").

¹⁵³ See *Concepcion*, 991 F.3d at 285 (joining and citing cases from the Second, Fifth, Sixth, and Ninth Circuits).

¹⁵⁴ *United States v. Jackson (Jackson III)*, 995 F.3d 1308, 1311 (11th Cir. 2021) (Pryor, C.J., respecting denial of rehearing en banc) (one of the consolidated cases in *Jones*, 962 F.3d 1290).

¹⁵⁵ *United States v. Venable*, 943 F.3d 187, 194 n.11 (4th Cir. 2019) (quoting 18 U.S.C. § 3582(c)(1)(B) and *Hegwood*, 934 F.3d at 418).

In *United States v. Chambers*, however, it subsequently rejected this limited recalculation only “as if” the Fair Sentencing Act’s referenced modifications applied.¹⁵⁶ The Fourth Circuit would have district courts at least recalculate the Sentencing Guidelines in light of intervening caselaw,¹⁵⁷ reasoning that “[r]etroactive Guidelines errors based on intervening case law are no different from a typo, and they do not require a plenary resentencing to correct.”¹⁵⁸

The Seventh Circuit acknowledged the “general[] agree[ment] that plenary sentencing is not required” but then addressed the issue as a matter of what it deemed section 404(c)’s “requirement that a motion under § 404 receive a ‘complete review.’”¹⁵⁹ Section 404(c) precludes consideration of a motion by a movant who has had a previous motion “denied after a complete review of the motion on the merits.”¹⁶⁰ The court concluded that section 404 therefore required “a baseline of process that includes an accurate comparison of the statutory penalties—and any resulting change to the sentencing parameters—as they existed during the original sentencing and as they presently exist.”¹⁶¹ The Sixth Circuit similarly stated that, “[w]hile ‘complete review’ does not authorize plenary resentencing, a resentencing predicated on an erroneous or expired guideline calculation would seemingly run afoul of Congressional expectations.”¹⁶²

The Tenth Circuit seemed to have it both ways. It acknowledged section 3582(c)(1)(B)’s limitation to only modifications “‘expressly permitted by statute’” but then reasoned that section 404 “neither incorporates nor excludes other federal statutory provisions regarding sentencing.”¹⁶³ So while determining that “plenary resentencing is not appropriate” and that the district court “can only make the Fair Sentencing Act retroactive and cannot consider new law,” it

¹⁵⁶ *Chambers*, 956 F.3d at 674.

¹⁵⁷ *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021).

¹⁵⁸ *Chambers*, 956 F.3d at 674.

¹⁵⁹ *United States v. Corner*, 967 F.3d 662, 665 (7th Cir. 2020).

¹⁶⁰ First Step Act § 404(c).

¹⁶¹ *Corner*, 967 F.3d at 665.

¹⁶² *Boulding*, 960 F.3d at 784.

¹⁶³ *United States v. Brown*, 974 F.3d 1137, 1143–44 (10th Cir. 2020) (quoting 18 U.S.C. § 3582(c)(1)(B)).

nevertheless held that “the district court is not required to ignore all decisional law subsequent to the initial sentencing.”¹⁶⁴

Some courts note that section 404(c)’s exclusion of certain movants from relief contains “no limiting language to preclude the court from applying intervening case law.”¹⁶⁵ Eleventh Circuit Chief Judge William Pryor says this “turns . . . section 3582(c)(1)(B) on its head.” Instead of asking “what section 404 expressly permits,” such analysis “read[s] section 404 to allow any relief that the provision does not explicitly prohibit.”¹⁶⁶

The more expansive interpretation of section 404 authority stems in part from disagreement over Congress’s use of the word “impose.” Like the phrase “violation of a federal statute” discussed above, the phrase “impose a reduced sentence” has divided the courts.

Some circuits focused on the verb “impose.” Section 404, they say, granted the district courts the authority to “impose,” “[n]ot ‘modify’ or ‘reduce,’ which might suggest a mechanical application of the Fair Sentencing Act.”¹⁶⁷ Suggesting a plenary resentencing, after all, the Fourth Circuit explained that “when ‘imposing’ a *new sentence*, a court does not simply adjust the statutory minimum; it must also recalculate the Guidelines range.”¹⁶⁸ And so, in recalculating the Guidelines range, the district court should not adjust only those calculations affected by the Fair Sentencing Act’s modification to the movant’s statutory penalties—such as a career offender offense level

¹⁶⁴ *Id.* at 1144–45.

¹⁶⁵ *Chambers*, 956 F.3d at 672 (“The only express limitations arrive in § 404(c), which prevents the court from ‘entertain[ing] a motion’ made by someone who filed a prior First Step Act motion that was denied on the merits, or whose sentence was already imposed or reduced in accordance with section 2 and 3 of the Fair Sentencing Act.”).

¹⁶⁶ *Jackson III*, 995 F.3d at 1310 (Pryor, C.J., respecting denial of rehearing en banc).

¹⁶⁷ *Chambers*, 956 F.3d at 672; *see also Easter*, 975 F.3d at 324 (“Importantly, § 404(b) uses the verb ‘impose’ twice rather than ‘reduce’ or ‘modify.’”).

¹⁶⁸ *Chambers*, 956 F.3d at 672 (emphasis added) (citing *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”)); *see also United States v. Murphy*, 998 F.3d 549, 560 (3d Cir. 2021) (holding that while, “[o]n one hand, the First Step Act does not permit a district court to conduct a plenary resentencing . . . on the other hand, the Act requires a court to ‘impose’ a sentence in accord with the § 3553(a) sentencing factors as they stand at the time of resentencing”).

triggered by the movant’s new, lower statutory maximum imprisonment term.¹⁶⁹ It must instead revisit a guideline application that was understood to be correct at the time of original sentencing but which has subsequently been recognized to be erroneous by intervening decisions.¹⁷⁰

Other circuits have focused on the verb’s object—what Congress authorized district courts to impose was “a reduced sentence.”¹⁷¹ “[S]ituating the word ‘impose’ in context, we are skeptical that a meaningful difference exists between ‘imposing’ a reduced sentence and ‘reducing’ a sentence.”¹⁷² Indeed, the Eighth Circuit noted that section 404(b) contains two uses of the verb *to impose* (“[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence”) and determined that it is the second imposed that controls the scope of relief (“as if sections 2 and 3 of the Fair Sentencing . . . were in effect”).¹⁷³ The statutory language “plainly indicates that Congress intended to limit courts engaging in resentencing to considering a single changed variable.”¹⁷⁴ “Congress did not intend an isolated use of a single term to create a plenary resentencing requirement by implication.”¹⁷⁵ Neither post-2010 crack offenders nor pre- or post-2010 powder offenders may have their career offender guideline status revisited, and “[t]here is no indication

¹⁶⁹ See U.S.S.G. § 4B1.1.

¹⁷⁰ *Chambers*, 956 F.3d at 673 (“It would pervert Congress’s intent to maintain a career-offender designation that is as wrong today as it was in 2005. . .”).

¹⁷¹ “[T]he term “impose” modifies the phrase “a reduced sentence.” *United States v. Foreman*, 958 F.3d 506, 511 (6th Cir. 2020); see also *Concepcion*, 991 F.3d 288; *United States v. Moore (Moore II)*, 963 F.3d 725, 727–28 (8th Cir. 2020); *Kelley*, 962 F.3d at 475; see also *United States v. Lawrence*, 1 F.4th 40, 49, (D.C. Cir. 2021) (explaining that “[w]hile the district court may ‘impose’ a different sentence in a Section 404 proceeding . . . it does not do so in the usual sense,” and is thus not required to allow allocation) (cleaned up).

¹⁷² *Concepcion*, 991 F.3d at 288.

¹⁷³ *Moore II*, 963 F.3d at 727–28.

¹⁷⁴ *Kelley*, 962 F.3d at 475.

¹⁷⁵ *Foreman*, 958 F.3d at 511.

in the statute that Congress intended this limited class of crack cocaine offenders to enjoy such a windfall.”¹⁷⁶

The Supreme Court will take up these issues in *Concepcion v. United States*, No. 20-1650, *cert. granted* Sept. 30, 2021. And regardless, even if section 404(b) does not require district courts to consider all intervening legal developments, it does not necessarily follow that “it prohibits trial judges from considering [such] . . . developments in handling First Step Act requests.”¹⁷⁷ After recalculating what statutory and guideline sentencing ranges would apply with the Fair Sentencing Act’s modifications in place, the district court may then consider other factors in exercising its discretion to decide whether and how much to reduce the movant’s sentence, including, potentially, the sentencing factors set forth in 18 U.S.C. § 3553(a).¹⁷⁸

The implications of whether a section 404 proceeding is or even approximates a full imposition of sentence or is a more abbreviated occasion to consider imposing a reduced sentence also include whether a defendant has a right to a hearing and be present¹⁷⁹ or whether the district court *must*¹⁸⁰ or *may*¹⁸¹ consider the section 3553(a) factors. The Eighth Circuit reasoned that only an original imposition of sentence is governed by 18 U.S.C. § 3582(a)’s requirement to consider the section 3553(a) factors, while section 404’s second use of “impose” (regarding the imposition of a reduced sentence) is governed by § 3582(c)(1)(B), which contains no such requirement.¹⁸² Of course, even in an original sentencing proceeding, where the district court “must

¹⁷⁶ *Kelley*, 962 F.3d at 478.

¹⁷⁷ *United States v. Maxwell*, 991 F.3d 685, 691 (6th Cir. 2021).

¹⁷⁸ *See Maxwell*, 991 F.3d at 691–92 (noting that “[m]ost other circuits follow a similar approach”).

¹⁷⁹ *See Mannie*, 971 F.3d at 1157 (“[The] differences between an initial sentencing and a sentence modification support our conclusion that a 2018 FSA movant is not entitled to a hearing.”).

¹⁸⁰ *See Easter*, 975 F.3d at 323–24 (“When a court ‘imposes’ a sentence, the text of § 3553(a)—i.e., ‘Factors to be considered in *imposing* a sentence’—mandates that a district court ‘shall consider’ the factors set forth therein.”).

¹⁸¹ *See id.* at 325 (collecting decisions from circuits that permit but do not require consideration of the section 3553(a) factors). The Eleventh Circuit recently joined this group, noting that “there is no mention of the § 3553(a) sentencing factors, or a mandate requiring their consideration, in the text of section 404.” *United States v. Stevens*, 997 F.3d 1307, 1315 (11th Cir. 2021).

¹⁸² *Moore II*, 963 F.3d at 727–28.

always take account” the required statutory sentencing factors, the Supreme Court has held that so long as “the record makes clear that the sentencing judge considered the evidence and arguments,” the judge need not “write more extensively.”¹⁸³

Although there is arguable tension, too, among the circuit courts over whether section 404(b) authorizes reductions in sentences for non-covered offenses,¹⁸⁴ the Department has taken the position that a district court may reduce concurrent sentences for non-covered offenses if the sentences for those offenses were effectively determined by the sentence for the covered offense.¹⁸⁵

At least three circuits have thus far determined that “[a] district court lacks authority to reduce a sentence that is already at the statutory floor,”¹⁸⁶ that is, “if he [had already] received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act.”¹⁸⁷ “A sentence shorter than the statutory minimum could not be imposed ‘as if’ the Fair Sentencing Act was in effect.”¹⁸⁸

The Fourth Circuit seemingly acknowledged the same limitation when it noted that a defendant’s statutory mandatory minimum term, triggered by his unmodified non-crack objects of a covered multi-object

¹⁸³ *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963–64 (2018) (“At bottom, the sentencing judge need only set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” (internal quotation omitted)).

¹⁸⁴ *Compare* *United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020) (“a court is not limited under the text of the First Step Act to reducing a sentence solely for a covered offense”), *with* *Denson*, 963 F.3d at 1089 (a district court “is not free . . . to change the defendant’s sentences on counts that are not ‘covered offenses’”).

¹⁸⁵ See Brief for the United States in Opposition at 16, *Concepcion v. United States*, cert. granted 2021 WL 4464217 (U.S. 2021) (No. 20-1650), 2021 WL 3810047, at *16.

¹⁸⁶ *Winters*, 986 F.3d at 951; see also *United States v. Echeverry*, 978 F.3d 857, 860 (2d Cir. 2020); *Jones*, 962 F.3d at 1303.

¹⁸⁷ *Jones*, 962 F.3d at 1303.

¹⁸⁸ *Winters*, 986 F.3d at 951.

offense, would “remain in effect.”¹⁸⁹ A district court considering a section 404 reduction “cannot avoid those statutory requirements.”¹⁹⁰

For a reform so simply titled “APPLICATION OF FAIR SENTENCING ACT,” these ongoing debates suggest that we see its applications “through a glass, darkly.”¹⁹¹

B. Even section 404 discretion is both alive and dead

However obscure Congress has made its intentions as to what a district court may, must, or even should do to put a movant in the position he would have been in “as if” the Fair Sentencing Act had applied at the time of his violation, one might think that “the First Step Act makes pellucid that the decision to impose or withhold a reduced sentence is a decision that rests within the sound discretion of the district court.”¹⁹² Section 404(b) states that the district court “may . . . impose a reduced sentence.”¹⁹³ “The use of ‘may’ is quintessential discretionary language.”¹⁹⁴ Section 404(c) then reiterates: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”¹⁹⁵ An Eleventh Circuit panel took “Congress at its word that . . . [n]othing” means nothing.”¹⁹⁶

Indeed, there had been early agreement that the fact that a movant “is eligible for resentencing does not mean he is entitled to it.”¹⁹⁷ “The First Step Act ultimately leaves the choice whether to resentence to

¹⁸⁹ *Gravatt*, 953 F.3d at 264 n.5.

¹⁹⁰ *Id.*; see, e.g., *Echeverry*, 978 F.3d at 860 (affirming denial of relief to a defendant whose “sentence could not have been lower” because of mandatory minimum penalties still triggered by other drug objects).

¹⁹¹ 1 *Corinthians* 13:12 (King James).

¹⁹² *Concepcion*, 991 F.3d at 284 (citing First Step Act § 404(c)).

¹⁹³ First Step Act § 404(b).

¹⁹⁴ *Sutton*, 962 F.3d at 986.

¹⁹⁵ First Step Act § 404(c).

¹⁹⁶ *United States v. Wyatt*, 798 F. App’x 595, 597 (11th Cir. 2020) (not precedential).

¹⁹⁷ *United States v. Beamus*, 943 F.3d 789, 792 (6th Cir. 2019); see *Jackson II*, 945 F.3d at 321 (quoting *Beamus*, 943 F.3d at 792); *Holloway*, 956 F.3d at 666 (“while Holloway is plainly *eligible* for relief, he is not necessarily *entitled* to relief”); *Sutton*, 962 F.3d at 986; *Jones*, 962 F.3d at 1304 (“The district court had the authority to reduce Allen’s and Johnson’s sentences, but it was not required to do so.”); *Jackson I*, 964 F.3d at 201 (quoting *Beamus*, 943 F.3d at 792).

the district court's sound discretion.”¹⁹⁸ This discretion to “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect” means that “unlike the statutory penalties that applied when the movants were originally sentenced, the amended statutory penalties in the First Step Act apply to the movants as an act of legislative grace left to the discretion of the district court.”¹⁹⁹

No matter how broad the consensus in favor of reducing sentences for small-time crack offenders or even drug sentences in general, there will be cases where a district judge could reasonably conclude that the original sentence was still “sufficient, but not greater than necessary” to fulfill the purposes of section 3553(a)'s statutory sentencing factors.²⁰⁰

A district court might reasonably deny a reduction to a defendant with “very serious” offense conduct, a lengthy record of recidivism, and a history of violence—including post-sentencing violence while incarcerated.²⁰¹ A court might wish to avoid disparities, recognizing that even if a multi-drug defendant's crack offense makes him eligible for a sentence reduction, his “cocaine-base offense did not affect the calculation of his sentence” and “other defendants who were similarly sentenced for powder-cocaine offenses (but . . . did not have an additional cocaine-base charge that made them eligible for relief under the First Step Act) could not benefit.”²⁰² The court might also consider that a reduction is inappropriate if the defendant was actually responsible for a sufficiently large crack amount that would trigger the same sentencing ranges after the Fair Sentencing Act.²⁰³ While the actual crack amount involved in a movant's offense may not matter to the initial “covered offense” inquiry, “[t]he actual quantity of

¹⁹⁸ *Beamus*, 943 F.3d at 792.

¹⁹⁹ *Jones*, 962 F.3d at 1304.

²⁰⁰ 18 U.S.C. § 3553(a).

²⁰¹ *See United States v. Black*, 992 F.3d 703 (8th Cir. 2021).

²⁰² *Ware*, 964 F.3d 486.

²⁰³ *See United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019) (movant was responsible for more than a kilogram of crack); *United States v. Carter*, 840 F. App'x 52, 53 (8th Cir. 2021) (mem.) (not precedential) (movant was responsible for “16 times the amount of crack cocaine that is currently necessary to be punished pursuant to 21 U.S.C. § 841(b)(1)(A)”).

crack cocaine involved in a violation is a key factor for a sentence modification just as it is when a district court imposes a sentence.”²⁰⁴

Initially, the Fourth Circuit again fell inside this early consensus, holding that “even after the district court found [the movant] eligible for a sentence reduction, the court was not obligated to reduce [his] sentence *at all*,” citing and quoting section 404(c)’s reminder that “[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”²⁰⁵

More recently, however, in *United States v. Collington*, the Fourth Circuit held that a court that declines to reduce a sentence to at least the new, lower statutory maximum that would apply under the Fair Sentencing Act automatically abuses its discretion.²⁰⁶ For covered offenses, not only is the district court “require[d] . . . to determine whether and to what extent it should impose a *new* sentence under this retroactive statutory range,” but deciding not to impose a new sentence is itself “impos[ing] a new sentence” and it abuses its discretion not to act if it “impose[s] a reduced sentence’ that exceeds the maximum established by the Fair Sentencing Act.”²⁰⁷ The court continued to profess its acknowledgment of the district court’s “discretion,” but in an interesting turn of phrase it explained that “once the Fair Sentencing Act’s reforms are given retroactive effect, courts are *obligated to exercise discretion* within their constraints.”²⁰⁸

To date, at least one circuit has published a decision affirming a discretionary denial of a section 404 reduction where the original sentence exceeded the statutory maximum that it held would have applied if the Fair Sentencing Act had been in effect.²⁰⁹ The district court could appropriately “consider[] the fact that . . . [the movant’s] statutory maximum would have been lower” but decide against reducing the original sentence to avoid “disparities with other

²⁰⁴ *Jones*, 962 F.3d at 1301 (citing 18 U.S.C. § 3553(a)(1)’s consideration of the “nature and circumstances of the offense” at sentencing).

²⁰⁵ *United States v. Jackson (Jackson IV)*, 952 F.3d 492, 502 (4th Cir. 2020) (emphasis added) (quoting First Step Act, § 404(c)).

²⁰⁶ *United States v. Collington*, 995 F.3d 347, 356 (4th Cir. 2021) (“[D]istrict courts abuse their discretion in letting stand a sentence of imprisonment that exceeds the statutory maximum established by the Fair Sentencing Act.”).

²⁰⁷ *Id.* at 356–57 (quoting First Step Act, § 404(b)).

²⁰⁸ *Id.* at 357 (emphasis added).

²⁰⁹ *See Ware*, 964 F.3d at 489.

similarly situated defendants,”²¹⁰ such as others, like the movant, whose sentences were driven by their ample powder cocaine amounts but who, unlike the movant, did not also deal in crack and would therefore not have the opportunity to retroactively apply *Apprendi* to lower their statutory ranges.²¹¹

Early on, the Fourth Circuit justified *Wirsing’s* expansive reading of section 404 eligibility by noting Congress’s “emphasizing [of the] district courts’ discretion” to avoid “a complicated and eligibility-limiting determination at the ‘covered offense’ stage.”²¹² The circuit courts expressed “confiden[ce] that district court judges will exercise their sound discretion in a way that avoids precipitating unfair disparities.”²¹³ They “expect[ed] that a district court, in exercising its discretion, will consider the actual quantity of drugs a defendant possessed,”²¹⁴ as well as other relevant conduct and the availability of relief to other similarly situated drug offenders.²¹⁵ Congress “ensure[d] protection against unwarranted windfalls by leaving the Court with discretion to deny relief completely, or to tailor relief to fit the facts of the case.”²¹⁶

And yet, Kenneth Townsend’s 25-year sentence was reduced to approximately nine years’ time served despite pleading guilty to personally trafficking approximately 60 kilograms of heroin (60 times the amount necessary to still trigger his original statutory range), a history of recidivism, and a supervisory role in his drug conspiracy.²¹⁷ Keith Henderson’s 20-year term was reduced to approximately 13 years’ time served despite his responsibility for more than 11 kilograms of crack, almost 40 times the amount necessary to trigger a recidivist 15-year mandatory minimum today under the Fair

²¹⁰ *Id.*

²¹¹ *See id.* at 486; *see also supra* notes 166 & 167 (regarding the conflict over the applicability of *Apprendi* to determining a pre-*Apprendi* movant’s new statutory range).

²¹² *Wirsing*, 943 F.3d at 186.

²¹³ *Jackson I*, 964 F.3d at 204.

²¹⁴ *Id.*

²¹⁵ *See Jones*, 962 F.3d at 1301 (“a district court . . . could consider its previous findings of relevant conduct in deciding whether to exercise its discretion to reduce an eligible movant’s sentence”).

²¹⁶ *Boulding*, 960 F.3d at 782.

²¹⁷ *United States v. Townsend*, 489 F. Supp. 3d 790 (N.D. Ill. 2020).

Sentencing Act's reforms.²¹⁸ Monae Davis's 20-year mandatory minimum sentence was reduced to approximately 10 years' time served despite his admission to more than 1.5 kilograms of crack, more than five times the amount necessary to trigger a 15-year mandatory minimum term today.²¹⁹

VI. Conclusion

The Department reported that, by January 2020, section 404 had resulted in 2,471 sentence-reduction orders.²²⁰ The United States Sentencing Commission reported 1,410 more modifications in 2020.²²¹ Without conducting further data analysis, it is difficult to know what percentage of defendants receiving reductions were those whose original penalties were affected by the 100-1 crack-to-powder ratio in pre-Fair Sentencing Act sentencing. Some, we know, have been significant drug offenders dealing in large crack amounts and other drugs whose sentences would have been the same whether sentenced before or after the Fair Sentencing Act.

Disagreements over how to apply section 404 stem in part from whether it was meant to help those left behind because the Fair Sentencing Act did not apply retroactively or whether it was meant to more generally fill “gaps left by the Fair Sentencing Act.”²²² Undoubtedly, it was meant to fill “some gaps left by the Fair Sentencing Act.”²²³ Tensions remain over whether to “elevate[] the general purpose of the First Step Act over the specific text of the statute.”²²⁴

²¹⁸ *United States v. Henderson*, 399 F. Supp. 3d 648 (W.D. La. 2019).

²¹⁹ *United States v. Davis (Davis II)*, 423 F. Supp. 3d 13 (W.D.N.Y. 2019), *aff'd*, 961 F.3d 181 (2d Cir. 2020).

²²⁰ Press Release, U.S. Dep't of Just., Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation (Jan. 15, 2020).

²²¹ U.S. SENT'G COMM'N, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES 22 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

²²² *Chambers*, 956 F.3d at 673 (quoting *Wirsing*, 943 F.3d 179).

²²³ *Wirsing*, 943 F.3d at 179 (emphasis added).

²²⁴ *Jackson III*, 995 F.3d at 1310–11 (Pryor, C.J., respecting denial of rehearing en banc); see *Terry I*, 141 S. Ct. at 1868 (Sotomayor, J., concurring in part and concurring in judgment) (noting that where “the text will not

Certainly, “Congress authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme.”²²⁵ Presumably reflecting and addressing this historical racial disparity in crack sentencing, 91.6% of those receiving section 404 reductions by October 2020 were African American.²²⁶

What remains debated is whether the reform purpose and effect of “SEC. 404. APPLICATION OF FAIR SENTENCING ACT” extends beyond retroactively applying the Fair Sentencing Act to more broadly reforming drug sentences in America.

About the Author

Jonathan D. Colan is a Senior Appellate Attorney in the Appellate Division of the U.S. Attorney’s Office for the Southern District of Florida. He has been an adjunct professor of Appellate Law at the University of Miami School of Law and has published numerous articles on appellate law, including: *Reassigning Cases on Remand in the Interests of Justice, for the Enforcement of Appellate Decisions, and for Other Reasons That Remain Unclear*, 72 U. Miami L. Rev. 1092 (2018); *The Supreme Court’s Talmudic Debate on the Meanings of Guilt, Innocence, and Finality*, 73 Wash. & Lee L. Rev. 1243 (2016) (presented as part of the W&L symposium “From Conviction to Clemency: A Case Study in the Modern Death Penalty”); and *A Wrong Without a Remedy: Can the Erroneous Grant of a Batson Objection Ever Constitute Reversible Error?*, 88 Fla. Bar. J. 33 (2014). He appeared on the September 2017 American Bar Association Sound Advice podcast under the auspices of the Appellate Practice Section.

bear” a broader application, “Congress has numerous tools to right this injustice”).

²²⁵ *Chambers*, 956 F.3d at 674.

²²⁶ U.S. Sentencing Commission Report, *supra* note 8, at Table 4.

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Protecting the Record at Sentencing

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I. Introduction

By the time parties arrive at a sentencing hearing, often so much has been argued, and so much has been decided, that the prosecutor may think there is little left she can do to protect the record. That assumption is, just as often, wrong. Before a sentencing hearing, it is generally true that the probation department compiles a detailed presentence investigation report (PSR), the parties submit objections to that PSR and sentencing memoranda, judges resolve those objections and hold evidentiary hearings, and the parties brief the legal issues that could affect a defendant's exposure. But a prosecutors' job to ensure that there is no procedural or substantive infirmity continues through, and indeed may be most critical at, the sentencing hearing.

This article aims at giving prosecutors practical advice—based largely on examples of adverse appellate rulings—about potential missteps that could result in a remand and resentencing. The article contains three substantive sections. First, it discusses the issues and arguments that prosecutors must raise at the district court level and on appeal to obtain full appellate review. Second, it discusses notice requirements that prosecutors should ensure are provided by judges before sentencing. And third, it discusses the need to ensure that a judge makes an adequate record for the imposed sentence.

II. Protecting the record

A. Issues and arguments raised by prosecutor

For the most part, appellate courts do not consider issues raised for the first time on appeal.¹ But raising issues at a sentencing hearing—after sentencing memoranda and objections to the PSR have been submitted and without explicit invitation—may seem odd to prosecutors, particularly when some judges are not receptive to procedural niceties as they weigh the more challenging and consequential decision of whether (and for how long) to send a person to prison.² Preserving the record, however, in all but the most exceptional circumstances,³ is necessary to obtain full appellate review or avoid an unnecessary remand—even if the district judge does not permit making a full record.⁴ And any objection must have a

¹ See, e.g., *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) (“[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal. This rule is not an absolute bar to raising new issues on appeal; the general rule is disregarded when we think it necessary to remedy an obvious injustice.”) (citation omitted).

² *United States v. Puentes*, 803 F.3d 597, 601 (11th Cir. 2015) (“At the close of the hearing, counsel tried a third time, saying, ‘Your Honor, respectfully, I need to make an *objection* to the restitution.’ The court advised her to [h]ave a seat.”) (alteration in original).

³ *United States v. Castillo*, 430 F.3d 230, 242–43 (5th Cir. 2005) (noting that the “district court effectively called the prosecutor a liar, stated that he was ‘rude’ and ‘thoughtless,’ and found that he ‘deliberately’ and ‘intentionally’ attempted to harm the defendant” and reasoning that, “In light of the district court’s evident anger, its unusual hostility toward the prosecutor (including its attacks on his personal integrity and truthfulness), its unwavering opinion that the prosecutor had maliciously endangered the defendant, and the prosecutor’s protestations to the contrary, requiring a formal objection by the prosecutor—above and beyond his repeated protestations—would have been futile, would not have served the purposes behind requiring contemporaneous objections, and would have clearly ‘exalt[ed] form over substance.”) (alteration in original).

⁴ See, e.g., *Puentes*, 803 F.3d at 603 (“As we see it, the prosecutor tried repeatedly to raise an objection to the court’s order on restitution. To the extent she failed to provide the legal basis for that objection, she did not have a full opportunity to do so—which means that no prejudice can result.”).

sufficient degree of specificity to apprise the judge of its basis unless, of course, the judge silences the parties.⁵

Failing to object results in plain error review or, in certain circumstances, waiver. Plain error review was established by the Supreme Court in 1993.⁶ It sets forth a four-part test for reversal under Rule 52(b) of the Federal Rules of Criminal Procedure, requiring an appellate court to find (1) an error (2) that is clear or obvious, (3) affects substantial rights, and (4) warrants discretionary relief.⁷

There are circumstances, however, when failing to raise an issue results in the government's full waiver of the argument on appeal. For instance, in 2008, the Supreme Court held that the government may not raise a sentencing issue on appeal unless it filed a notice of appeal or cross appeal.⁸

Another more common example occurs when the government fails to argue at the district court level or on appeal that a defendant waived a claim by not timely raising it.⁹ Such an omission generally precludes

⁵ *See, e.g.*, *United States v. Bostic*, 371 F.3d 865, 870–72 (6th Cir. 2004) (concluding that the government failed to adequately preserve an objection to a downward departure even though prosecutor argued about an evidentiary matter related to it); *United States v. Taylor*, 800 F.3d 701, 715 (6th Cir. 2015) (“While the district court judge in this case did not make even a cursory mention of Taylor’s age-recidivism argument, this Court cannot conclude that the sentencing was procedurally unreasonable. Taylor did not raise the objection with a sufficient degree of specificity under the circumstances to apprise the court of the true basis for his objection.”); *United States v. Hansley*, 54 F.3d 709, 715 (11th Cir. 1995) (reasoning that a comment “made in the middle of a general statement” does not preserve a sentencing issue for appeal).

⁶ *United States v. Olano*, 507 U.S. 725, 732–738 (1993).

⁷ 28 MOORE’S FEDERAL PRACTICE § 652.04[1] (Daniel R. Coquillette, et al. eds, 3d ed. 2021).

⁸ *Greenlaw v. United States*, 554 U.S. 237, 248 (2008) (“Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill.”).

⁹ *See, e.g.*, *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994) (collecting authority for waiving waiver on appeal); *United States v. Nastri*, 633 F. App’x 57, 58 n.2 (2d Cir. 2016) (not precedential) (noting that the government’s reference to the plain-error standard for addressing a newly

the government from raising waiver on appeal, whether it is in the context of sentencing or another stage of a criminal case.¹⁰ On appeal, the government must unequivocally press the waiver argument, distinguished from mere forfeiture (defined by the Supreme Court as “the failure to make the timely assertion of a right”).¹¹ That is, it must argue that even plain error should not apply and that the defendant fully waived the issue, foreclosing review.¹² For instance, when a defendant intentionally withdraws an objection of a sentencing enhancement, he is normally precluded from challenging that enhancement on appeal—but only if the government argues that the issue was waived rather than forfeited.¹³

There are other examples of the government’s waiving waiver. If, for instance, without an objection from the government, a district judge informs the defendant that he has the right to appeal his sentence, when in fact he waived that right in his plea agreement, the government is at risk of foregoing its right to draw on that plea waiver if it does not timely correct the district court’s misstatement.¹⁴ The

raised claim by the defendant is not sufficient to avoid waiving waiver); *United States v. Gibbs*, 626 F.3d 344, 351 (6th Cir. 2010) (finding that the government waived an argument by taking a certain position on remand following initial appeal).

¹⁰ *United States v. Leichtnam*, 948 F.2d 370, 380–81 (7th Cir. 1991) (noting that the defendant likely waived a challenge to an evidentiary ruling but the government waived making any waiver argument on appeal).

¹¹ *United States v. Tichenor*, 683 F.3d 358, 363 (7th Cir. 2012) (quoting *Olano*, 507 U.S. at 733), overruled on other grounds by *United States v. Hurlburt*, 835 F.3d 715 (7th Cir. 2012).

¹² *Tichenor*, 683 F.3d at 363 (quoting *United States v. Harris*, 230 F.3d 1054, 1058–59 (7th Cir. 2000)) (observing that when an issue is waived, the appellate court cannot review it at all “because a valid waiver leaves no error for us to correct on appeal.”).

¹³ *Id.* (“[E]ven if [the defendant] had waived all grounds for challenging the application of the career offender guideline, the government has waived the waiver argument.”).

¹⁴ *United States v. Buchanan*, 59 F.3d 914, 917–18 (9th Cir. 1995) (finding waiver unenforceable where district court informed a defendant of his right to appeal); *accord United States v. Felix*, 561 F.3d 1036, 1041 (9th Cir. 2009) (“[T]he government waived its waiver argument because the sentencing judge on two occasions told Felix that he could appeal his sentence and the government failed to object. On both occasions, the district judge indicated that Felix retained his right to appeal his sentence. The judge further stated

same is true with other sentencing issues—for example, when the government fails to object to a defendant’s belated challenge to the filing of a prior felony information and, instead, “remain[s] silent and participat[es] in an extensive hearing,” it “waive[s] its waiver argument.”¹⁵ And as an example of how the “waiving waiver” doctrine applies on appeal, in one case, the government lost the chance to argue the issue when it failed to raise it in its opening appellate brief after it had notice that it could so.¹⁶

B. Notice requirements

Prosecutors should also ensure that district judges do not run afoul of Rule 32 of the Federal Rules of Criminal Procedure and other applicable law regarding procedure. One set of common avoidable issues arises from a district court’s failure to give adequate notice to defendants before imposing a sentence. Prosecutors can cure these defects by reminding district judges of the requirements and, if necessary, agreeing to a reasonable continuance.

There are recurring examples resulting in remands. For instance, district courts have sometimes failed to provide adequate notice to defendants before imposing a condition of supervised release that is not on the list of mandatory or discretionary conditions in the Sentencing Guidelines (Guidelines); this omission has led the government to concede error and agree to remand.¹⁷

that should the case come back after appeal, he would give it prompt consideration.”) (footnote omitted).

¹⁵ *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009).

¹⁶ *See, e.g., United States v. Prado*, 743 F.3d 248, 251 (7th Cir. 2014) (collecting authority and holding, “Prado’s forfeiture is absolved by the government’s failure to recognize the forfeiture and by responding to Prado’s argument”). *But see United States v. Cone*, 714 F.3d 197, 216 n.12 (4th Cir. 2013) (“Because the government never had the opportunity to address an appellate challenge to its closing arguments, the dissent’s assertion that the government has ‘waived waiver’ is misplaced and a conclusion of pure speculation. Had [the defendant] raised an independent challenge to the government’s closing remarks, the government could have asserted the waiver bar in response, but was never put on notice to do so.”).

¹⁷ *See, e.g., United States v. Wise*, 391 F.3d 1027, 1033 & n. 12 (9th Cir. 2004) (“Where a condition of supervised release is not on the list of mandatory or

Another common issue related to lack of notice occurs when a district judge departs (rather than varies) from the Guidelines. The distinction between departures and variances is subtle but important not only for purposes of appellate review but also for notice requirements. An upward departure can only be imposed under a particular Guidelines provision and must, therefore, satisfy the relevant criteria for that provision.¹⁸ An upward variance, by contrast, “is not hemmed in by the language of a particular guideline. Instead, it is a product of the sentencing court’s weighing of the myriad factors enumerated in 18 U.S.C. § 3553(a).”¹⁹ The appellate review for an upward variance is deferential—for abuse of discretion—and asks only if there was any relevant factor warranting a variance, mindful that the district court is in the best position to conduct the “fact-intensive sentencing determination.”²⁰ Because the distinction is potentially consequential on appeal, it is important to ensure the district court is clear at a sentencing hearing on whether it is upwardly departing or varying from the Guidelines, particularly if the prosecutor asks for both,²¹ though the record could, at times, be defensible even if the district court is less than clear.²² Importantly,

discretionary conditions in the sentencing guidelines, notice is required before it is imposed.”) (collecting authority from other Courts of Appeals).

¹⁸ See, e.g., *United States v. Heindenstrom*, 946 F.3d 57, 62 (1st Cir. 2019).

¹⁹ *Id.* at 63.

²⁰ *Id.*

²¹ See, e.g., *United States v. Brown*, 578 F.3d 221, 226 (3d Cir. 2009) (vacating sentence and remanding in part because the court’s ruling “leaves us unable to determine whether the court intended to grant an upward departure or a variance”); *United States v. Fisher*, 597 F. App’x 685, 686–87 (3d Cir. 2015) (not precedential) (stating that the “threshold question is whether the District Court imposed an upward variance or improperly imposed an upward departure”).

²² See, e.g., *United States v. Borek*, 831 F. App’x 727, 728 (5th Cir. 2020) (not precedential) (“It is not apparent from the record whether the district court imposed an upward variance or an upward departure. In any event, this court has held that the specific characterization as a departure or variance is irrelevant if an imposed sentence is ‘reasonable under the totality of the relevant statutory factors.’”); *United States v. Bentley*, 756 F. App’x 957, 963 (11th Cir. 2018) (not precedential) (“To determine whether the district court applied an upward departure or a variance, we consider whether the district court cited to a specific guideline departure provision and whether the court’s

nothing prevents a district court from imposing both²³ or even drawing on some of the same aggravating factors.²⁴

The distinction is also consequential for determining whether advance notice is necessary before the sentence is imposed. Generally, a defendant must receive adequate opportunity to address the risk of a potential upward departure;²⁵ failure to do so could result in vacatur of the sentence.²⁶ The Supreme Court held in 2008 that the notice—which can be provided in a PSR or prehearing submissions—is

rationale was based on the § 3553(a) factors and its finding that the guidelines were inadequate.”).

²³ See, e.g., *United States v. Thomas*, 293 F. App’x 971, 973 (3d Cir. 2008) (not precedential) (affirming court’s upward departures and upward variance); *United States v. Bullock*, 773 F. App’x 146, 147 (4th Cir. 2019) (not precedential) (“The district court did not abuse its discretion in concluding that these circumstances justified an upward departure under U.S. Sentencing Guidelines Manual § 4A1.3, p.s. (2016), and an upward variance from the post departure advisory Guidelines range.”).

²⁴ See, e.g., *United States v. Sanders*, 501 F. App’x 455, 460 (6th Cir. 2012) (not precedential) (collecting authority across circuits rejecting the double-counting argument, explaining that the “very same factors that influence a district court to impose an upward departure in a defendant’s criminal history category might be evaluated differently in imposing an upward variance under 18 U.S.C. § 3553(a.)”; see also *United States v. Edmonds*, 920 F.3d 1212, 1214–15 (8th Cir. 2019) (affirming an 80-month sentence despite a 41- to 51-month initial Guidelines range after a 15-month upward departure based on defendant’s criminal history and an 18-month upward variance based on the same conduct).

²⁵ See, e.g., *United States v. Contractor*, 926 F.2d 128, 131 (2d Cir. 1991) (“The obligation of the district court, prior to sentencing with upward departure, is to assure itself that the defendant has received notice and has thus had adequate opportunity to defend against that risk.”); see also *United States v. Reed*, 744 F. App’x 16, 17–18 (2d Cir. 2018) (not precedential) (observing that “[a]lthough the district court generally used the term ‘departure’ rather than ‘variance,’” it actually varied from the Guidelines, and in any event, sufficient notice of possible departure had been given by the PSR and the government’s submissions).

²⁶ See, e.g., *United States v. Diaz*, 285 F.3d 92, 98 (1st Cir. 2002) (vacating sentence and remanding because the district court departed based on a Guidelines provision of which defendant had no prior notice).

required only for an upward departure, not an upward variance.²⁷ Nevertheless, notice may still be required before a court can vary upward if the district court considers information or issues that may surprise the defendant and not allow him to meaningfully dispute them.²⁸ And while the issue most often arises when a district court departs *upward*, the government is entitled to notice of a possible downward departure.²⁹

Finally, and relatedly, prosecutors should ensure that defendants receive their PSRs at least 35 days before sentencing.³⁰ Defendants can waive that requirement, which may often be in their interest, if they are eager to proceed expeditiously to sentencing.³¹ If a defendant does not waive the requirement and the judge proceeds to sentencing, an appellate court can reverse for abuse of discretion.³²

C. Making an adequate record

Regardless of what sentence a district court imposes, it must explain its reasoning. Title 18, section 3553(c) requires that district courts state their reasons for sentences, and courts of appeals have routinely

²⁷ *United States v. Irizarry*, 553 U.S. 708, 712–16 (2008); *see also* *Burns v. United States*, 501 U.S. 129, 138 (1991); *accord* *United States v. Reiss*, 186 F.3d 149, 156 (2d Cir. 1999).

²⁸ *United States v. Fleming*, 894 F.3d 764, 770–72 (6th Cir. 2018) (vacating sentence and remanding for lack of adequate notice that certain information would be considered by the district court).

²⁹ *See, e.g., United States v. Evans*, 352 F.3d 65, 72 (2d Cir. 2003) (vacating sentence, observing, “That the Government had no notice of the downward departures is also troublesome. As to Neal, no notice of a downward departure on *any* ground was provided by the court, the defense, or the PSR. As to Donald, the record’s silence renders it impossible to determine whether the grounds on which Donald moved for a downward departure are the same grounds on which the court actually departed. On remand, we direct the district court to provide clear notice to both parties of any contemplated departure.”).

³⁰ FED. R. CRIM. P. 32(e)(2); *see e.g., United States v. Casas*, 425 F.3d 23, 59 (1st Cir. 2005) (reversing for violation of Rule 32(e)(2), noting that the violation was not harmless in part because the case was complex and involved voluminous evidence).

³¹ *Casas*, 425 F.3d at 59.

³² *See, e.g., id.*

reversed when judges fail to abide by the requirement.³³ In practice, the district court's justification must be particularly compelling when imposing an upward variance or departure; it must either analyze the Guidelines provision that warrants the upward departure or, if it upwardly varies, explain why the applicable Guidelines range is insufficient. Failing to do so will often result in a reversible procedural error.³⁴

District courts must also make appropriate factual findings, resolving any factual disputes on issues that are material to sentencing. If there are no disputes at sentencing about the facts set

³³ See, e.g., *United States v. Greer*, 285 F.3d 158, 177–78 (2d Cir. 2002) (“Because we find the District Court’s remarks ambiguous, we remand for clarification as to whether the court in fact sentenced the defendants within their applicable ranges or downwardly departed to arrive at their sentences. If the District Court did not depart downward, it should provide a statement of reasons for imposing the defendants’ sentences at a particular point within their applicable ranges, which exceed 24 months, as required by § 3553(c)(1).”) (citation omitted)).

³⁴ See, e.g., *United States v. Mends*, 412 F. App’x 370, 374 (2d Cir. 2011) (not precedential) (vacating and remanding for re-sentencing because “the district court in effect granted a substantial upward departure or variance, but with no explanation of its reasons for doing so”); *United States v. Rivera-Gonzalez*, 809 F.3d 706, 712 (1st Cir. 2016) (“[T]here is no question that the defendant’s underlying criminal conduct was significant. Yet here, we have a sentence that varies greatly and that not only lacks an express explanation for the variance, but also was imposed after the District Court appeared to question the fairness of just such a sentence. In such circumstance, we cannot say that the District Court has offered an adequate explanation for the sentence imposed.”); *United States v. Hirliman*, 503 F.3d 212, 216 (2d Cir. 2007) (“The plain fact is that, with regard to Donald, the district judge, although accepting the PSR calculations, once again failed to give notice of a possible deviation and provided no explanation whatsoever for his decision to impose a non-Guidelines sentence. When the prosecutor asked for an explanation, he simply replied ‘I’ll write you a letter.’”); *United States v. Chan*, 677 F. App’x 730, 733 (2d Cir. 2017) (not precedential) (vacating sentence where “the district court did not offer any insight into its rationale for imposing a sentence that exceeded the applicable Guidelines sentence by 36 months and exceeded the sentence requested by the government by 21 months”) (cleaned up).

forth in the PSR, the prosecutor should encourage the district court to accept those undisputed portions of the PSR as its finding of fact.³⁵

Finally, a district court must explain all the components of its sentence, not just the term of incarceration. One common and avoidable misstep occurs when a district court imposes a special condition of supervised release without adequate support in the record.³⁶ Another example occurs when the conditions imposed in a written judgment deviate from those pronounced orally.³⁷ The oral pronouncement ordinarily controls.³⁸ Therefore, prosecutors should ensure that district courts articulate any appropriate conditions at sentencing hearings.

In short, if the government seeks a sentence above an applicable Guidelines range, the prosecutor should ensure that (1) the defendant received notice in advance of sentencing; (2) the district court specifies whether it is imposing an upward variance or upward departure; and (3) the record adequately supports the court's justification for all facets of the sentence, not just the term of incarceration.

³⁵ See FED. R. CRIM. P. 32(i)(3)(A)–(B) (providing that the sentencing judge “may accept any undisputed portion of the presentence report as a finding of fact” and “must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing”). *But see* United States v. Rizzo, 349 F.3d 94, 99 (2d Cir. 2003) (“[I]f a defendant fails to challenge factual matters contained in the presentence report at the time of sentencing, the defendant waives the right to contest them on appeal.”).

³⁶ United States v. Eaglin, 913 F.3d 88, 101 (2d Cir. 2019) (remanding for resentencing where the special condition of supervised release was not, *inter alia*, “reasonably related to the relevant sentencing factors”); United States v. Betts, 886 F.3d 198, 202 (2d Cir. 2018) (same) (banning alcohol use was not related to the relevant sentencing factors because “[n]either defendant’s underlying crime nor any of the conduct contributing to his violations of supervised release involved the use of alcohol”).

³⁷ See, e.g., United States v. Hooker, 806 F. App’x 24, 26 (2d Cir. 2020) (not precedential) (modifying judgment to conform with oral pronouncement where the government conceded error).

³⁸ See United States v. Young, 910 F.3d 665, 670 (2d Cir. 2018) (“Insofar as there is a variance between the written and oral conditions, the District Court’s oral pronouncement controls.”).

III. Conclusion

A prosecutor's job does not end with submitting a sentencing memorandum and objections to a PSR. She must carefully guard the record before a sentencing hearing, through final judgment, and on appeal to avoid waiver, unnecessary remands, and more importantly, to protect a defendant's and the government's procedural rights.

About the Authors

Spektor and **Gerdes** served together in the Eastern District of New York's Business and Securities Fraud Unit, which focuses on investigating and prosecuting white-collar criminal offenses committed by individuals and corporations. Recently, Spektor left the Department and entered private practice. They previously served in the Office's Organized Crime and Gangs and General Crimes Units. They have participated in dozens of sentencing hearings and briefed and argued Second Circuit appeals involving sentencing issues. The authors are grateful to Ofir Hadari, law school student and intern at the U.S. Attorney's Office, for her research and ideas.

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Cybercrime Sentencing

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What is “cybercrime”? That word is used frequently by the Department of Justice (Department), private actors, and academics when discussing criminal conduct linked to computers or the internet.¹ But there is no consensus definition. One can conceive of computer- and internet-driven scenarios that do not feel like “cybercrimes”—John meets “Mary on the Internet, correspond[s] with her and use[s] e-mail to lure her to a meeting where he kills her”²—and crimes that are intuitively “cyber” that do not involve the internet—plugging a USB drive into a protected computer to disable it or to steal information from it.

¹ See, e.g., Press Release, U.S. Dep’t of Just., Two Members of the Romanian Cybercriminal Enterprise Bayrob Group Sentenced on 21 Counts Relating to Infecting Over 400,000 Victim Computers with Malware and Stealing at Least \$4 Million (Dec. 6, 2019); George Kurtz, *The CrowdStrike 2020 Global Threat Report Reveals Troubling Advances in Cybercrime*, CROWDSTRIKE (Mar. 3, 2020), <https://www.crowdstrike.com/blog/global-threat-report-foreword-2020/>; Stephen Cobb, *Advancing Accurate and Objective Cybercrime Metrics*, 10 J. NAT’L SEC. L. & POL’Y 605, 609 (2020) (“Examples of cybercrime range from physical theft of computer equipment and the cloning of data for illegal resale—popular in the 1980s—to unauthorized access to systems and data for use in criminal enterprises, enabled by the rapid growth of networking in the 1990s.”); Jonathan Mayer, *Cybercrime Litigation*, 164 U. PA. L. REV. 1453, 1453 (2016) (“Cybercrime is, undoubtedly, a growing problem.”); Daniel Ortner, *Cybercrime and Punishment: The Russian Mafia and Russian Responsibility to Exercise Due Diligence to Prevent Trans-Boundary Cybercrime*, 2015 B.Y.U. L. REV. 177, 177 (2015) (discussing “an extremely profitable and professional cybercrime industry”); Susan W. Brenner, *Cybercrime Metrics: Old Wine, New Bottles?*, 9 VA. J. L. & TECH. 13, *2 (2004) (noting that the term “cybercrime” has “various correlates (e.g., ‘computer crime,’ ‘computer-related crime,’ ‘high-tech crime’ and ‘information age crime’)”).

² Brenner, *supra* note 1, at *4.

Sentencing individuals convicted of federal “cybercrimes” does not depend on a consensus definition—it is driven by the offense of conviction and the underlying facts rather than a concept. But it is useful to consider how so-called “cybercrimes” may be addressed through the sentencing process. To conduct such an exercise in limited space, this article focuses on the criminal prosecution and sentencing of individuals under the Computer Fraud and Abuse Act (CFAA), specifically section 1030 of title 18 of the United States Code.³

Part I sets forth the sentencing scheme for violations of section 1030 and provides examples of section 1030 prosecutions and resulting sentences. Part II identifies and explores common issues and arguments that arise in sentencings for section 1030 violations, particularly highlighting the role played by the need for deterrence. Finally, Part III discusses violations of section 1030 committed by nation-state actors or by individuals sponsored by nation-states. Because those actors are rarely arrested, let alone sentenced, this last section considers the sentencing implications of such unprosecuted intrusions.

I. Overview of sentencing for section 1030

A. The sentencing scheme for violations of section 1030

Section 1030(a) broadly criminalizes seven types of conduct associated with the use (and abuse) of computers: (1) improperly accessing computers to obtain information protected for reasons of national defense or foreign relations; (2) improperly accessing

³ There is also a role for state and local governments to play in the enforcement of criminal prohibitions against “cybercrime,” but this article does not directly address such a role. *See* Maggie Brunner, *Challenges and Opportunities in State and Local Cybercrime Enforcement*, 10 J. NAT'L SEC. L. & POL'Y 563, 563 (2020) (“Federal law enforcement agencies have restrictive thresholds for investigation and cannot address the bulk of regular cybercrimes that take a significant aggregate toll on the United States economy. To close this gap and create an effective enforcement strategy, state and local governments must take a leading role with measurable, effective steps to bring perpetrators to justice and reduce the potential victim pool.”) (footnote omitted).

computers to obtain other information;⁴ (3) improperly accessing computers of the U.S. government; (4) improperly accessing a computer to further a fraud and obtain something of value; (5) transmitting computer code or a computer program to damage a computer; (6) trafficking, with intent to defraud, a password or other information to access a computer; and (7) transmitting a threat to damage a computer or to obtain information from a computer with intent to extort money or a thing of value.⁵ Some of these provisions, notably section 1030(a)(2) and section 1030(a)(5), are charged more frequently than the others. Indeed, according to an empirical analysis conducted in 2016, 47% of all section 1030 prosecutions charged a violation of 1030(a)(2)(C), and 37% included a violation of 1030(a)(5)(A).⁶

The corresponding statutory sentencing scheme for violations of section 1030 is complex.⁷ Violations of section 1030(a)(2), (a)(3), and (a)(6) are subject to a five-year maxima where the violation was committed for purposes of commercial advantage or private gain, or where the information obtained exceeded \$5,000; lesser violations are subject to a one-year maximum.⁸ Violations of section 1030(a)(4) and (a)(7) are also generally subject to a five-year maximum.⁹ Finally, violations of section 1030(a)(5) are generally subject to a five-year maximum, except where the defendant attempted to cause, or caused,

⁴ Section 1030 applies only to “protected computers,” not all computers, although the definition of “protected computer” is extremely broad. A “computer” is “an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.” 18 U.S.C. § 1030(e)(1). A “protected computer” is a computer used by a financial institution or the U.S. government, or “which is used in or affecting interstate or foreign commerce or communication.” 18 U.S.C. § 1030(e)(2).

⁵ This article does not address certain other aspects of section 1030, including the ongoing debate about section 1030’s proscription of accessing a protected computer in a manner that “exceeds authorized access.” *See Van Buren v. United States*, 140 S. Ct. 2667 (2020).

⁶ Mayer, *supra* note 1, at 1493.

⁷ *See generally* 18 U.S.C. § 1030(c)(1)–(4).

⁸ 18 U.S.C. § 1030(c)(2).

⁹ 18 U.S.C. § 1030(c)(3)(A).

serious bodily injury or death.¹⁰ There are also enhanced penalties for serial offenders.

The scheme for sentencing under section 1030 pursuant to the United States Sentencing Guidelines (the Guidelines) relies on several different sections, as befitting a statute with many sub-provisions that, at their extremes, involve very different kinds of conduct. For example, most economically motivated violations of section 1030 are addressed under section 2B1.1 of the Guidelines—the same one used for wire fraud. However, the Guideline for violations of section 1030(a)(1), which involve obtaining information related to national security, is section 2M3.2 (“Gathering National Defense Information”), and the Guideline for violations of section 1030(a)(7), which involve extortion related to computers, is section 2B3.2 (“Extortion by Force or Threat of Injury or Serious Damage”).

The Guidelines also include several specific enhancements for violations of section 1030. First, the Guidelines provide for a two-level enhancement for a section 1030 violation that involves an intent to obtain personal information or the unauthorized public dissemination of such information.¹¹ Second, the Guidelines include a two-level enhancement for the involvement of a computer system used to maintain or operate critical infrastructure, and a six-level enhancement if the offense “cause[] a substantial disruption of a [sic] critical infrastructure.”¹² Third, the Guidelines include a four-level enhancement for a violation of section 1030(a)(5)(A), which prohibits the transmission of a computer program or code that intentionally causes damage to a protected computer.¹³

In addition to these enhancements, which refer specifically to section 1030, multiple other enhancements are likely to apply in most cases involving violations of section 1030.¹⁴

¹⁰ 18 U.S.C. § 1030(c)(4)(A), (E) and (F).

¹¹ See U.S. Sentencing Guidelines Manual § 2B1.1(b)(18) (U.S. SENT’G COMM’N 2018) [hereinafter U.S.S.G.].

¹² U.S.S.G. § 2B1.1(b)(19)(i), (iii).

¹³ U.S.S.G. § 2B1.1(b)(19)(ii).

¹⁴ See *infra* Section Part II.A.

B. Different section 1030 violations, different sentences

Given the breadth of conduct encompassed by section 1030, there is no easy way to quantify an average term of imprisonment for a violation of section 1030. One empirical analysis from 2016 shows that, by 2010, the average term of imprisonment for a section 1030 violation was between 10 and 15 months, but those data are both dated and general.¹⁵ The same analysis also asserts that “Most convicted cybercrime defendants do not receive a prison sentence; instead, most receive probation, a fine, a suspended sentence, or no sentence at all.”¹⁶

To further aid in discussion, this section sets forth examples of section 1030 violations. These examples are meant to be illustrative, rather than comprehensive, and are divided in several categories based upon the apparent motivation, or purpose, of the section 1030 violation. In addition to describing the resolution of each matter, this section sets forth the sentences imposed (or agreed to) for any violations of section 1030(a). Note that this section omits nation-state sponsored violations of section 1030, which are treated separately in part III of this article because individuals committing those violations are rarely sentenced.

1. Money

One of the primary motivations for “cybercrime” is economic. Some criminals use computer intrusions to steal money directly, while others use intrusions to obtain information that has economic value, either because it can be sold to others or because it can be used by the intruders themselves.¹⁷ Consider two sets of defendants, one a Romanian cybercrime group and one a U.S. company.

Starting in 2007, a group of Romanians operating in Bucharest, Romania, committed a variety of cybercrimes, including using

¹⁵ Mayer, *supra* note 1, at 1477.

¹⁶ *Id.*

¹⁷ “Data stolen by cybercrime rings generally falls into one of two categories: records (like credit card or health records) that can be monetized for use in fraud; and stolen intellectual property (IP) or other kinds of trade secrets.” Zachary K. Goldman & Damon McCoy, *Deterring Financially Motivated Cybercrime*, 8 J. NAT’L SEC. L. & POL’Y 595, 599 (2016).

proprietary malware to infect and control more than 60,000 computers.¹⁸ The defendants engaged in three primary schemes: (1) stealing credit card and other personal information from victims; (2) causing victims to send approximately \$4 million to fictitious websites purporting to be part of eBay; and (3) using infected computers to mine cryptocurrency.¹⁹

The defendants were ultimately charged with multiple counts of wire fraud, as well as conspiracies to commit money laundering and to violate sections 1030(a)(2)(C) (obtaining information from a protected computer), 1030(a)(4) (furthering a fraud and obtaining something of value), and 1030(a)(5)(A) (damaging a protected computer through a computer program).²⁰ Despite the predominance of wire-fraud charges, the defendants were described as “cyber criminals” who engaged in “cybercrime” when the charges were announced. In 2019, after being convicted at trial, two of the defendants were sentenced to 18 and 20 years in prison. The court imposed no fine or restitution.²¹ The announcement of the sentences again referred to the defendants’ “cybercriminal enterprise.”²²

Turning to our corporate example, in July 2013, Ticketmaster, LLC (Ticketmaster)—a company that sold and distributed tickets to events—hired the former employee of a victim company located in the United Kingdom. The victim company sold certain kinds of tickets. After he was hired by Ticketmaster, and in violation of a separation agreement, the former employee helped various Ticketmaster employees repeatedly access the victim company’s computer systems between August 2013 and December 2015. Using that unauthorized

¹⁸ Press Release, U.S. Dep’t of Just., Three Romanian Nationals Indicted in \$4 Million Cyber Fraud Scheme that Infected at Least 60,000 Computers and Sent 11 Million Malicious Emails (Dec. 16, 2016).

¹⁹ *Id.*

²⁰ Indictment, United States v. Nicolescu, No. 16 CR 224 (N.D. Ohio July 8, 2016), ECF No. 1 (Count 14).

²¹ *E.g.*, Judgment, United States v. Nicolescu, No. 16 CR 224 (N.D. Ohio Dec. 12, 2019), ECF No. 198 (judgment as to Bogdan Nicolescu).

²² Press Release, U.S. Dep’t of Just., *supra* note 1. Notably, despite the growing organization and sophistication of groups committing numerous computer intrusions, section 1030 is not one of the enumerated crimes that qualify as “racketeering activity” under the RICO statute. *See* 18 U.S.C. § 1961. That statute would otherwise seem to be an available tool to address such cybercrime organizations.

access, Ticketmaster employees gained various competitive advantages, including identifying clients of the victim company whom Ticketmaster employees could try to dissuade from working with the victim company.

In December 2020, Ticketmaster entered into a deferred prosecution agreement (DPA) with the U.S. Attorney's Office for the Eastern District of New York in which Ticketmaster agreed to the filing of an information charging the company with, among other crimes, violating 18 U.S.C. §§ 1030(a)(2)(C) and 1030(a)(4) as well as conspiring to violate those provisions.²³ As part of the DPA, Ticketmaster agreed to pay a penalty of \$10,000,000.²⁴

2. Scandal and mischief

Some criminals have used computer intrusions to obtain records that are embarrassing for victims without an obvious motivation to monetize that information.

For example, between 2012 and 2014, Marcel Lazar, a Romanian hacker who used the moniker "Guccifer," gained unauthorized access to e-mail and social media accounts of approximately 100 victims in the United States. The victims included "a former member of the U.S. Cabinet," "a former member of the Joint Chiefs of Staff", and "an immediate family member of two former U.S. presidents."²⁵ In general, Guccifer obtained access to the victim accounts by guessing passwords or the answer to a victim's account security question.²⁶

According to his plea agreement, Guccifer provided some of the victims' personal information to media organizations and used his access to victims' accounts to send communications in the name of the victims. For example, Guccifer used the AOL e-mail account of a

²³ Deferred Prosecution Agreement, *United States v. Ticketmaster LLC*, 20-CR-563 (E.D.N.Y. 2020).

²⁴ *Id.*

²⁵ Press Release, U.S. Dep't of Just., Romanian Hacker "Guccifer" Pleads Guilty to Computer Hacking Crimes (May 25, 2016).

²⁶ See Plea Agreement, *United States v. Lazar*, 14-CR-213 (E.D. Va. May 25, 2016), ECF No. 28.

former member of the U.S. Cabinet to e-mail media organizations the message: “the 9/11 victim’s blood is on my hands.”²⁷

In 2016, Guccifer pleaded guilty to violating section 1030(a)(2)(C), as well as to aggravated identity theft.²⁸ He was sentenced to 52 months’ imprisonment: 28 months for the section 1030 violation and a consecutive 24 months for aggravated identity theft.²⁹

A second example involves similar intrusions with a different type of victim. Specifically, between November 2013 and August 2014, Edward Majerczyk used a phishing scheme to obtain the usernames and passwords of various victims. He sent emails that appeared to be from the security accounts of internet service providers, directing victims to a website designed to collect their information. Majerczyk then accessed the victims’ iCloud and Gmail accounts, stealing personal information, including sensitive and private photographs and videos. He stole information from at least 300 victims, including 30 that belonged to celebrities.³⁰ Some of the images Majerczyk obtained were later posted online, although he was not accused of posting the images himself. According to the government’s sentencing submission, Majerczyk admitted to conducting the intrusions to “see things through other people’s eyes” and “for kicks.”³¹

In January 2017, Majerczyk pleaded guilty to violating 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(B)(ii) and (iii).³² He was then sentenced to nine months’ imprisonment.³³

3. Terrorism

In June 2015, Ardit Ferizi used cybercrime to provide material support to ISIS. Ferizi gained system-level access to a server that maintained a website for a U.S. company that sold goods to customers

²⁷ See Statement of Facts, United States v. Lazar, 14-CR-213 (E.D. Va. May 25, 2016), ECF No. 29.

²⁸ *Id.*

²⁹ Judgment, United States v. Lazar, 14-CR-213 (E.D. Va. Sept. 1, 2016), ECF No. 48.

³⁰ See Plea Agreement, United States v. Majerczyk, 16-CR-550 (N.D. Ill. Sept. 27, 2016), ECF No. 12.

³¹ Gov’t’s Sent’g Memorandum, United States v. Majerczyk, 16-CR-550 (E.D. Va. Jan. 18, 2017), ECF No. 17.

³² Plea Agreement, *supra* note 30.

³³ Judgment, United States v. Majerczyk, 16-CR-550 (Feb. 6, 2017) ECF No. 20.

in the United States and abroad. He then obtained personal information for thousands of the company's customers, including individuals associated with the U.S. military and other parts of the government. Ferizi provided personal information for 1,300 individuals he identified using their ".mil" and ".gov" e-mail addresses to an ISIS facilitator, Junaid Hussain.³⁴

In August 2015, Hussain, acting in the name of the Islamic State Hacking Division, used Twitter to disseminate a document with what appeared to be the personal information obtained by Ferizi. Hussain's communications warned so-called "Crusaders" that "we have your names and addresses, we are in your emails and social media accounts, we are extracting confidential data and passing on your personal information to the soldiers of the khilafah, who soon with the permission of Allah will strike at your necks in your own lands!"³⁵

In June 2016, Ferizi pleaded guilty to providing material support to a designated foreign terrorist organization, a violation of 18 U.S.C. § 2339B, and to accessing a protected computer without authorization and obtaining information, a violation of section 1030(a)(2)(C).³⁶ He was sentenced to a total of 240 months' imprisonment—180 months for violating section 2339B and 60 months for violating section 1030.³⁷

* * *

As these examples illustrate, Department prosecutions of section 1030 violations have resulted in a wide variety of sentences. The next section focuses on the considerations that tend to drive such sentences.

³⁴ Position of the U.S. With Respect to Sent'g, *United States v. Ferizi*, 16-cr-00042 (E.D. Va. Sept. 16, 2016), ECF No. 54; Press Release, U.S. Dep't of Just., ISIL-Linked Kosovo Hacker Sentenced to 20 Years in Prison (Sept. 23, 2016).

³⁵ Position of the U.S. With Respect to Sent'g, *supra* note 34, at 5.

³⁶ Plea Agreement, *United States v. Ferizi*, 16-cr-00042 (E.D. Va. June 15, 2016), ECF No. 35.

³⁷ Judgment, *United States v. Ferizi*, 16-cr-00042 (E.D. Va. June 15, 2016), ECF No. 68.

II. Common sentencing considerations for violations of section 1030

Certain issues are likely to arise as parties and courts determine an appropriate sentence for violations of section 1030. This section discusses some of those issues, arising both in calculating the Guidelines and in applying some of the factors set forth in 18 U.S.C. § 3553—the characteristics of the defendant, the need for a sentence to reflect the seriousness of the offense, and the need for a sentence to promote deterrence.

A. Guidelines calculations

Calculating the total offense level for a violation of section 1030 under the Guidelines will, in most cases, involve applying a number of enhancements.³⁸

As discussed in part I.A, the Guidelines include various enhancements for certain violations of section 1030. In addition, the two-level enhancement under section 2B1.1(b)(10) for “sophisticated means”—an “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense”—and the two-level enhancement under section 3B1.3 for the use of a “special skill”—“a skill not possessed by members of the general public and usually requiring substantial education, training or licensing,” including “pilots, lawyers, doctors, accountants, chemists, and demolition experts”—will apply to many, if not most, violations of section 1030.³⁹

³⁸ Section 2B3.2, which applies to violations of section 1030(a)(7), and section 2M3.2, which applies to violations of section 1030(a)(1), contain only limited enhancements unlikely to apply generally in cases of section 1030 violations.

³⁹ See generally Orin S. Kerr, *Trespass, Not Fraud: The Need for New Sentencing Guidelines in CFAA Cases*, 84 GEO. WASH. L. REV. 1544, 1562–63 (2016). Kerr argues that, “[a]lthough data is sparse, courts appear to have widely used both enhancements in run-of-the-mill CFAA cases. Even simple computer use has been deemed a sophisticated means.” *Id.* Kerr also argues that these two enhancements should play a more limited role in section 1030 sentencing than one might otherwise think. First, Kerr points out that the “sophisticated means” enhancement is targeted at the manner in which an individual conceals a fraud; but the sophistication in a section 1030 case will often relate to the manner in which an intrusion is effected, not concealed. *Id.* at 1563. Second, the “special skill” enhancement is designed “to recognize the

Enhancements for numbers of victims and for when a substantial portion of the offense took place outside of the United States are also likely to apply in a large portion of the section 1030 cases.⁴⁰ As a result, the total offense level under the Guidelines for a violation of section 1030 is likely to be higher than it would be for a similar fraud or theft conducted without the use of computers.⁴¹

Given that violations of section 1030 typically have relatively high Guidelines ranges, defendants' section 1030 sentencing arguments often focus on whether the Guidelines overstate the true seriousness of the offense. Such litigation may also address an argument common in many cases involving economic crime, namely that the "loss amount" enhancement in section 2B1.1 of the Guidelines generally produces total offense levels that overstate the seriousness of the crime.

B. Section 3553: history and characteristics of the defendant

As even the examples in part I.B indicate, individuals who violate section 1030 can come from a variety of backgrounds, ranging from purportedly bored U.S. citizens to radicalized militants to Eastern European organized crime. Nevertheless, cybercriminals generally share certain characteristics, including a relatively high level of education and technical ability.⁴² After all, it is difficult to carry out

special harms when defendants take advantage of society's trust in certain professions and positions to give them less oversight." *Id.* at 1563. That concern will generally not be implicated by the individuals who commit unauthorized computer intrusions.

⁴⁰ See U.S.S.G. § 2B1.1(b)(10)(B) ("a substantial part of a fraudulent scheme was committed from outside the United States"); *id.* § 2B1.1(b)(2)(A)(i) (the offense "involved 10 or more victims").

⁴¹ A defendant would likely be unsuccessful in arguing that the imposition of these different enhancement, which relate to each other, is improper "double counting." See, e.g., *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003) ("However, the imposition of two somewhat overlapping enhancements does not necessarily result in prohibited double counting. '[D]ouble counting is legitimate where a single act is relevant to two dimensions of the Guidelines analysis.'") (alteration in original); *United States v. Lauersen*, 362 F.3d 160 (2d Cir. 2004), *cert. granted, judgment vacated*, 543 U.S. 1097 (2005).

⁴² See 18 U.S.C. § 3553(a)(1).

the computer-centric crimes described in section 1030 without such knowledge and skills.

Moreover, the kinds of individuals who engage in other kinds of typically “white collar crime”—such as wire fraud, securities fraud, bank fraud—resemble individuals in similar roles who do not commit those crimes. That is, individuals committing securities fraud often resemble people who engage in legitimate sale of securities. There is no obvious analogy for cybercriminals. After all, the typical cybercriminal is not someone who declined a job at a cybersecurity firm or who uses a job at a cybersecurity firm as a platform for unauthorized computer intrusions.

Cybercrimes are also generally planned in advance—requiring the obtaining of passwords or other access credentials to get further in to a network or the deploying of ransomware software through a spear-phishing campaign. Many such crimes are also long running, involving persistence in a network or a thorough harvesting of data. As a result, cybercriminals are unlikely to be motivated by desperation for money, as might an individual who robs a store or agrees to sell controlled substances illegally.

The net result of these factors is that the typical individual who violates section 1030 is more likely to be educated, well-resourced, and foreign than the typical individual who commits many other kinds of crimes.

C. Section 3553: seriousness of the offense

Although each section 1030 violation stands on its own facts, there are certain issues that recur in considering the “seriousness” of a section 1030 violation.⁴³

First, the “seriousness” of many cybercrimes is difficult to measure. In particular, section 1030 violations that involve obtaining information about a large number of victims present questions of scaling. How much more serious is an unauthorized intrusion that yields information about hundreds, rather than hundreds of thousands, of individuals? If the information is monetized—for example, when the intruder sells the stolen information to a third party—that value may serve as a proxy for seriousness. But even the economic value of stolen information understates the harm caused by the theft.

⁴³ See 18 U.S.C. § 3553(a)(2)(A).

Aspects of other kinds of violations of section 1030 may be difficult to quantify in that objective measures may understate the true harm. The cost of paying the ransom to end a ransomware attack—in which an intruder places malicious code that locks a victim computer and threatens to delete data unless the victim pays a ransom—is easy enough to quantify.⁴⁴ But ransomware attacks target schools, universities, airports, local governments, and hospitals as well as businesses. A ransomware attack that temporarily shuts down one such target may cause extraordinary harm to a number of victims, such as students or patients. That resulting harm may be difficult to quantify or convey—what is the harm to students if a school district’s computer system shuts down for a week? Of shutting down a hospital for a day?

A related consideration in determining how serious a section 1030 violation is that, in many cases, the victims will not know they are victims. For example, an intrusion that harvests thousands of access credentials, or a ransomware attack that cripples the ability of a business to provide a service for some time, are likely to have a small effect on a large number of victims. In many of those cases, the victims will not even know of the effect. As a result, it can be challenging to adequately convey the impact on victims for purposes of accurately assessing the seriousness of an intrusion.

Second, considering the “harm” to larger victims may underestimate the effects of cyber intrusions, particularly on corporate victims. A company that is the victim of an intrusion can face significant costs in responding to that intrusion, both in terms of legal and other costs incurred in responding to the intrusion and in terms of subsequent costs to address regulatory inquiry or civil litigation. These costs,

⁴⁴ A recent *Wall Street Journal* article includes several examples, including a \$1.14 million ransom paid by the University of California, San Francisco, and a \$206,931 ransom paid by the Sheldon Independent School District in Houston in order to avoid disruption of an upcoming paycheck distribution. See Robert McMillan et al., *Beyond Colonial Pipeline, Ransomware Cyberattacks Are a Growing Threat*, WALL. ST. J. (May 11, 2021), <https://www.wsj.com/articles/colonial-pipeline-hack-shows-ransomware-emergence-as-industrial-scale-threat-11620749675>. The Sheldon school district actually negotiated a final ransom amount with the malicious actor, who had originally demanded \$350,000. *Id.*

which may not be recoverable as restitution, will be the result of the defendant's actions and should be considered in an overall analysis of the "seriousness" of the intrusion.

Third, the conduct that violates section 1030 is often one component of a broader criminal scheme. As some of the examples discussed in part I.B illustrate, section 1030 violations are often conducted to further other crimes, including wire fraud, identity theft, theft of trade secrets, and even the provision of material support to terrorist organizations. As a result, the "seriousness" of the section 1030 violation will understate the overall seriousness of the offense conduct. Perhaps most egregiously, Ardit Ferizi's computer intrusion—which netted him the personal information of thousands of victims—was not itself far different from many other intrusions conducted by malicious actors; it was Ferizi's provision of that information to ISIS that made his crime notably serious. As a result, Ferizi's 240-month sentence was primarily driven by the material support charge (180 months) rather than the section 1030 violation (60 months).

D. Section 3553: deterrence of criminal conduct

Several typical aspects of section 1030 violations are likely to be relevant to considerations of general and specific deterrence.⁴⁵ All of these considerations indicate that the sentence for a violation of section 1030 should likely be higher than for an analogous crime committed without a computer intrusion. Questions about deterrence with respect to cybercrimes are particularly significant given that the number of unauthorized intrusions is increasing: The *Wall Street Journal* recently reported that there was a 66% increase in cases involving ransomware since 2019.⁴⁶

First, most section 1030 violations likely will not be prosecuted. Although some computer intrusions are easy to detect—for example, a ransomware message pops up on a screen—others may go undetected for long periods.⁴⁷ Detecting an intrusion is not the same as

⁴⁵ See 18 U.S.C. § 3553(a)(2)(B).

⁴⁶ McMillan, *supra* note 44.

⁴⁷ See, e.g., Zachary K. Goldman & Damon McCoy, *Deterring Financially Motivated Cybercrime*, 8 J. NAT'L SEC. L. & POL'Y 595, 601 (2016) ("Attribution of attacks is difficult because attacks conducted over the Internet can easily be masked and routed through intermediate points

identifying, let alone arresting, the intruder. Identifying a cyber actor—a process called “attribution”—normally involves numerous investigative steps with no guarantee of success.⁴⁸ Even then, many malicious cyber actors are located outside of the United States, often in countries from which extradition is a practical impossibility.

These challenges counsel in favor of imposing relatively more significant sentences for violations of section 1030 to further the principle of general deterrence.⁴⁹ The best way to deter other malicious cyber actors would be to severely punish those actors who do get prosecuted.⁵⁰

Second, because the relative cost of committing a cybercrime is low—most only require internet access and a computer—the possibility of recidivism among cyber criminals may be relatively higher than for other crimes. In addition, the difficulty of detecting cybercrimes (and identifying bad actors) further increases the risk that a malicious cyber actor, once prosecuted, will commit a subsequent crime. This concern is particularly acute for cyber actors

between the aggressor and his victim. . . . Network intrusions themselves also may lie undetected for a long period of time.”).

⁴⁸ One empirical analysis of section 1030 violations from 2016 argues that most defendants are not “hacker archetypes (i.e., repeat offenders motivated by sport, profit, or national pride)” but rather are individuals whose “criminal cases arise from one-time misconduct, in which an underlying dispute migrates from the real world to the internet.” Mayer, *supra* note 1, at 1484. The article asserts that its “findings squarely deflate the myth that most cybercrime defendants align with hacker archetypes (i.e., repeat offenders motivated by sport, profit, or national pride).” *Id.* But this analysis of individuals who *are* prosecuted does not shed light on the full universe of individuals committing cybercrimes; the set of defendants may not be representative of the set of malicious actors, but rather be skewed towards the individuals who are easily caught.

⁴⁹ The Guidelines make a similar argument in the case of violations of income tax laws: “Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines.” See Introductory Commentary, U.S.S.G. § 2T1.

⁵⁰ See Ye Hong & William Neilson, *Cybercrime and Punishment*, 49 J. LEGAL STUD. 431, 457 (2020) (“Since it is hard to catch a cybercriminal, judges tend to impose severe penalties to deter them.”).

who are removed from the United States after serving a prison sentence.

A prison sentence is also likely to play a relatively more significant role in deterring cybercriminals than other bad actors because of the relatively greater difficulty of imposing economic costs for violations of section 1030.

As an initial matter, the proceeds of violations of section 1030 may be harder to detect and recover through asset forfeiture proceedings, particularly proceeds that were realized or stashed abroad. Similarly, a cyber actor may appear to a U.S. court to have few resources—because those resources are either concealed abroad or stored in assets such as cryptocurrency that are harder to quantify or reach. This apparent lack of resources may lead a court not to impose a fine or to impose a smaller fine than might otherwise be appropriate. In addition, as discussed above, the victims of a section 1030 violation may not even realize they are victims, and even if a victim is aware of being a victim, the costs of seeking restitution for an individual victim may outweigh the ultimate benefit, leading to fewer (if any) victims seeking restitution. Thus, the deterrent effect of fines, forfeiture, and restitution may be muted in the case of cybercriminals.

For all these reasons, considerations of specific deterrence will also counsel in favor of relatively more significant sentences for violations of section 1030 than for other economic crimes.

III. Nation-state intrusions—crime without punishment?

No treatment of cybercrime sentencing could be complete without a brief review of cybercrimes committed by individuals working for, or sponsored by, nation-states. Although such individuals have been charged with violations of section 1030 in recent years, virtually none have appeared in U.S. courts, let alone been sentenced. Nevertheless, these prosecutions of nation-state actors are relevant to a consideration of sentencing for violations of section 1030.

To start with, consider three examples of nation-state sponsored intrusions associated with the Russia Federation, the People’s Republic of China, and the Democratic People’s Republic of Korea (“North Korea”).

A. Russia

In 2018, an indictment was unsealed that charged various members of Russia's Main Intelligence Directorate of the General Staff, also known as the GRU, with multiple crimes related to interference in the 2016 U.S. presidential election. The charges included conspiracies to violate sections 1030(a)(2)(C) and section 1030(a)(5)(A) based upon (1) alleged efforts to obtain election-related information from the computers of the Democratic Congressional Campaign Committee and the Democratic National Committee and (2) alleged efforts to hack into the computers of U.S. persons and entities responsible for the administration of 2016 U.S. elections, including state boards of elections and secretaries of state.⁵¹

B. China

In 2014, an indictment was unsealed in the Western District of Pennsylvania that charged five members of the Chinese military with computer hacking and other offenses directed towards certain U.S. industries, including nuclear, metals, and solar products.⁵² The alleged intrusions involved efforts to obtain trade secrets and other information from victims, including Westinghouse Electric, U.S. Steel, and Alcoa, Inc. The hackers were charged with violating sections 1030(a)(2)(C) and 1030(a)(5)(A), as well as with identity theft, economic espionage, and theft of trade secrets.⁵³

C. North Korea

In 2018, the Department unsealed a complaint charging Park Jin Hyok, a North Korean citizen, for his involvement in a conspiracy to commit numerous intrusions as part of the so-called "Lazarus Group," a hacking team sponsored by the government of North Korea. Park was charged with a conspiracy to violate sections 1030(a)(2)(C), 1030(a)(4), and 1030(a)(5), as well as a conspiracy to commit wire fraud. The group's efforts included creating malware used in the 2017

⁵¹ Indictment, *United States v. Netyshko, et al.*, 18-CR-215 (E.D. Va.), ECF No. 1.

⁵² Press Release, U.S. Dep't of Just., U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014).

⁵³ *Id.*

“WannaCry” ransomware attacks, the theft of \$81 million from a bank in Bangladesh in 2016, and the hack of Sony Pictures Entertainment in 2014. The motivations for some of these crimes appeared to have been a mix of economic (the theft of \$81 million); national security (apparent efforts to access the computer systems of Lockheed Martin); and retaliation for perceived slights (the hack of Sony in response to a comedy depicting the assassination of the leader of North Korea). More recently, the Department announced an indictment charging various North Korean computer programmers with efforts to steal and extort more than \$1.3 billion from financial institutions and companies.⁵⁴

These charges have not resulted in convictions or sentences because nation-state hackers tend not be present in the United States (or in countries from which extradition is reasonably likely).

Nevertheless, charges against these nation-state actors may still further at least two goals of criminal sentencing: specific and general deterrence. With respect to specific deterrence, the individuals charged will suffer from a limited ability to travel, their assets may be seized, and the publicity from the charges may make their careers more difficult. With respect to general deterrence, future individuals who contemplate conducting nation-state-sponsored computer intrusions may not wish to be publicly identified as criminal actors and may wish to avoid the other specific consequences of being named in a charging document.⁵⁵

In addition, the imposition of significant prison sentences for non-state actors, as discussed above, may also help to deter state-sponsored action. If a malicious cyber actor working on behalf of a nation-state knows that a significant prison sentence awaits if he or she is apprehended, then that actor might think twice about conducting a cyberattack—even if the risk of being caught is small.

⁵⁴ Press Release, U.S. Dep’t of Just., Three North Korean Military Hackers Indicted in Wide-Ranging Scheme to Commit Cyberattacks and Financial Crimes Across the Globe (Feb. 17, 2021).

⁵⁵ The so-called “name and shame” indictment may also serve to encourage dialogue between the United States and the nations on whose behalf the malicious actors are operating. *See, e.g.*, Eric Tucker & Tami Abdollah, Iranian Hacker Indictment Part of US “Name and Shame” Tactic, ASSOCIATED PRESS (Mar. 25, 2016), <https://www.washingtontimes.com/news/2016/mar/25/us-indicts-7-hackers-in-effort-to-send-a-message-t/>.

IV. Conclusion

This article has provided a brief overview of considerations relevant to sentencing for violations of section 1030, one of the most common statutes used to charge instances of “cybercrime.” Although section 1030 can be (and has been) violated in a number of ways, certain core characteristics arise repeatedly. A particularly significant issue is the need for section 1030 sentences to account for both general and specific deterrence. Notably, those sentencing goals may also be pursued in charges—if not sentences—for violations of section 1030 by nation-state actors or malicious actors sponsored or encouraged by nation-states.

About the Author

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When an Officer of the Court is a Defendant: Federal Sentencing of Attorneys

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I. Introduction

At a typical federal sentencing proceeding, the judge, prosecutor, and defense attorney draw upon their legal training and knowledge of the pertinent facts, advocate for their view of or determine the applicable United States Sentencing Guidelines (Guidelines or USSG) range; discuss the defendant's history and characteristics, the seriousness of his or her crimes, his or her role in those offenses, and other factors set forth in 18 U.S.C. § 3553(a); and advocate for, or determine, an appropriate sentence. But what happens when the defendant is an attorney and used his or her legal training to commit the crime for which she faces sentencing? How does the federal legal system consider the appropriate sentence for one of its own?

First, and most straightforwardly, the Guidelines provide for an enhancement for any defendant who, in the commission or concealment of a crime, abuses a position of trust or uses a special skill.¹ This enhancement applies to attorney-defendants who prey on the trust of actual or purported clients or who use their legal training to facilitate or conceal a crime, although courts differ on whether attorney-defendants automatically occupy a "position of trust" with respect to victims *other* than their own clients. They also differ on what actions constitute "facilitation" of a crime.

¹ U.S.S.G. § 3B1.3.

Second, and more significantly, attorney-defendants using their legal training to commit or conceal crimes factors into a section 3553(a) analysis in several ways. Because attorney-defendants often operate from a position of trust and with the veneer of legitimacy, their crimes are often both more difficult to detect and more sophisticated, which courts generally recognize increases the need for specific and general deterrence. And while attorney-defendants often argue at sentencing that leniency is appropriate because a criminal conviction in and of itself often leads to the loss of the very privileges that made their crimes easier to commit or conceal, including the loss of their law license and the community standing that may come with a successful career as an attorney, courts frequently reject such arguments, concluding that perceived or actual special treatment for such white-collar offenders is not appropriate.

This article explores the foregoing and other considerations when a federal criminal defendant is an attorney.

II. Guidelines considerations

The Guidelines provision that is generally applicable for attorney-defendants (and often for other white-collar professionals as well) is section 3B1.3, which provides for a two-point enhancement if a defendant “abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.”² In short, the enhancement applies if, in committing or concealing the crime at issue, the defendant either abused a position of public or private trust or used a special skill. As detailed below, courts have routinely found both prongs of section 3B1.3 applicable to the conduct of attorney-defendants.³

² U.S.S.G. § 3B1.3.

³ While the enhancement is a role adjustment that applies regardless of the nature of the crime, there are two specific offense conduct sections that reference section 3B1.3 in the context of attorney-defendants. Application note 2 for section 2B1.4 (Insider Trading) states that section 3B1.3 should apply “if the defendant occupied and abused a position of special trust” and gives as an example “an attorney who misused information regarding a planned but unannounced takeover attempt.” U.S.S.G. § 2B1.4 cmt. n.2. Similarly, Application note 23 for section 2D1.1 (Drug Manufacturing, Importing, Exporting or Trafficking) states that section 3B1.3 should apply when a defendant “used special skills in the commission of the offense” and gives as an example “professionals[,] include[ing] . . . attorneys . . .[,] whose

A. Abuse of trust

The “abuse of trust” prong of section 3B1.3 has two components: To qualify for the enhancement, a defendant must have (1) “abused a position of public or private trust”; and (2) done so in a manner that “significantly facilitated the commission or concealment of the offense.”⁴ Application Note 1 to section 3B1.3 further clarifies that “public or private trust” refers to a position that is “characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference).”⁵ However, “determining what constitutes a position of trust for the purposes of § 3B1.3 is not a simple task,” and the determination of whether to apply the enhancement is highly dependent on the specific facts in each situation.⁶

For attorney-defendants, courts have universally, and unsurprisingly, concluded that attorneys occupy a “position of trust” when it comes to their own clients.⁷ As a result, to the extent that attorney-defendants have used their positions as attorneys to

special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense.” U.S.S.G. § 2D1.1 cmt. n.23.

⁴ U.S.S.G. § 3B1.3.

⁵ U.S.S.G. § 3B1.3 cmt. n.1. The enhancement also applies where a “defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not.” U.S.S.G. § 3B1.3 cmt. n.3; *see, e.g.*, *United States v. Szekely*, 632 F. App’x 546, 548 (11th Cir. 2015) (defendant was in a “trust relationship with his victims” because, while posing as a fictitious attorney, he “led his victims to believe they were in an attorney–client relationship”).

⁶ *United States v. Iannone*, 184 F.3d 214, 222 (3d Cir. 1999); *see United States v. Hart*, 273 F.3d 363, 375 (3d Cir. 2001).

⁷ *Comm’r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (“The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill and effort the attorney contributes, is a quintessential principal-agent relationship. Restatement (Second) of Agency § 1, Comment e (1957); ABA Model Rules of Professional Conduct Rule 1.3, and Comment 1; Rule 1.7, and Comment 1 (2002).”) (abbreviation omitted); *see generally United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (“The common law has recognized that some associations are inherently fiduciary. Counted among these hornbook fiduciary relations are those existing between attorney and client . . .”).

facilitate crimes that directly harmed their own clients or others to whom they owe a fiduciary duty, courts have concluded that the enhancement applies.⁸

There is far less of a consensus, however, about what it means for an attorney to occupy a position of public trust, or whether the section 3B1.3 enhancement may apply to attorney-defendants whose victims are not their own clients or someone else to whom they owe a fiduciary duty. Some circuits have concluded that “attorneys inherently occupy a position of public trust” such that the section 3B1.3 enhancement may apply even when the victim of the attorney-defendant’s scheme is not a client.⁹ For example, in *United States v. Goldman*,¹⁰ the court held that the section 3B1.3 enhancement should apply to the defendant, an attorney who participated in a scheme to help his client fraudulently obtain a loan from a bank, even though the bank itself was not a client or otherwise in a fiduciary relationship with the defendant. The court reasoned that a “defendant acting in his capacity as an attorney occupies a position of public trust” such that “[u]se of knowledge gained as an attorney to commit a crime subjects a defendant to [the section 3B1.3] enhancement for abuse” of that public trust.¹¹ Similarly, in *United States v. Christensen*, the court concluded that a section 3B1.3 enhancement applied to an attorney-defendant who hired a private investigator to illegally wiretap an individual in a dispute with the defendant’s client even though there was no fiduciary relationship between the defendant and the individual who was wiretapped.¹² The court reasoned that the “relevant provision of the Guidelines refers specifically to abuse of ‘public or private trust,’ suggesting a concern for more than the individual interests of a specific client or beneficiary” and that any rule that required a direct relationship of trust between the defendant and the victim was “too constrained.”¹³

By contrast, at least one other circuit has explained that a defendant’s status as an attorney does not automatically mean that he

⁸ See, e.g., *United States v. Davis*, 616 F. App’x 742, 745 (5th Cir. 2015); *United States v. White*, 1 F.3d 13, 18 (D.C. Cir. 1993).

⁹ *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015).

¹⁰ 447 F.3d 1094, 1096 (8th Cir. 2006).

¹¹ *Id.*

¹² 828 F.3d at 817.

¹³ *Id.* at 818; see also *United States v. Delgado*, 608 F. App’x 230, 237 (5th Cir. 2015) (“attorneys inherently occupy a position of public trust”).

or she occupies a position of public trust, even when the defendant's crime involved his or her work as an attorney. In *United States v. Morris*, the court concluded that the section 3B1.3 enhancement did not apply to a defendant attorney because he did not have an attorney-client relationship or other relationship of trust with his victims, even though the defendant attorney used his attorney trust account to receive victim funds and his co-conspirators used the defendant attorney's status to help recruit victims.¹⁴ The court reasoned that "although attorneys are expected to abide by ethical standards, it simply is not the case that an attorney holds a position of trust with respect to all people with whom he comes into contact solely by virtue of his status as an attorney."¹⁵ And other circuits that have not specifically addressed the question of whether attorneys occupy a position of public trust by virtue of their profession alone have, in other contexts, reached conclusions that suggest it is unlikely that they would agree. For example, the Fourth Circuit has noted that an abuse-of-trust enhancement was "not designed to turn on formalistic definitions of job type," and as a result, concluded that other types of professionals, such as doctors, do not inherently qualify as holding a position of public trust.¹⁶

Finally, to qualify for the enhancement in any of these cases, including in those circuits where attorneys are deemed to occupy a position of "public trust" simply by holding law licenses, attorney-defendants must abuse their position as lawyers in a manner that facilitates or conceals their crimes. In short, consistent with the plain language of the Guidelines, the mere fact that a defendant happens to be an attorney will not "by itself justify application of the enhancement."¹⁷ For example, "a lawyer who robbed a bank on the side would likely not qualify under § 3B1.3, because the guidelines

¹⁴ 286 F.3d 1291, 1295–99 (11th Cir. 2002).

¹⁵ *Id.* at 1297.

¹⁶ *United States v. Gordon*, 61 F.3d 263, 269 (4th Cir. 1995); *see United States v. Caplinger*, 339 F.3d 226, 237 (4th Cir. 2003); *see also United States v. Huggins*, 844 F.3d 118, 125 (2d Cir. 2016) ("A purely arm's-length contractual relationship between the defendant and the victims does not create a position of trust."); *United States v. Moore*, 29 F.3d 175, 180 (4th Cir. 1994) (same).

¹⁷ *Christensen*, 828 F.3d at 818.

require that the position of trust be abused . . . in a manner that significantly facilitated the commission or concealment of the offense.”¹⁸

B. Special skill

To determine whether the special-skill enhancement is appropriate, the Guidelines require a similar two-part analysis: (1) whether defendants possessed special skills; and (2) whether they used their skills in a manner to significantly facilitate or conceal the offenses.¹⁹ Application Note 4 to section 3B1.3 identifies “lawyers” as examples of persons possessing a “special skill” . . . not possessed by members of the general public and usually requiring substantial education, training or licensing.”²⁰ As a result, courts have uniformly held that attorney-defendants possess a “special skill” by virtue of their legal training.²¹ This is the case even when an attorney-defendant has been disbarred, is unlicensed, or is no longer practicing law.²²

¹⁸ *Id.* (internal quotation marks omitted); *see also Delgado*, 608 F. App’x at 237 (concluding that, while district court properly found that the attorney-defendant occupied a position of “public trust,” it failed to make findings that the attorney-defendant used his position as an attorney to facilitate the crime, and remanding for that issue to be considered).

¹⁹ U.S.S.G. § 3B1.3; *see also United States v. Downing*, 297 F.3d 52, 64 (2d Cir. 2002).

²⁰ U.S.S.G. § 3B1.3 cmt. n.4.

²¹ *See, e.g., United States v. Maurello*, 76 F.3d 1304, 1314 (3d Cir. 1996) (“defendant’s legal training clearly constitutes a special skill, as lawyering is specifically listed as an example of a special skill in the text of the Guideline”), *superseded on other grounds as stated by United States v. Aronowitz*, 151 F. App’x 193 (3d Cir. 2005); *United States v. Reich*, 479 F.3d 179, 191 (2d Cir. 2007).

²² *See United States v. Harris*, 38 F.3d 95, 99 (2d Cir. 1994) (upholding district court’s imposition of “special skills” enhancement where the defendant, a disbarred attorney, “used lawyering skills instrumental to his [mail and wire fraud] schemes,” including executing a power of attorney, drafting a codicil to a will, and preparing documents for others to execute); *United States v. Nawaz*, 555 F. App’x 19, 28–29 (2d Cir. 2014) (concluding that the enhancement applied to the defendant, a disbarred attorney who held himself acted as a practicing attorney, served as the closing attorney for a number of the scheme’s fraudulent real estate transactions and used his legal expertise to counsel co-conspirators on how to handle inquiries by lenders that could have disrupted the scheme); *Maurello*, 76 F.3d at 1315

Thus, in practice, whether the “special skill” enhancement applies generally turns not on whether a defendant who has legal training or is an attorney has a special skill, but on whether the defendant used those legal skills to commit the crime or to avoid detection, which is necessarily a fact-intensive analysis.²³ In cases where the special-skill enhancement has been found applicable, courts have focused on attorney-defendants’ use of their legal training, such as drafting legal documents, and their knowledge of the legal system, such as relationships with other attorneys, or prior experience as a defense attorney or prosecutor.²⁴ Because the analysis is fact-specific, however, courts have sometimes found the enhancement did not apply even where legal skills or knowledge had some role in the offense.²⁵

(upholding district court’s application of the enhancement to the defendant, an unlicensed lawyer convicted of mail fraud, because he used his “education and experiences . . . to successfully portray himself to his clients, adversaries, and the courts as a knowledgeable attorney” and “to facilitate his fraudulent scheme and to avoid detection”).

²³ *United States v. Thorn*, 446 F.3d 378, 388 (2d Cir. 2006) (“The determination of whether a defendant utilized a position of trust or special skill in a manner that significantly facilitated the commission or concealment of the offense is a question of fact reviewed for clear error.”).

²⁴ *See, e.g., United States v. Sampson*, 898 F.3d 287, 313 (2d Cir. 2018) (upholding district court’s decision that the enhancement applied because the defendant “relied on his skills as an attorney in his endeavors to obstruct justice,” including his knowledge of what stage of a criminal investigation witnesses would be identified, what steps the prosecutor’s office was likely to take and which defense attorneys to recommend for co-defendants); *United States v. Naselsky*, 561 F. App’x 155, 161–62 (3d Cir. 2014) (upholding district court’s application of the enhancement to a defendant who used his skills as an experienced real estate attorney to set up certain transactions and charge fees for those transactions in furtherance of tax and wire fraud scheme); *United States v. Kubick*, 205 F.3d 1117, 1125 (9th Cir. 1999) (holding enhancement properly applied where defendant’s expertise as an attorney allowed “easily and inconspicuously to create shell corporations so that [the defendant] could deceive the bankruptcy court by secreting assets” in furtherance of a criminal scheme).

²⁵ *Compare United States v. Hemmingson*, 157 F.3d 347, 359–60 (5th Cir. 1998) (holding district court did not clearly err in concluding that the defendant did not employ his legal skills in committing his crimes, because although the defendant “drafted an engagement letter, he copied much of it

In keeping with the language of the Guidelines, courts have also found the enhancement applicable when attorney-defendants used their legal skills solely to seek to obstruct justice or to conceal crimes, and not in the commission of the underlying offenses themselves, “because the dispositive question is simply whether [the defendant’s] ‘special skills increase[d] his chances of succeeding or of avoiding detection.’”²⁶ Similarly, courts have concluded that, when attorney-defendants are charged with conspiracies to commit crimes, and attempt or intend to use their legal skills in furtherance of the conspiracies, but are ultimately unsuccessful, the enhancement still applies.²⁷

C. Policy statements

Finally, the Guidelines provide that attorney-defendants should not receive any downward departure based on their education,

from a standard form” and the defendant’s limited use of his legal skills did not “‘significantly facilitate’ the offense”), *and* *United States v. Weisberg*, 297 F. App’x 513, 515–17 (6th Cir. 2008) (holding district court did not err by declining to apply the enhancement to a defendant who used an attorney escrow account to hide funds in connection with a scheme to evade taxes because the defendant’s use of the account was incidental to the crime and no different than the use of any other type of account to hide funds), *with* *United States v. Ross*, 190 F.3d 446, 454 (6th Cir. 1999) (rejecting defendant’s argument that the enhancement should not apply because he used his legal skills to draft “real estate papers[, which] are regularly prepared by people who are not attorneys”), *and* *Sampson*, 898 F.3d at 313 (“that Sampson’s offenses did not directly relate to his status as an attorney and could have been committed by a layperson is immaterial’ (internal quotation marks omitted)).

²⁶ *Sampson*, 898 F.3d at 313 (alteration in original).

²⁷ *See, e.g.*, *United States v. Tucci-Jarraf*, 939 F.3d 790, 797 (6th Cir. 2019) (concluding that the enhancement applied to an attorney-defendant who held herself out as an attorney and used “legal jargon and official-looking documents” to help further a fraud scheme, even if those actions were not ultimately persuasive); *United States v. White*, 972 F.2d 590, 601 (5th Cir. 1992) (concluding that the enhancement applied to an attorney-defendant who used his prior experience as a prosecutor and defense attorney to trade legal skills for drugs, speak confidentially with an individual to arrange a drug transfer and to avoid detection and apprehension, even when the attorney-defendant was the target of a sting operation and the “criminal enterprise was doomed from the outset”).

employment record, socioeconomic status, or charitable works.²⁸ As discussed below, while attorney-defendants often raise these factors in the context of the section 3553(a) analysis, courts have been reluctant to give them much weight.

III. Section 3553(a) analysis for attorney-defendants

In addition to the Guidelines provisions discussed above, certain common arguments or issues often arise for attorney-defendants in the context of the section 3553(a) analysis.

A. Complexity and rationality of crime

Courts have recognized that white-collar offenses tend to be economically driven, deliberative, and complex, and thus are “prime candidates for general deterrence.”²⁹

²⁸ See 28 U.S.C. § 994(d) (requiring the Guidelines to be “entirely neutral as to the . . . socioeconomic status of offenders”); U.S.S.G. §§ 5H1.2 (“Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted. . . .”), 5H1.5 (“Employment record is not ordinarily relevant in determining whether a departure is warranted.”), 5H1.10 (socio-economic status is “not relevant in the determination of a sentence”), 5H1.11 (“Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”).

²⁹ *United States v. Warner*, 792 F.3d 847, 860 (7th Cir. 2015); see also *United States v. Musgrave*, 761 F.3d 602, 609 (6th Cir. 2014) (“Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence.” (internal quotation marks omitted)); *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (same); *United States v. Brown*, 880 F.3d 399, 405 (7th Cir. 2018) (concluding that district court did not err in concluding that a high sentence was needed to meet the goal of general deterrence because white-collar criminals like the defendant tended to “engage in cost-benefit analyses in deciding whether to engage in illicit activities,” and those who engage in complex fraud crimes have “a low probability of getting caught”); cf. *United States v. Goffer*, 721 F.3d 113, 132 (2d Cir. 2013) (noting that “high sentences” were necessary to alter the calculus “that insider trading ‘was a game worth playing.’”).

These same factors are often present in cases involving attorney-defendants, whose crimes are generally calculated and sophisticated and whose use of legal acumen makes their crimes difficult to detect, resulting in an increased need for the resulting sentence to send a message to other members of the bar who might be tempted to similarly engage in criminal activity. As one court observed with respect to the sentencing of an attorney-defendant:

General deterrence was the dominant consideration in the [this] sentencing. What happened to [the attorney-defendant] was important in terms of the message it conveyed to the bar and to the public about the bar. [He] crossed the forbidden boundary between the practice of law and the practice of crime. The result in his case must serve as a beacon to lawyers to be ever vigilant not to cross the line between acting as a lawyer on behalf of persons accused of criminal conduct and helping criminals commit crimes.³⁰

³⁰ *United States v. Morris*, 837 F. Supp. 726, 729–30 (E.D. Va. 1993); *see also* *United States v. Davis*, No. 08 Cr. 332, 2010 WL 1221709, at *2 (E.D.N.Y. Mar. 29, 2010) (“But the seriousness of the offense, and the fact that defendant was a member of the bar, cannot be overlooked. For purposes of general deterrence the court bears a responsibility to the public and to the bar to impose a sentence of imprisonment in addition to the other consequences defendant will suffer, such as discipline or disbarment.”); *United States v. McCord*, No. 13 Cr. 59, 2014 WL 2881395, at *6–7 (S.D. Ohio June 25, 2014) (finding that general deterrence was an important sentencing consideration for an attorney-defendant who committed tax fraud and observing that general deterrence has “persuasive power in the white-collar crime arena where defendants are genuinely scared of incarceration”); Sent’g Transcript at 55, *United States v. Flom*, No. 14 Cr. 507 (E.D.N.Y. July 28, 2017), Dkt. No. 112 (“[L]awyers need to be deterred when they abuse their license, their skill, their position of trust, to help fraudsters carry out their fraud. . . . [F]raud is hard enough to detect, it’s even harder when a lawyer is willing to abuse his position of trust to shield that fraud from detection, the crime is exacerbated when a defendant uses his appearance of trust to lure people to [it].”).

B. Impact of loss of reputation and license

Attorneys who commit white-collar offenses, like other white-collar offenders, often argue that they deserve a lower sentence because they lost a lucrative career or a professional license and face lasting reputational and/or financial harm. These arguments, generally, do not get much traction with courts.

As an initial matter, such arguments are in tension with the Guidelines, and the policies underlying them, as noted above.³¹ Courts uniformly agree.³²

The same arguments, and courts' rejection of them, have occurred in cases involving attorneys. As the Tenth Circuit observed in finding that a district court had improperly considered "collateral consequences" in its section 3553(a) analysis for an attorney-defendant:

³¹ See 28 U.S.C. § 994(d) (requiring the Guidelines to be "entirely neutral as to the . . . socioeconomic status of offenders"); U.S.S.G. §§ 5H1.2 ("Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted"), 5H1.5 ("Employment record is not ordinarily relevant in determining whether a departure is warranted."), 5H1.10 (socio-economic status is "not relevant in the determination of a sentence"); see also *United States v. Kuhlman*, 711 F.3d 1321, 1329 (11th Cir. 2013) ("The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status.").

³² See, e.g., *United States v. Prospero*, 686 F.3d 32, 47 (1st Cir. 2012) ("It is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater reputational harm or have more to lose by conviction."); *United States v. Bistline*, 665 F.3d 758, 760 (6th Cir. 2012) ("[W]e do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose."); *United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cir. 1999) ("Business criminals are not to be treated more leniently than members of the 'criminal class' just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity. It is natural for judges, drawn as they (as we) are from the middle or upper-middle class, to sympathize with criminals drawn from the same class. But in this instance we must fight our nature. Criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime.").

By considering [the defendant's] loss of law license, [among other things], the court impermissibly focused on the collateral consequences of [the defendant's] prosecution and conviction. But § 3553(a)(2)(A) requires '*the sentence* imposed . . . to reflect the seriousness of his offense.' (Emphasis added). None of these collateral consequences are properly included in [the] sentence. They impermissibly favor criminals, like [this defendant], with privileged backgrounds. And, paradoxically, in this case they favor a popular politician who corruptly sold influence, not only violating the law but also betraying solemn obligations and the public's trust, and who misused his license to practice law in concealing the bribes.³³

Indeed, courts generally not only reject arguments for leniency made by attorney-defendants who point to the loss of their reputation and license but also frequently impose longer sentences precisely because an attorney-defendants abused their licenses.³⁴

C. Charitable donations and community work

Attorneys who commit white-collar offenses, like other white-collar offenders, also often argue that they deserve a lower sentence because they previously made charitable donations or engaged in pro bono or other community work. And like other white-collar offenders, unless these donations or work are atypically extensive or otherwise materially probative of the defendant's character, these arguments, generally, do not get much traction with courts.

As an initial matter, again, such arguments are in tension with the Guidelines, and the policies underlying them.³⁵ Indeed, courts have

³³ United States v. Morgan, 635 F. App'x 423, 445–46 (10th Cir. 2015).

³⁴ See, e.g., United States v. Orozco Mendez, 371 F. App'x 159, 161 (2d Cir. 2010) ("When a lawyer uses his status and privileges as a lawyer to facilitate a crime, it 'compounds the gravity of his crime.'" (quoting United States v. Stewart, 590 F.3d 93, 150 (2d Cir. 2009)) (alterations incorporated)).

³⁵ See 28 U.S.C. § 994(d) (requiring the Guidelines to be "entirely neutral as to the . . . socioeconomic status of offenders"); U.S.S.G. §§ 5H1.5 ("Employment record is not ordinarily relevant in determining whether a departure is warranted."), 5H1.11 ("Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.").

explained that reflexively accepting the argument that a white-collar or wealthy defendant who engaged in charity or community work deserves a lower sentence ignores that “more is expected” of those “who enjoy sufficient income and community status so that they have the opportunities to engage in charitable and benevolent activities.”³⁶

And again, the same arguments, and courts’ rejection of them, have occurred in cases involving attorneys. In *United States v. Fishman*,³⁷ for example, the court rejected a request for a downward departure based on the attorney-defendant’s charitable and civic activities. At the sentencing proceeding, the court explained:

[W]hite collar offenders, because of their greater wealth and leadership in the community, enjoy much greater

³⁶ *United States v. Cooper*, 394 F.3d 172 (3d Cir. 2005) (cleaned up); *see also*, *e.g.*, *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004) (“It is hardly surprising that a corporate executive like [the defendant] is better situated to make large financial contributions than someone for whom the expenses of day-to-day life are more pressing; indeed, business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities. Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot.”), *vacated on other grounds*, 543 U.S. 1097 (2005); *United States v. Kohlbach*, 38 F.3d 832, 838 (6th Cir. 1994) (vacating a good works departure because “it is *usual* and *ordinary*, in the prosecution of similar white collar crimes involving high-ranking corporate executives . . . to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts”); *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990) (“[T]o allow any affluent offender to point to the good his money has performed . . . suggests that a successful criminal defendant need only write out a few checks to charities and then indignantly demand that his sentence be reduced. The very idea of such purchases of lower sentences is unsavory[.]”); *cf.*, *e.g.*, *United States v. Davis*, 182 F. App’x 741, 743–44 (9th Cir. 2006) (“Many of [the defendant’s] acts amounted to monetary contributions that were unremarkable for a person of his resources and station in life. A significant number of the other activities [the defendant] describes are those that he would have undertaken in the normal course of his career as a medical doctor, and are therefore not exceptional, either.”) (cleaned up); *United States v. Crouse*, 145 F.3d 786, 792 (6th Cir. 1998) (no downward departure warranted where a defendant’s “community works,” while “significant,” are “not unusual for a prominent businessman”).

³⁷ 631 F. Supp. 2d 399 (S.D.N.Y. 2009).

opportunities to participate and rise to prominence in charitable activities, and also possess the means to contribute resources with larger generosity to community service organizations. These social and economic advantages could enable them to gain a substantial edge over blue collar offenders who cannot make claim to comparable means and opportunities with which to mitigate the full impact of a heavy sentence.³⁸

The court further noted “that cases arise in which a defendant commits serious crimes and then begs for leniency under circumstances such as those presented here, and thus uses his good name and good works—again at least to some degree—as both sword and shield, the mask of piety he wears is but the face that previously disarmed his victims, and his front of charity merely the human shield he raises to seek immunity or dramatic mitigation of punishment when he is caught.”³⁹

This is not to say that charitable or community work may not be considered or is never relevant. Rather, courts may consider such work under section 3553(a), as the court in *Fishman* did,⁴⁰ and consistent with the language of the applicable policy statement, U.S.S.G. § 5H1.11, where such work is atypically extensive or otherwise materially probative of the defendant’s character, courts have found that it may militate in favor of a lower sentence.⁴¹

IV. Conclusion

In sum, in the case of a defendant who is an attorney, the key Guidelines consideration is the abuse-of-trust/special-skill enhancement, which will apply if the defendant’s crime directly

³⁸ *Id.* at 403.

³⁹ *Id.*

⁴⁰ *Id.* at 404.

⁴¹ *See, e.g., Warner*, 792 F.3d at 859 (“The district court looked behind the numbers to [the defendant’s] character and found him to be a genuinely benevolent person. A non-wealthy defendant who showed similar qualities would be entitled to similar treatment (all else being equal). And a rich defendant who gave large gifts without real concern for others, or who did so cynically to give himself an argument at sentencing, would not deserve the same leniency.”).

harmed his or her own clients or if the defendant used his or her legal skills to facilitate the crime, and may apply in other circumstances depending on the facts of the case and the law of the relevant circuit. With respect to the section 3553(a) factors, courts have tended to find compelling the need for the sentence imposed to afford general and specific deterrence when attorney-defendants have used their specialized knowledge and training to evade the law, and have tended to find less compelling arguments that attorney-defendants—who often occupy a privileged position in their communities as a result of their profession—should be afforded increased leniency because they may have used that privileged position to engage in charitable works as well as committing crimes, or because those crimes may result in the loss of that privileged position.

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The Uncertain Role of 18 U.S.C. § 3742 in Sentence-Modification Appeals: Lessons from the Sixth Circuit

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I. Introduction

When an appellate court reviews a ruling on a motion to modify an otherwise-final sentence, what role, if any, is played by 18 U.S.C. § 3742, “[t]he statute that governs appeals of criminal sentences”?¹ That question would seem to be fundamental to the resolution of such appeals and indeed may go to the heart of a court’s jurisdiction. Yet, circuits have struggled to answer it clearly and consistently, despite resolving huge numbers of sentence-modification appeals in recent years.

This article focuses on the Sixth Circuit’s attempts to address the nature, scope, and meaning of section 3742(a), which, among other things, authorizes defendants to appeal any sentence “imposed in violation of law.”² As set out below, the Sixth Circuit’s understanding of the statute has shifted dramatically in recent years—first viewing it as a jurisdictional statute, applicable to both grants and denials, that precludes review for *Booker*-style reasonableness;³ and now viewing it as a claim-processing rule, inapplicable to denials, that incorporates review at least roughly resembling *Booker*-style reasonableness. And while the practical impact of this shift remains to be seen, the framework for evaluating sentence-modification appeals looks very different in the Sixth Circuit today than it did a decade ago.

¹ *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017).

² 18 U.S.C. § 3742(a)(1).

³ *United States v. Booker*, 543 U.S. 220 (2005) (making the sentencing guidelines advisory).

II. Recurring questions in sentence-modification appeals

Sentencing has been described as “the most solemn part of the criminal process”⁴ and “one of the weightiest and most difficult responsibilities of a trial judge.”⁵ In part, this may be because of the decision’s finality: In a system without parole, once a sentence is imposed—and particularly once it is affirmed on appeal—it generally cannot be modified unless a narrow statutory exception applies.⁶

Cases involving one of these narrow exceptions to the rule of finality typically arrive in a steady trickle—a Rule 35(b) motion here, a motion for early termination of supervised release there.⁷

Occasionally, however, the trickle becomes a torrent. And over recent years, courts have seen several overlapping torrents: The Sentencing Commission promulgated two retroactively applicable amendments to the Sentencing Guidelines, authorizing motions under 18 U.S.C. § 3582(c)(2);⁸ Congress enacted section 404 of the First Step Act of 2018, making sections 2 and 3 of the Fair Sentencing Act of 2010 retroactive, thereby authorizing motions under section 3582(c)(1)(B);⁹ and Congress extended to prisoners the right to seek compassionate release directly from the district court, which—when combined with a historic global pandemic—produced “an unprecedented surge” of motions under section 3582(c)(1)(A).¹⁰

Together, these developments have resulted in tens of thousands of motions filed in district courts in recent years by prisoners seeking modifications of otherwise-final sentences. For example, in fiscal years 2015 and 2016, district courts granted nearly 30,000 motions under 18 U.S.C. § 3582(c)(2).¹¹ And between 2019 and 2020, district courts

⁴ *United States v. Cunningham*, 883 F.3d 690, 701 (7th Cir. 2018).

⁵ *Virgin Islands v. Mills*, 935 F.2d 591, 597 (3d Cir. 1991).

⁶ *See* 18 U.S.C. § 3582(c).

⁷ *See* Fed. R. Crim. P. 35(b); 18 U.S.C. § 3583(e)(1).

⁸ *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (U.S. SENT’G COMM’N 2018) [hereinafter U.S.S.G.]; U.S.S.G. app. C, amend. 782 (Supp. 2018).

⁹ *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

¹⁰ *See* First Step Act of 2018, § 603, 132 Stat. at 5239; *United States v. Jones*, 980 F.3d 1098, 1101 n.1 (6th Cir. 2020).

¹¹ *See* U.S. SENT’G COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 62, <https://www.ussc.gov/sites/default/files/pdf/research->

granted over 3,500 motions under section 404 and thousands more for compassionate release.¹² And these figures reflect only motions that were *granted*; the total number of cases involving sentence-modification motions is far higher. For example, nearly 13,000 compassionate-release motions were filed in calendar year 2020 alone.¹³

Defendants whose motions were either granted in part or denied outright have also appealed these decisions by the thousands. Yet, despite the recent volume of sentence-modification appeals, the circuits remain uncertain about fundamental questions of appellate review in this area generally and the application of 18 U.S.C. § 3742(a) specifically.

That subsection states:

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law; [or]
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or

and-publications/annual-reports-and-sourcebooks/2015/Table62.pdf (recording 21,576 motions granted under section 3582(c)(2)); U.S. SENT’G COMM’N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 62, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table62.pdf> (recording 8,015 motions granted under section 3582(c)(2)).

¹² U.S. SENT’G COMM’N, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE R, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/TableR.pdf> (recording 2,166 motions granted under section 404); U.S. SENT’G COMM’N, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE R, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableR.pdf> (recording 1,410 motions granted under section 404 and 1,662 motions granted for compassionate release).

¹³); U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEAR 2020, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210714-Compassionate-Release.pdf>.

(3) is greater than the sentence specified in the applicable guideline range . . . ; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.¹⁴

Three questions about this subsection—about its nature, scope, and meaning—have proved particularly vexing.

First, regarding the statute’s nature, does section 3742 govern the court’s jurisdiction, or is it simply a claim-processing rule? Although the question may seem to be of largely theoretical interest, its answer can have profound practical effects. In particular, if the statute is non-jurisdictional in nature, the subsidiary questions about its scope and meaning can often be avoided, especially if the parties decline to raise the issue.

Second, regarding the statute’s scope, does section 3742(a) apply at all when a defendant appeals from the *denial* of a sentence-modification motion? On one hand, no new sentence has been “imposed,” as the statute requires? On the other hand, denying the motion could be seen as re-imposing the original sentence. Furthermore, if the statute doesn’t apply to denials—because, as properly understood, no sentence has been “imposed”—does that mean that the defendant automatically loses on appeal because he can’t show a statutorily prescribed basis for reversal? Or does it mean that he’s freed from the strictures of section 3742(a) and can obtain reversal on grounds beyond the four statutorily enumerated bases?

Third, regarding the statute’s meaning, what sorts of claims present a cognizable “violation of law” within the meaning of section 3742(a)(1)? Does a defendant raise a cognizable violation of law by asserting that the district court’s decision was procedurally or substantively unreasonable within the meaning of cases like *Booker*, *Rita*, and *Gall*?¹⁵

As one appellate court recently noted, the circuits have been “confounded by these issues,” producing many different answers over the years.¹⁶ This article traces the efforts of one court, the Sixth

¹⁴ 18 U.S.C. § 3742(a).

¹⁵ See *Booker*, 543 U.S. 220; *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

¹⁶ *United States v. Doe*, 932 F.3d 279, 282 n.2 (5th Cir. 2019); see also *United States v. Long*, 997 F.3d 342, 350 (D.C. Cir. 2021) (noting, in a compassionate-release appeal, that “[t]he source of our appellate jurisdiction

Circuit, to answer these questions, particularly focusing on the ways those answers changed between 2010 and 2020.

III. The Sixth Circuit's shifting understanding of section 3742(a)'s nature, scope, and meaning

A. The era of *United States v. Bowers*

The Sixth Circuit's first extended foray into these topics came in 2010, in *United States v. Bowers*.¹⁷ In 2000, Anthony Bowers received a below-Guidelines sentence of 262 months' imprisonment.¹⁸ Several years later, the government moved under Rule 35(b) to reduce his sentence based on substantial assistance, and Bowers separately moved under 18 U.S.C. § 3582(c)(2) to reduce his sentence based on Guidelines Amendments 706 and 713, which retroactively lowered the offense level for crimes involving crack cocaine.¹⁹ After a two-day hearing, the district court denied both motions and left the 262-month sentence in place, based largely on its finding that Bowers participated in an assault on a fellow inmate (an assault that Bowers denied).²⁰

Bowers appealed, disputing the district court's factual findings about the assault and arguing "that, for various policy-oriented reasons, the denial of a sentence reduction was 'unreasonable' and the re-imposed sentence 'is substantially longer than a sentence that would be sufficient, but not greater than necessary, to comply with' the 18 U.S.C. § 3553(a) factors."²¹ In a lengthy opinion, the Sixth Circuit rejected Bowers's arguments and dismissed the appeal for lack

is an open question in this circuit," and that "[o]ther courts that have heard appeals from denials of compassionate release have not yet engaged with the jurisdictional question at any length," with some "not address[ing] jurisdiction at all").

¹⁷ 615 F.3d 715 (6th Cir. 2010). See generally Sarah E. Welch, Comment, *Reviewing Leniency: Appealability of 18 U.S.C. § 3582(c)(2) Sentence Modification Motions*, 85 U. CHI. L. REV. 1269 (2018).

¹⁸ *Bowers*, 615 F.3d at 717.

¹⁹ *Id.*

²⁰ *Id.* at 717–18.

²¹ *Id.* at 723.

of jurisdiction.²² In so doing, the court offered an extended analysis of section 3742(a)'s nature, scope, and meaning.

1. The statute's nature: Section 3742(a) is the exclusive basis for the court's jurisdiction

Based on then-applicable circuit precedent,²³ the government argued that the court lacked jurisdiction over the portion of the appeal related to the denial of the Rule 35(b) motion, but it “d[id] not challenge [the court’s] jurisdiction to hear Bowers’s appeal of the district court’s § 3582(c)(2) determination.”²⁴ Nevertheless, because “subject-matter limitations on federal jurisdiction must be policed by the courts on their own initiative,” the Sixth Circuit analyzed whether the same principles applied.²⁵

The court started from two seemingly uncontroversial premises. First, that “[c]riminal defendants enjoy no constitutional right to appeal their convictions,” and so “in order to appeal one must come within the terms of some applicable statute.”²⁶ Second, that there were two potential statutory bases for appellate jurisdiction: 28 U.S.C. § 1291, which gives the courts of appeals “jurisdiction of appeals from all final decisions of the district courts of the United States,” and 18 U.S.C. § 3742, which, as the *Bowers* court summarized it, “authorizes us to hear a defendant’s appeal of an ‘otherwise final sentence’ in only four specified situations.”²⁷

The question then became how these two purportedly jurisdictional statutes interacted with each other in the context of sentence-modification appeals: Could they coexist, or did one necessarily displace the other? And if one displaced the other, should a court rely on the principle that the specific displaces the general (suggesting that section 3742 governs) or the principle that repeals by implication are disfavored (suggesting that section 1291—which long preexisted section 3742—governs)?²⁸

²² *Id.* at 728.

²³ *See* *United States v. Moran*, 325 F.3d 790, 793 (6th Cir. 2003).

²⁴ *Bowers*, 615 F.3d at 718.

²⁵ *Id.* (quoting *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)) (cleaned up).

²⁶ *Id.* (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977) (cleaned up)).

²⁷ *Id.*

²⁸ *See* *Welch*, *supra* note 17 (discussing how various circuits have attempted to answer these questions).

In answering these questions, the *Bowers* court largely relied on circuit precedent concerning Rule 35(b) appeals, which it found to be materially indistinguishable, treating section 3742 as the exclusive source for jurisdiction in that area.²⁹ The court also reasoned that, because section 3742 was intended to “tightly circumscribe[]” the court’s jurisdiction to hear sentencing appeals, it followed that “a criminal defendant may not invoke the broad grant of appellate jurisdiction found in § 1291 to circumvent” those limitations.³⁰ The court accordingly held that its “jurisdiction to consider the appeal of a § 3582(c)(2) determination, like [its] jurisdiction to consider the appeal of a Rule 35(b) determination, must come from § 3742.”³¹

2. The statute’s scope: Section 3742(a) applies equally to grants and denials of sentence-modification motions

In a footnote, the court acknowledged that “one might question whether this reasoning applies to a district court’s decision to *deny* a Rule 35(b) motion outright, which arguably does not ‘effectively impose a *new* sentence.’”³² Again relying on circuit precedent, however, the court brushed that objection aside, concluding that “the outright denial of a Rule 35(b) motion effectively reimposes the defendant’s original sentence,” and “nothing in § 3742 . . . requires that a sentence be ‘new’ to fall within that section’s ambit.”³³

Implicit in *Bowers*’s reasoning is the view that a contrary rule—holding that section 3742(a) applies when the defendant’s motion has been granted, but not when it has been denied—would allow some defendants to avoid the strictures of section 3742(a) in apparent contravention of Congress’s intent to make that statute the sole basis for reviewing all sentencing decisions. Thus, even though *Bowers* appealed from the *denial* of both motions, and not the imposition of a new sentence, the court found that section 3742 governed the exercise of its jurisdiction.

²⁹ *Bowers*, 615 F.3d at 722 (citing *Moran*, 325 F.3d at 793).

³⁰ *Id.* at 719 (quoting *United States v. Hartwell*, 448 F.3d 707, 712 (4th Cir. 2006) (cleaned up)).

³¹ *Id.* at 722.

³² *Id.* at 719 n.4 (cleaned up).

³³ *Id.*

3. The statute’s meaning: a claim of *Booker* unreasonableness is not a “violation of law”

If *Bowers* had been limited to the first two topics—section 3742’s nature and scope—its significance would be fairly limited, since the result would have been to treat sentence-modification appeals just like appeals following original plenary sentencing. After all, as *Bowers* noted, “the federal courts are in agreement that § 3742 is now ‘the exclusive avenue through which a party can appeal a sentence’ imposed as the result of a run-of-the-mill plenary sentencing proceeding following a conviction.”³⁴ The widespread agreement on this point was neither surprising nor particularly consequential given that every original sentencing hearing results in the imposition of a sentence for purposes of section 3742, as well as the entry of a final judgment for purposes of section 1291.³⁵

When it came to interpreting the phrase “in violation of law,” however, *Bowers* introduced a significant divergence between original-sentencing appeals and sentence-modification appeals. Specifically, *Bowers* held that, although *Booker*, *Rita*, and *Gall* introduced reasonableness review as the standard governing original-sentencing appeals, that standard did not apply to sentence-modification appeals.³⁶ Thus, while a defendant in an original-sentencing appeal could show a cognizable “violation of law” by showing that his sentence was procedurally or substantively unreasonable, a defendant in a sentence-modification appeal could *not* show a cognizable “violation of law” by demonstrating, for example, that the district court failed to provide an adequate explanation for its decision or gave an unreasonable amount of weight to one of the section 3553(a) factors.³⁷ This conclusion followed, *Bowers* reasoned, from the Supreme Court’s holding in *Dillon* that “proceedings under [section 3582(c)(2)] do not implicate the interests identified in *Booker*,” since these limited, non-constitutionally compelled proceedings “do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.”³⁸

³⁴ *Id.* at 719.

³⁵ *See, e.g.*, 18 U.S.C. § 3582(b) (“[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment . . .”).

³⁶ *Bowers*, 625 F.3d at 727–28.

³⁷ *Id.*

³⁸ *Id.* at 727 (quoting *Dillon v. United States*, 560 U.S. 817, 828 (2010)).

Bowers allowed for the possibility that a defendant could “continue to appeal district-court determinations in sentence-reduction proceedings to the extent they allege ‘violation[s] of law’ not premised on *Booker* and its progeny,”³⁹ such as when the district court misunderstood the scope of its discretion or relied on “wholly improper factors’ in its analysis.”⁴⁰ And indeed these exceptions provided a basis for numerous appeals involving errors allegedly made at “step one” of the *Dillon* framework, concerning legal eligibility for a reduced sentence under section 3582(c)(2).⁴¹ But when a district court found a prisoner to be legally eligible for a reduced sentence and then, as an exercise of its discretion, denied the motion outright or granted a smaller reduction than the law allowed, a defendant had little to no pathway to reversal in the Sixth Circuit.

B. *United States v. Marshall* and the efforts to reconsider *Bowers*

Although no other circuit agreed with all three aspects of *Bowers*’s reasoning,⁴² its framework held sway in the Sixth Circuit for roughly the next decade, with the Supreme Court frequently denying certiorari in cases seeking to overturn it.⁴³ The result was regular jurisdictional dismissals of defense appeals in section 3582(c)(2) cases alleging, for example, that the district court “failed to provide a ‘reasoned basis’” for its decision,⁴⁴ “relied on clearly erroneous facts,”⁴⁵

³⁹ *Id.* at 728 n.14 (alteration in original).

⁴⁰ *Id.* at 724 n.9.

⁴¹ *See, e.g.*, *United States v. Webb*, 760 F.3d 513 (6th Cir. 2014); *United States v. Taylor*, 749 F.3d 541 (6th Cir. 2014); *United States v. McClain*, 691 F.3d 774 (6th Cir. 2012).

⁴² *See, e.g.*, *United States v. Calton*, 900 F.3d 706, 712 (5th Cir. 2018) (collecting cases); *United States v. Rodriguez*, 855 F.3d 526, 530 (3d Cir. 2017) (“No Circuit has followed [*Bowers*].”); *Welch*, *supra* note 17.

⁴³ *See, e.g.*, *Reid v. United States*, 139 S. Ct. 1320 (2019); *Bautista v. United States*, 138 S. Ct. 979 (2018).

⁴⁴ *United States v. Reid*, 888 F.3d 256, 258 (6th Cir. 2018).

⁴⁵ *United States v. Turner*, 797 F. App’x 226, 229 (6th Cir. 2019) (not precedential), *vacated on other grounds*, 2020 WL 4578575 (6th Cir. Apr. 22, 2020) (order vacating panel opinion following the defendant’s death).

“failed to analyze the [18 U.S.C.] § 3553(a) factors,”⁴⁶ “gave an unreasonable amount of weight to certain factors,”⁴⁷ or “add[ed] a new factor” beyond those authorized by section 3553(a).⁴⁸

In a series of decisions in 2020 and 2021, however, the Sixth Circuit began reconsidering all three aspects of *Bowers*’s holdings. As discussed below, many of these decisions arose in the context of cases brought under the First Step Act—whether under section 404 or under the expanded procedure for seeking compassionate release. But the most consequential reconsideration of *Bowers* came in a seemingly simple case involving an appeal from the denial of a motion for early termination of supervised release.

1. The statute’s nature reconsidered: Section 3742(a) as a claim-processing rule

In *United States v. Marshall*, the defendant filed an unopposed motion for early termination of supervised release with support from the Probation Office.⁴⁹ The district court denied the motion, reasoning that Marshall had completed only a small percentage of his term and had previously violated the conditions of his release.⁵⁰ Marshall appealed, and the panel initially dismissed the case for lack of jurisdiction under the rationale in *Bowers*.⁵¹

After Marshall filed a petition for rehearing en banc, the panel withdrew its initial opinion and substituted a new one, which repudiated one of the seemingly uncontroversial premises on which *Bowers* was based: That section 3742 was a jurisdictional statute in the first place.⁵² Relying on recent reminders by the Supreme Court—both before and after *Bowers*—to be more precise about the use of the word “jurisdiction,” *Marshall* held that section 3742 was not, in fact,

⁴⁶ *United States v. Black*, 407 F. App’x 892, 895 (6th Cir. 2011) (not precedential).

⁴⁷ *United States v. Miller*, 697 F. App’x 842, 843 (6th Cir. 2017) (per curiam) (not precedential).

⁴⁸ *United States v. Bautista*, 699 F. App’x 449, 451 (6th Cir. 2017) (not precedential).

⁴⁹ *United States v. Marshall (Marshall II)*, 954 F.3d 823, 824–25 (6th Cir. 2020).

⁵⁰ *Id.* at 825.

⁵¹ *United States v. Marshall (Marshall I)*, 949 F.3d 262 (6th Cir. 2020), *amended and superseded by* 954 F.3d 823 (6th Cir. 2020).

⁵² *Marshall II*, 954 F.3d at 826–29.

“a subject-matter jurisdiction limit on our power” at all.⁵³ Instead, *Marshall* concluded that “*Bowers* is best read as confining our power to grant certain types of relief in sentencing appeals, not as confining our subject-matter jurisdiction over them.”⁵⁴ Thus, jurisdiction over appeals from final orders disposing of sentence-modification motions comes from section 1291, *Marshall* concluded, just as several other circuits had previously held.⁵⁵

The full consequences of this holding remain to be seen. As courts continue to narrow the category of rules that are truly jurisdictional, new questions may arise. For example, is every non-jurisdictional rule a mere claim-processing rule, or are there other non-jurisdictional categories, such as “mandatory limit[s] on [a court’s] authority to grant a certain form of relief,” as *Marshall* seems to suggest?⁵⁶ More to the point, can courts treat all non-jurisdictional rules as waivable or forfeitable, regardless of whether they’re procedural or substantive in nature? Is a party’s failure to note that its opponent missed a filing deadline materially indistinguishable from a party’s failure to note that no statute authorizes the court to grant the relief that its opponent requests?

Whatever the answers to these questions may be, the Sixth Circuit has interpreted *Marshall* to mean that section 3742 is now a claim-processing rule.⁵⁷ This has had significant practical consequences since the statute is now treated as subject to normal rules of waiver and forfeiture and need not be raised by the court sua sponte.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 826 (“More often than not, the Court has explained, what might seem to be a limit on our subject-matter jurisdiction amounts to a ‘mandatory claim-processing rule’ or a mandatory limit on our authority to grant a certain form of relief.”) (emphasis added).

⁵⁷ *See, e.g.*, *United States v. Smith*, 958 F.3d 494, 500 (6th Cir. 2020) (“[W]e have recently clarified that although *Bowers* spoke in ‘jurisdictional’ terms, § 3742(a) is really what we would now consider a mandatory claim-processing rule.” (citing *Marshall II*, 954 F.3d at 826–29)).

⁵⁸ *See, e.g.*, *United States v. Smithers*, 960 F.3d 339, 343–44 (6th Cir. 2020) (“The United States raises no claim that § 3742(a) limits our ability to consider Smithers’s [section 404] appeal. . . . So we need not decide whether § 3742(a) imposes any limits on a criminal defendant’s appeal of the denial of

Moreover, the court can simply assume away any questions about the statute’s scope and meaning and resolve the case on the merits, which it would not be permitted to do if the statute were still jurisdictional.⁵⁹ And indeed the court has taken that path in several recent decisions.⁶⁰

2. The statute’s scope reconsidered: Section 3742(a) is inapplicable to denials

While *Marshall*’s reconsideration of the statute’s nature made it easier for defendants to invoke the court’s jurisdiction, *Marshall* also alluded to a reconsideration of the statute’s scope that, if accepted, would make it almost impossible for defendants to win reversals when their sentence-modification motions are *denied*. Recall that *Bowers* (building on *Moran*) held that section 3742 applies to both grants and denials on the theory that “the denial of a Rule 35(b) motion effectively reimposes the . . . original sentence.”⁶¹

In *Marshall*, however, the court rejected the premise of *Moran* and *Bowers* out of hand, stating, “Even if one could view modifying a sentence as imposing a new sentence, it makes no sense to say *declining* to modify a sentence ‘imposes’ a sentence.”⁶² An appellate court, therefore, may not “treat the district court’s decision to deny” a sentence-modification motion “as re-imposing [the original] sentence.”⁶³

a motion for a reduced sentence under the First Step Act.”); *United States v. Keefer*, 832 F. App’x 359, 362 (6th Cir. 2020) (not precedential) (“The government makes no argument that appellate review [in compassionate-release cases] should be even more restricted under 18 U.S.C. § 3742(a), so we need not consider the point.”).

⁵⁹ *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93–94 (1998).

⁶⁰ *See, e.g., United States v. Richardson*, 960 F.3d 761, 764–65 (6th Cir. 2020) (per curiam) (“We assume without deciding that we have that authority [to reverse a denied motion on substantive-unreasonableness grounds] because the issue has not been briefed, and Richardson’s substantive-reasonableness claim is in any event without merit.”); *Smithers*, 960 F.3d at 344 (“assum[ing]” that reasonableness review applies and affirming on the merits).

⁶¹ *Bowers*, 615 F.3d at 719 n.4.

⁶² *Marshall II*, 954 F.3d at 830.

⁶³ *Id.*

But what follows from the conclusion that a denial is not equivalent to a reimposition? *Bowers* suggested that this would effectively make it too easy for defendants to appeal, since they could then rely on section 1291's general grant of jurisdiction. *Marshall*, however, suggested the opposite: Far from freeing defendants from section 3742(a)'s grasp, the lack of an "impose[d]" sentence below precludes a defendant from obtaining reversal on appeal.⁶⁴ Under this theory, not only does the defendant have to show that the district court made mistakes amounting to a violation of law, he has to show that "the district court ma[d]e these mistakes while *imposing* a sentence."⁶⁵ A defendant would thus lose on appeal in any case involving a discretionary denial, even if he could show an underlying violation of law. Indeed, the logic of *Marshall* would seem to extend to denials based on legal ineligibility, since any error on that point would not have been made while imposing a sentence. Ultimately, however, the court found that it "need not finally resolve the point today" because the district court did not abuse its discretion or otherwise engage in a violation of law.⁶⁶

After *Marshall*, the Sixth Circuit issued at least two unpublished decisions following this rationale to conclude that "§ 3742(a)(1) does not authorize us to order the relief defendant seeks [since] no sentence was 'imposed' upon him as a result of the district court's denial of his motion," and so the defendant's "appeal does not fit within the narrow class of sentencing appeals for which we may order relief."⁶⁷ In published decisions, however, the court has declined to follow *Marshall's* rationale.

In *United States v. Richardson*, for example, the court noted that because "[t]he district court denied Richardson's request for a lower sentence" and thus "did not 'impose' a new or modified sentence," it followed that section 3742(a) "does not provide the basis or the criteria for reviewing the denial of Richardson's request for a lower

⁶⁴ *Id.* at 829–30.

⁶⁵ *Id.*

⁶⁶ *Id.* at 831.

⁶⁷ *United States v. Hunnicutt*, 807 F. App'x 551, 552–53 (6th Cir. 2020) (not precedential); *see also* *United States v. Cashin*, 822 F. App'x 378, 381 (6th Cir. 2020) (not precedential).

sentence.”⁶⁸ Judge Kethledge expanded on this point in a concurring opinion that began by acknowledging that “[o]ur precedents have sent mixed signals regarding the scope of 18 U.S.C. § 3742.”⁶⁹ Despite these mixed signals, he viewed the statute itself as “clear” and “completely inapposite in a case where the district court *denies* a defendant’s motion to modify his sentence.”⁷⁰ “Thus, when a defendant seeks review of a district court’s denial of a sentence-reduction motion, § 3742 neither limits our ‘jurisdiction’ over the appeal, nor confines our power to grant certain types of relief. Instead, in appeals like this one, § 3742 simply does not apply at all.”⁷¹ In *United States v. Ware*, the court more fully embraced Judge Kethledge’s reasoning, stating that section 3742(a) “does not apply—and therefore does not preclude relief—where a district court denied a defendant’s request for a sentence reduction under the First Step Act.”⁷²

Interpreting section 3742’s scope has proved difficult in part because the language of the statute seems plainly inapplicable to denials, but treating it as inapplicable has the potential to yield puzzling results. For example, if the statute is inapplicable to denials, and its inapplicability largely precludes reversal on appeal, as in *Marshall*, a defendant whose sentence was substantially reduced could seek reversal on appeal, while a defendant who was denied any reduction at all would have no recourse on appeal. Conversely, if the statute is inapplicable to denials and its inapplicability permits the defendant to seek appellate review unencumbered by the strictures of section 3742(a), as in *Richardson*, then a defendant whose sentence was reduced by one day would face a vastly steeper path to reversal than a defendant whose sentence was not reduced. Perhaps a court could avoid those anomalies by saying that the substantive standards of review are identical regardless of whether section 3742(a) applies, such that all defendants are treated the same—whether they received a large reduction, a small reduction, or no reduction at all. But under that approach, courts would pay lip service to the scope and meaning of section 3742 while, in practice, applying the same substantive standards regardless of whether it applies. Given these somewhat

⁶⁸ *Richardson*, 960 F.3d at 764 (per curiam).

⁶⁹ *Id.* at 765 (Kethledge, J., concurring).

⁷⁰ *Id.* at 765–66 (Kethledge, J., concurring).

⁷¹ *Id.* at 766 (Kethledge, J., concurring).

⁷² *United States v. Ware*, 964 F.3d 482, 487 (6th Cir. 2020).

unsatisfying alternatives, it is no wonder that courts have struggled to settle on a consistent interpretation of the statute's scope.

One possible solution—which the Sixth Circuit has not yet considered and no circuit has fully embraced—is that section 3742 is entirely inapplicable to sentence-modification appeals, even when the district court has reduced the defendant's sentence. When courts have found section 3742 to be inapplicable to cases involving denials, they have emphasized important practical and legal “distinction[s] between the imposition of a sentence under Section 3742 and sentence-modification proceedings.”⁷³ Those distinctions have also formed the basis for the conclusion that a sentence-modification proceeding does not require an in-person hearing at which the defendant is present.⁷⁴ In short, a ruling on a motion to reduce an otherwise-final sentence is qualitatively different from the imposition of an original sentence, and so different rules and procedures apply.⁷⁵ Perhaps courts will take that reasoning a step further and conclude that, while section 3742 governs review in original-sentencing appeals, it simply has no role to play at all in sentence-modification appeals. Doing so would ensure that the same substantive standard applies regardless of whether the motion was denied or partially granted below. It would also avoid a legal framework in which courts insist that section 3742 nominally controls whenever applicable while applying the same standards of review regardless.

3. The statute's meaning reconsidered: a “violation of law” includes reasonableness review, or at least something resembling it

As noted above, even under *Bowers*, defendants could always appeal threshold legal questions about eligibility for relief as contemplated by step one of the *Dillon* framework. Unsurprisingly, this rule has also carried over to the context of sentence-modification appeals involving

⁷³ *Long*, 997 F.3d at 351.

⁷⁴ *See, e.g.*, *Dillon v. United States*, 560 U.S. 817, 825–26 (2010); *Smith*, 958 F.3d at 498–99.

⁷⁵ *Id.*

section 404 or compassionate release.⁷⁶ Indeed, most of the published decisions in recent sentence-modification appeals have addressed important threshold legal questions like the meaning of the “as if” clause of section 404,⁷⁷ whether a conviction under 21 U.S.C. § 841(b)(1)(C) is a “covered offense,”⁷⁸ or whether U.S.S.G. § 1B1.13 remains an “applicable” policy statement.⁷⁹

Nevertheless, many appeals involve orders in which the district court found the defendant legally eligible for a sentence reduction but exercised its discretion to deny the motion or to grant a smaller reduction than the defendant requested. In such cases, defendants often argue that the district court’s decision was unreasonable in some way, either because the relevant section 3553(a) factors should have compelled a different outcome or because the court inadequately addressed certain arguments or explained its rationale.

Had the rule of *Bowers* carried over to the context of these sentence-modification appeals, such arguments would have been doomed on the grounds that they did not allege a cognizable violation of law. But the Sixth Circuit reconsidered this aspect of *Bowers* as well, holding in *United States v. Foreman* that “an allegation of unreasonableness in a First Step Act proceeding constitutes a cognizable ‘violation of law’ that is reviewable under § 3742(a)(1).”⁸⁰ Although the court has not used precisely this language in the context of compassionate-release appeals, it has generally incorporated the standards of reasonableness review into those decisions as well.⁸¹

Although the court has thus made clear that review in sentence-modification appeals incorporates some form of reasonableness review, it has not fully decided the extent to which this form of reasonableness review *mirrors*, or instead merely

⁷⁶ See, e.g., *United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020) (reversing denial of section 404 motion where district court misunderstood the factors it was permitted to consider).

⁷⁷ See, e.g., *United States v. Maxwell*, 991 F.3d 685, 689–93 (6th Cir. 2021).

⁷⁸ See, e.g., *Terry v. United States*, 141 S. Ct. 975 (2021).

⁷⁹ Compare, e.g. *United States v. Elias*, 984 F.3d 516, 519–20 (6th Cir. 2021) with *United States v. Bryant*, 996 F.3d 1243, (11th Cir. 2021).

⁸⁰ *United States v. Foreman*, 958 F.3d 506, 515 (6th Cir. 2020).

⁸¹ See, e.g., *Jones*, 980 F.3d 1111–16 (citing *Rita* and *Gall* and discussing, arguably in *dicta*, the district court’s obligation to consider every section 3553(a) factor and provide a reasoned explanation similar to that required on direct appeal).

resembles, that conducted in the original-sentencing context. For example, *Foreman* suggested that there could be some divergence between the “precise contours” of reasonableness review in the different contexts, given that the court was applying the “yardstick of reasonableness” largely because it was “familiar,” not because it was legally required.⁸²

The possibility of different “contours” is consistent with the Supreme Court’s approach in *Chavez-Meza*, which considered the adequacy of a district court’s explanation when granting a motion under section 3582(c)(2).⁸³ There, the Court “assum[ed] (purely for argument’s sake) [that] district courts have equivalent duties when initially sentencing a defendant and when later modifying the sentence.”⁸⁴ But it found the district court’s explanation sufficient, even though it used a check-the-box form order when granting the defendant a smaller reduction than he requested (and was legally eligible for).⁸⁵ As the Court explained, the adequacy of a district court’s explanation is necessarily context-dependent and should be reviewed against the backdrop of the entire record, including the explanation given at the original sentencing hearing.⁸⁶ Thus, an appellate court might affirm the district court’s use of a form order in a sentence-modification appeal even though it would not, presumably, tolerate a district court concluding an original sentencing hearing by issuing a form order listing the selected sentence without explaining its rationale in open court.

The possibility of different “contours” is also consistent with *Booker*’s remedial opinion itself, which explained that the contours of reasonableness review were “infer[red] . . . from related statutory language, the structure of the statute, and the sound administration of justice.”⁸⁷ Applying those same principles to sentence-modification appeals necessarily yields different results. For example, a district court conducting an original sentencing must select a sentence that is sufficient, but not greater than necessary, to comply with the purposes

⁸² *Foreman*, 958 F.3d at 514, 515 n.4.

⁸³ *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018).

⁸⁴ *Id.* at 1965.

⁸⁵ *Id.* at 1966–68.

⁸⁶ *Id.*

⁸⁷ *Booker*, 543 U.S. at 260–61 (quotations omitted).

of sentencing and then explain the rationale for that selection in open court.⁸⁸ By contrast, a district court considering a sentence-modification motion may be required to consider the section 3553(a) factors, but only to the extent they are relevant, and it is under no equivalent duty to reduce a sentence to a particular point or even modify it at all, much less to explain its rationale in open court.⁸⁹ It follows that the review of sentence-modification appeals should have its own standards that may overlap with, but are not identical to, the standards in original-sentencing appeals and derive from the underlying statutory requirements themselves.

Indeed, if courts adopt the view that section 3742 is entirely inapplicable to sentence-modification appeals (as suggested above), that would allow them to shift the focus from questions like whether a claim of *Booker* unreasonableness states a cognizable violation of law, and if so, how the contours of reasonableness review differ in the different contexts. Instead, courts could simply focus on whether the district court abused the discretion granted to it by the underlying statute and whether the appellate court has enough information to make that assessment.

Whether the Sixth Circuit ultimately adopts different formal standards for reasonableness review in the sentence-modification context remains to be seen. But the fact that these types of challenges are cognizable at all represents a notable break from the *Bowers* era.

IV. Conclusion

On a doctrinal level, sentence-modification appeals in 2021 look significantly different in the Sixth Circuit than they did in 2010. Gone are the days of jurisdictional dismissals, sometimes *sua sponte*, grounded in the conclusion that the defendant's claim of unreasonableness failed to state a cognizable violation of law. In its place is a framework governed by a non-jurisdictional claim-processing rule, often treated as wholly inapplicable, that, when it does apply, permits (in one form or another) traditional reasonableness review.

On a practical level, the significance of these doctrinal changes may yet prove to be modest. For example, even after adopting the new

⁸⁸ See 18 U.S.C. § 3553(a), (c).

⁸⁹ See 18 U.S.C. § 3582(c)(1)(A), (c)(1)(B), (c)(2); First Step Act of 2018, 132 Stat. 5194.

framework, the Sixth Circuit has thus far been deferential when evaluating how district courts exercise their discretion and has generally affirmed denials and partial grants of sentence-modification motions even when the district court did so using only a form order.⁹⁰ Cases involving remands—at least outside the context of threshold legal issues—are still rare, typically confined to cases in which the district court declined to modify a sentence that would now be significantly above the guidelines.⁹¹ And those unusual cases would likely have been reviewable even without the reconsideration of *Bowers*, under section 3742(a)(3), which permits review when the defendant’s sentence “is greater than the sentence specified in the applicable guideline range.”⁹²

Of course, to say that the dramatic shift in doctrine has not produced a commensurately dramatic shift in *outcomes* is hardly surprising. After all, even in original-sentencing appeals, appellate courts are generally deferential to district courts and rarely reverse for reasons other than the improper calculation of the guideline range. In 2019, for example, of the roughly 3,250 sentencing appeals nationwide, only 46 (or 1.4%) were reversed for either substantive unreasonableness, reliance on clearly erroneous facts, or failure to explain the sentence or address certain section 3553(a) factors.⁹³

⁹⁰ See, e.g., *Smith*, 958 F.3d at 495 (affirming the use of a form order when reducing a life sentence to 360 months under section 404); *United States v. Navarro*, 986 F.3d 668, 671–72 (6th Cir. 2021) (affirming the use of a form order when denying compassionate release); *United States v. Harvey*, 996 F.3d 310 (6th Cir. 2021) (same).

⁹¹ See *United States v. Smith*, 959 F.3d 701, 704 (6th Cir. 2020) (reversing denial of motion to reduce 240-month sentence where defendant would face a guideline range of 77–96 months, or 120 months after application of the mandatory minimum). *But see, e.g.*, *United States v. Williams*, 817 F. App’x 164, 167 (6th Cir. 2020) (not precedential) (noting that “*United States v. Smith* is not the Rosetta Stone of sentencing appeals” and affirming decision to retain sentence of 151 months where the current range would be 77–96 months).

⁹² 18 U.S.C. § 3742(a)(3).

⁹³ See U.S. SENT’G COMM’N, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FIGURE A, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/FigureA.pdf>; U.S.

Whether appellate courts reverse at a comparable rate in sentence-modification appeals remains to be seen. But the Sixth Circuit's recent reconsideration of the nature, scope, and meaning of section 3742 has changed the applicable framework under which those decisions will be made. Given the number of issues that remain unsettled, that framework may yet remain in flux in the years ahead.

About the Author

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SENT'G COMM'N, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE A-6, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/TableA6.pdf>.

A Judge's Sentencing Perspective: An Argument in Favor of the Continuing but Flawed Utility of Advisory Sentencing Guidelines in a Determinate Sentencing Model

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I. Introduction

As a trial judge with prior career experience as both a federal prosecutor and a defense attorney, and having been the victim of a federal assault case, I have seen the criminal justice system and sentencing process from almost every perspective. As an advocate, both on behalf of the government and on behalf of my defendant clients, I used every tool at my disposal to advocate ethically and constitutionally for appropriate sentences. Now as a trial judge drawing on those experiences, I more fully recognize that a sentencing judge holds a unique role as the arbiter of the state's power in imposing a defendant's punishment. As an experienced practitioner, I understood the complexity of the process in criminal sentencing and enjoyed my role as an advocate, but I readily admit that the theoretical quickly falls away when faced with the prospect of *imposing* a criminal sentence that deprives a fellow citizen of their liberty. My hope is the angst and bewilderment that I frequently

encounter in making sentencing decisions reflects in some way that I am appropriately considering the gravity of the decision-making process and its practical consequences on the lives of so many affected by the decisions that I must make. It is a necessary burden, but it is a burden nonetheless.

Criminal statutes are enacted with the aspirational goal of preventing future criminal conduct by providing specified penalties for certain behaviors that society has deemed inconsistent with the broader social order. Punishing an offender serves to delineate the line between acceptable and unacceptable behavior and impose a penalty that is sufficient but not greater than necessary to educate the offender and prevent future criminal conduct.¹ Though well beyond the scope of this article, sentencing theory and practice in the United States and Europe over the last 300 years reflect only one consistent tendency—namely the absence of consistency.² As discussed more fully below, sentencing systems have vacillated along a spectrum between two poles: At one end, judges hold absolute monopolistic control over the functionality of sentencing imposition. At the other, judges are relegated to mere signatories to a codified or jury-imposed penalty.³ Despite differences in sentencing practices, all judges strive to achieve a just punishment through a careful balancing of conceptually similar but sometimes differently named policy objectives: retribution, incapacitation, deterrence, and rehabilitation.⁴ As a general matter, however, all three objectives in concert with each other, carefully balanced in light of statutory factors, case law, and advisory guidelines, provide the well-spring for the modern American sentencing system grounded in the law.⁵

¹ See 18 U.S.C. § 3553(a) (proscribing federal factors to consider in imposing sentence).

² Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L. J. 299, 310 (2000).

³ See generally JOHN BRIGGS ET AL., *CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY* 40 (1996) (describing the sentencing authority of local jurors as fact-finders and sentencing bodies).

⁴ See generally ELLEN PODGOR ET AL., *MASTERING CRIMINAL LAW* 40 (2d ed. 2015) (discussing the fundamental structure of crime, including statutory interpretation, sentencing, theories of punishment).

⁵ See Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1402 (1998)

Anchored by these policy objectives, trial judges seek to reach sentences that have a connection to, and serve to further, specific social goals. The United States Sentencing Guidelines Manual⁶ and its myriad of state counterparts all serve to incorporate these broad policy objectives and identify waypoints that allow judges to find a way forward amidst these various and often competing claims on the concept of justice.⁷ Despite reasonable criticism, both federal and state guidelines serve as useful guideposts for considering statutory and case law factors.⁸ While sentencing guidelines are a plainly but predictably flawed works in progress, they represent a significant improvement over the rehabilitative or “medical” model of sentencing they replaced.⁹ As detailed more fully below, the rehabilitative model prevailed in both federal and state courts and served as the dominant model for the American criminal justice system until the Sentencing Reform Act of 1984 (the Sentencing Act) and the follow-on Federal Sentencing Guidelines in 1987, which imposed a determinate

("[J]udge[s] bring[] to bear 'not only a range of personal and political preferences, but also a specialized cultural competence—his knowledge of and experience in "the law.'" Backgrounds will vary, attitudes will differ, environments will change, but the law remains the alpha and omega of judicial decisionmaking.") (internal citations omitted) (citing Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 24–25 (1993)).

⁶ See generally U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018) [hereinafter U.S.S.G.].

⁷ The vast majority of states with sentencing guidelines have adopted an advisory guidelines model. See Eric S. Fish, *Criminal Law: Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 590 (2015); see D.C. VOLUNTARY SENT'G GUIDELINES MANUAL § 1.1 (D.C. SENT'G COMM'N 2020) (noting a high degree of “compliance” with advisory guidelines but that judges are “free to impose any lawful sentence”); see also D.C. CODE § 3-105(c) (explaining that the Sentencing Guidelines do not create “any legally enforceable rights”).

⁸ See, e.g., 18 U.S.C. § 3553(a) (detailing the statutory factors the court must consider in imposing sentencing in federal cases).

⁹ See Bowman, *supra* note 2, at 300; see also PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11 (1991) (providing an overview of the American rehabilitative justice system from 1877–1970).

sentencing model that constrained judicial sentencing through mandatory guidelines.¹⁰

Leading up to these reforms, in the 1970s, state and federal courts began to steadily move away from the rehabilitative model of sentencing due to rising criminal cases, evidence that the aspirational goals of rehabilitation fell short, and “increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.”¹¹ In describing the then existing indeterminate sentencing system in 1973, Judge Marvin Frankel observed, “[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”¹² While I disagree with the imposition of mandatory guideline schemes and embrace the discretion afforded judges in our current determinate sentencing model aided by advisory guidelines, regarding the scope of judicial discretion, Judge Frankel’s point is well taken.

As expected, replacing the indeterminate sentencing scheme with the determinate sentencing scheme did not quiet sentencing critics. Moreover, even with the advent of the statutory framework and the now-advisory Guidelines¹³ that predominate current federal and most state sentencing schemes, the determinate system continues to engender its own criticism.¹⁴ Despite its patent flaws, on balance, the modern determinate system (constrained by mandatory minimum and maximum statutory sentences) reflects a steady but imperfect improvement over predecessor sentencing schemes in that it at least

¹⁰ See Bowman, *supra* note 2, at 300; see generally U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 1987).

¹¹ See Bowman, *supra* note 2, at 305.

¹² MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

¹³ “The current federal sentencing system is incoherent. . . . [T]he Guidelines were not written to ‘advise’ judges in any meaningful sense. They were written to *dictate* judges’ sentencing decisions.” Fish, *supra* note 7, at 550–51.

¹⁴ See generally United States v. Martinez-Ortega, 684 F. Supp. 634, 636 (D. Idaho 1988) (discussing the then binding federal sentencing guidelines and hold that the Guidelines violated a defendant’s due process rights by prohibiting an individualized sentencing assessment); see also United States v. Alafritz, 690 F. Supp. 1303, 1310 (S.D.N.Y. 1988); Sisk, *supra* note 5, at 1402 (“[T]he very concept of binding Sentencing Guidelines was directly questioned as violative of a purported substantive due process right of criminal defendants to individualized sentencing.”).

attempts to approach less disparate outcomes for similarly situated defendants and, in my view, provides a far more useful sentencing tool than simply “a mandatory homework assignment for judges.”¹⁵ All criminal justice systems have abundant and often repeating flaws, but federal and state advisory sentencing guideline models greatly assist judges in their attempts to follow a deliberate and somewhat predictable process to sift through the voluminous objective and specific factors of a sentencing decision equitably and constitutionally.

II. A brief history of American sentencing schemes

The history of sentencing in the United States before the Sentencing Reform Act of 1984 can be separated into two distinct sentencing theories: determinate sentencing and indeterminate sentencing.¹⁶ Under a determinate sentencing model, the codified or statutory law sets specific penalties for each crime that automatically apply irrespective of individual factors of a defendant or the crime of conviction.¹⁷ Indeterminate sentencing models, by contrast, delineate within the law “a broad range of possible penalties for each crime and then allow[] judges to choose an appropriate sentence for each individual wrongdoer.”¹⁸ These two different theories of sentencing also map onto two distinct periods of sentencing before the creation of the Sentencing Guidelines in 1987—the colonial period and the post-Civil War period.

¹⁵ Fish, *supra* note 7, at 551.

¹⁶ Legal scholars and practitioners often vary slightly in their definition of these sentencing models. Some refer to indeterminate sentencing as a system where the judge does not actually impose a set sentence. Instead, the judge imposes a range, and the ultimate amount of imprisonment is determined by a separate entity, such as the parole board. By contrast, some define determinate sentencing as when the judge imposes a precise amount of imprisonment and there is no change to be made by a parole board. I have done my best herein to define these broad sentencing models and acknowledge that some use indeterminate and determinate in slightly different ways than the authors.

¹⁷ See Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 3 (2015).

¹⁸ *Id.*

A. Colonial period—determinate sentencing

The first American colonies brought with them the British theory of determinate sentencing.¹⁹ This prevailing American style of determinate sentencing focused on retributive theories of punishment, or a “just deserts” model of punishment.²⁰ In practice, a judge imposing a sentence utilized a “backward-looking perspective [that] focus[ed] on the *moral* duty to punish past wrongdoing.”²¹ Determinate sentences were set by the legislature and “express[ed] the collective moral judgment of the community.”²² Under this scheme, early criminal justice in America was largely robotic and based on statutory mandatory sentences that left little for a jurist in the way of discretion, resulting in largely uniform sentences that lacked any real individualized assessment by the courts.

Procedurally, sentencing was largely the same then as it is today: The jury held the fact-finding role and considered the defendant’s guilt in light of the legal instructions provided by the judge. If a defendant was found guilty, the burden shifted to the judge to determine and then impose the sentence. Imposing a sentence, however, was primarily a ministerial task.²³ The British legislature expended incalculable time delineating in detail specific mandatory sentences for every prosecutable crime. If the defendant was found guilty, the trial judge merely consulted the legislatively mandated punishment and imposed it.

These legislative penalties were inarguably draconian. Indeed, capital punishment for common felony offenses occurred regularly. The colonies not only maintained the British criminal justice system but also the statutory penalties provided by Parliament, which “mandated capital punishment for all felony offenses and prescribed corporeal punishments or fines for the rest.”²⁴ For example,

¹⁹ *Id.* at 6.

²⁰ Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. L. REV. 815, 818–19, 819 n.11 (2008).

²¹ *Id.* at 818 (emphasis added).

²² Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1344 (2005).

²³ Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK UNIV. L. REV. 419, 424 (1999).

²⁴ Schuman, *supra* note 17, at 6.

Massachusetts, in 1684, utilized a “mandatory, automatic death sentence for a large variety of crimes, including most forms of homicide, kidnapping, and adultery[, and f]or lesser violations, . . . fines or specified forms of torture, including branding, forced labor, whipping, time in the stocks, or cutting off of the ears.”²⁵ Even as the colonies busied themselves with their nascent democratic political revolution, criminal justice remained barbaric by modern standards and legislatively mandated. As the Supreme Court observed in *United States v. Grayson*, “In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment.”²⁶

This shift away from capital punishment towards a more nuanced sentencing practice was identified and commented upon by 18th Century English judge and Tory politician, William Blackstone, who in his *Commentaries on the Laws of England*, detailed the then current thinking on departing away from capital punishment for felonies:

The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And, therefore, if a statute makes any new offense felony, the law implies that it shall be punished with death [W]hereas properly [felonies are] a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.²⁷

This shift towards determinate sentencing also came at a time when the jury was at the height of its power over the criminal justice process and was “explicitly permitted to find both the facts and the

²⁵ *Id.* at 6–7 (citing LAUUES AND LIBERTYES OF MASSACHUSETTS (1648)).

²⁶ *United States v. Grayson*, 438 U.S. 41, 45 (1978) (citing TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 83–85 (1976)).

²⁷ 5 WILLIAM BLACKSTONE, COMMENTARIES *98.

law.”²⁸ In fact, if a jury did not find that capital punishment was appropriate, they could exercise jury nullification and “simply decline to find guilt [at all], or find the defendant guilty of a lesser crime.”²⁹ This type of jury nullification to avoid draconian sentencing outcomes was so common in early American criminal justice that “[i]gnoring the law to effect a more lenient outcome was [viewed as] well within the jury’s role.”³⁰

In practice, determinate sentencing worked fairly well in the small and largely insular early American colonial communities. The legislatively delineated sentence set out explicit and inflexible punishments for each crime, and the jury exercised its leniency by nullifying a finding of guilt to avoid a particularly mandated sentence. Under this sentencing model, nascent American jurists were left with little to do in terms of sentencing. Undoubtedly, determinate sentencing provided for greater uniformity and predictability in sentencing outcomes across the colonies, but it also allowed the guilty to circumvent punishment to escape inarguably excessive sentences. In the absence of judicial discretion, every offender that was found guilty of committing the same crime received the same sentence. While these determinate sentences provided predictability, they only served the punitive and deterrent purposes of sentencing, and they failed to permit a jurist to consider the larger role that rehabilitation can play in sentencing as well as an individualized assessment of an offender that is, frankly, the most informative to trial judges in modern sentencing.

B. Post-Civil War period (late 19th century)— indeterminate sentencing

The post-Civil War period introduced a new theory of sentencing to the criminal justice landscape: indeterminate sentencing. Under an indeterminate sentencing model, “the law prescribes a broad range of possible penalties for each crime and then allows judges to choose an appropriate sentence for each individual wrongdoer.”³¹ This approach

²⁸ Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 693 (2010).

²⁹ *Id.*

³⁰ *Id.*

³¹ Schuman, *supra* note 17, at 3.

differs from the colonial period's "just deserts" retributive approach. Instead of focusing the sentencing assessment "primarily backward to the culpability or blameworthiness of the offense committed, the . . . approach looks forward to the effect of punishment on future conduct."³² This movement came largely in response to the excessive rigidity that dictated determinate sentencing theory and practice. Moreover, the perceived power and role of the jury in the criminal justice system was evolving during this timeframe and, in many ways, began to wane as the jury nullification practice became broadly disfavored and diminished in practice.³³

The evolution towards indeterminate sentencing stemmed largely from advancing social views on the causes of criminal conduct. Crime became popularly seen as a moral disease that stemmed from underlying medical problems.³⁴ Like a disease with a known cure, sociologists and criminologists of the time expounded on how punishment could serve as the antidote to antisocial criminal behavior that existed not by choice but due to metaphysical origin. These criminal justice ideas evolved into a widely accepted belief that, "through a regimented system of discipline, labor, and religious exhortation, the prisoner could be 'cured' of his or her evil ways."³⁵ The focus shifted then from retribution to rehabilitation. Prison became a "rehabilitative institution" that was no longer punitive, but curative, and it "aimed at individual restoration."³⁶ Armed with sentencing discretion, trial judges no longer focused on the crime of conviction. Indeed, "rather than requiring that the punishment fit the crime, judges adopted the view that the punishment should fit the offender."³⁷ The medical model of criminal justice incorporated a forward-looking perspective that sought to reform criminals "through a combination of deterrence motivated by the unpleasant experience

³² Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 898 (1990).

³³ See Gertner, *supra* note 28, at 694.

³⁴ *Id.* at 695.

³⁵ Nagel, *supra* note 32, at 892.

³⁶ *Id.* at 893.

³⁷ Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940–41 (1988).

of incarceration, and personal renewal spurred by counseling, drug treatment, [and] job training.”³⁸

By giving trial judges discretion to impose sentences, legislatures believed the new medical model viewpoint on sentencing would empower courts “to protect society from the convicted offenders who pose a danger to it, and to return the offender to the community as a law abiding citizen.”³⁹ At the time, legislative intent centered around achieving sentences based on individualized assessments of offenders as pronounced through the exercise of judicial discretion.⁴⁰ The legislature set a broad range of possible penalties for each crime and gave judges as much discretion as possible to select an appropriate punishment for each individual offender.⁴¹ Illuminating the concept of judicial discretion and its aspirational application by trial judges, the Supreme Court, in the 1949 decision of *Williams v. New York*, articulated reasons viewed as critical for ensuring broad judicial discretion in imposing criminal sentences:

Highly relevant—if not essential—to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.⁴²

In recognizing that the sentencing judge was not restricted to information received solely during trial, the Court made plain that the sources of information from which the sentencing court could draw upon in fashioning its sentence went well beyond the contours of what

³⁸ Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 685 (1996).

³⁹ Nagel, *supra* note 32, at 885–86.

⁴⁰ *Grayson*, 438 U.S. at 46–47 (commenting on the movement that began in the late nineteenth century proposing a flexible sentencing system that gave judges more discretion in determining the appropriate punishment).

⁴¹ Schuman, *supra* note 17, at 7.

⁴² *Williams v. New York*, 337 U.S. 241, 247 (1949).

the jury might hear in determining guilt. In doing so, the Court made the not so subtle observation that “punishment should fit the offender and not merely the crime.”⁴³ Supreme Court jurisprudence on sentencing in the mid twentieth century explicitly embraced a new way of sentencing with a focus on rehabilitation and deemphasis on retribution.⁴⁴ The widely held belief in the ability of the criminal justice system to reeducate defendants was centered on “the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.”⁴⁵

C. Critique of indeterminate sentencing

After the push for indeterminate sentences, the United States unquestionably entered a period of significant sentencing disparities based upon regional, cultural, social, and other independent factors that caused different judges to look at similar defendants with similar offense conduct and impose exceptionally different sentences. While the reasons for the countless individualized sentences imposed are immeasurable and ultimately unknowable, the objective basis for the shift towards disparities rests in three primary sources: “(1) lack of clearly defined and accepted sentencing goals, priorities, and criteria; (2) substantial discretion exercised by sentencing judges and paroling authorities in the absence of such goals and criteria; and (3) the procedures under which this discretion was customarily exercised.”⁴⁶ Critics of indeterminate sentencing also noted the lack of transparency and accountability and the virtually unreviewable decision-making authority of trial courts.⁴⁷ At bottom, the main problem that gave rise to these disparate sentencing outcomes was

⁴³ *Id.*

⁴⁴ *Id.* at 248 (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).

⁴⁵ *Id.* at 249.

⁴⁶ Nagel, *supra* note 32, at 897 (quoting Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 96 (1978)).

⁴⁷ Schuman, *supra* note 17, at 12.

that an offender's sentence depended almost entirely on the assigned sentencing judge.⁴⁸

The arc of American sentencing policy and consequent outcomes began with legislatively imposed equal sentences under the determinate model (same sentence for the same crime) and moved to significant sentencing disparities amongst offenders under the indeterminate scheme. Neither scheme was wholly satisfying to every stakeholder in the criminal justice system. Widespread criticism of the disparities eventually led to the passage of the Sentencing Act, abolishing the indeterminate sentencing regime and creating a new government agency to oversee federal sentencing policy, the United States Sentencing Commission (the Commission).⁴⁹ The new federal model was quickly imitated by most of the states, which collectively led to the mandatory, then advisory guidelines scheme (or more accurately, schism) that exists today.

III. The development of the Sentencing Guidelines

A. The Sentencing Reform Act of 1984

The Sentencing Act was born out of the growing critique of judges' discretion in federal sentencing and a desire for consistency in sentencing outcomes.⁵⁰ Among its provisions, the Sentencing Act created the Commission and charged it with developing policies to "provide certainty and fairness," to "avoid[] unwarranted sentencing disparities," and to "maintain[] sufficient flexibility to permit individualized sentences when warranted."⁵¹ The Commission was established with the goal of furthering the purposes of sentencing: deterrence, protecting the public, providing the defendant with needed treatment and training, and providing just punishment.⁵² Among its chief duties, the Commission was tasked with creating a set of sentencing guidelines (the Guidelines) that included categories of

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1169–70 (2017).

⁵¹ 28 U.S.C. § 991(b)(1)(B).

⁵² 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2).

criminal offenses and sentencing ranges for each category, subject to limitation by statute.⁵³

The Sentencing Act mandated both broad and specific criteria to assist the Commission in this task. The Sentencing Act instructed that the Guidelines were to be “neutral as to the race, sex, national origin, creed, and socioeconomic status of [the] offenders”⁵⁴ and, likewise, should make clear the general inappropriateness of considering “education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant” when imposing a sentence.⁵⁵ The Guidelines were to account for the “nature and capacity” of the available correctional institutions and be formulated to “minimize the likelihood that the . . . prison population will exceed the capacity of the Federal prisons.”⁵⁶ The Guidelines were also to instruct that sentencing judges could appropriately impose non-incarceration for first-time offenders not convicted of a violent or “otherwise serious” offense.⁵⁷

Additionally, the Sentencing Act gave guidance to limit incarceration terms. Before creating incarceration ranges for use with the Guidelines, the Commission was directed to examine the average sentences for each category and the period of incarceration actually served for each offense before the creation of the Commission.⁵⁸ The Commission was not bound by this information, but rather was directed to create sentencing ranges that reflect the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2).⁵⁹ Specifically, if the Guidelines called for a term of imprisonment, this term was not to exceed 25% of the minimum sentencing range (or 6 months, whichever is greater).⁶⁰ If the minimum term was 30 years or greater, however, the Guidelines were to provide that the maximum term may be life imprisonment.⁶¹

⁵³ 28 U.S.C. § 994(b)(1).

⁵⁴ 28 U.S.C. § 994(d).

⁵⁵ 28 U.S.C. § 994(e).

⁵⁶ 28 U.S.C. § 994(g).

⁵⁷ 28 U.S.C. § 994(j).

⁵⁸ 28 U.S.C. § 994(m).

⁵⁹ *Id.*

⁶⁰ 28 U.S.C. § 994(b)(2).

⁶¹ *Id.*

Finally, although the term “mandatory” does not appear in the Sentencing Act, the Act made clear that the then-forthcoming Guidelines were intended to be binding on sentencing judges.⁶² The Sentencing Act instructed that, generally, a court “shall impose” a sentence within the applicable guidelines range unless the Commission authorizes a departure or the court explicitly finds an aggravating or mitigating factor present that is not adequately accounted for by the Guidelines.⁶³ Thus, the Sentencing Act bound judges to sentence within the ranges set by the Commission absent an explicit and, frankly, very narrow group of exceptions.

Following the guidance set forth in the Sentencing Act, the initial Commission established the first set of Guidelines, creating 170 categories covering approximately 3,000 crimes.⁶⁴ This initial Commission authored the first *United States Sentencing Guidelines Manual*, which detailed the categories created by the Commission, a series of policy statements to guide sentencing, and a sentencing table that allocated sentencing ranges for each crime in ranges much narrower than those provided by statute.⁶⁵ This manual, and subsequent editions, became the principal tool used by federal judges when fashioning a federal sentence. Most states mimicked the federal system.

B. *United States v. Booker* and the advent of the now-advisory Guidelines

The Supreme Court’s decision in *United States v. Booker*⁶⁶ dramatically altered Congress’s attempts to limit judicial discretion and standardize sentencing through the Guidelines. The *Booker* decision answered the issue left unanswered following the Supreme Court’s decisions in *Apprendi v. New Jersey*⁶⁷ and *Blakely v. Washington*:⁶⁸ Whether the Sixth Amendment jury trial right applied

⁶² Newton & Sidhu, *supra* note 50, at 1185, n. 115; *see also* Mistretta v. United States, 488 U.S. 361, 367 (1989) (stating that the Sentencing Act “makes the Sentencing Commission’s guidelines binding on the courts.”).

⁶³ 18 U.S.C. § 3553(b). The Supreme Court ultimately found that mandatory guidelines violated the Sixth Amendment. *See infra* section III.B.

⁶⁴ Newton & Sidhu, *supra* note 50, at 1238.

⁶⁵ U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 4 (2018).

⁶⁶ 543 U.S. 220 (2005).

⁶⁷ 530 U.S. 466 (2000).

⁶⁸ 542 U.S. 296 (2004).

to the mandatory federal sentencing guidelines. To answer this issue, the Court issued two majority opinions in *Booker*.⁶⁹ The first opinion, authored by Justice Stevens, held that the mandatory Guidelines violate a defendant's Sixth Amendment right to a trial by jury.⁷⁰ The Court found that the mandatory Guidelines interfered with a defendant's jury trial right by (1) requiring a judge to find facts beyond what the jury decided to convict a defendant; and (2) forcing judges to increase sentences based on facts not found by the jury beyond a reasonable doubt.⁷¹

The second majority opinion, authored by Justice Breyer, considered the remedy; that is, whether the entire statute must be stricken or whether certain sections could be "severed and excised."⁷² The Court determined that two sections of the Sentencing Act must be invalidated as inconsistent with the Sixth Amendment: section 3553(b)(1) of the Sentencing Act, which makes the Guidelines mandatory, and section 3742(e) of the Sentencing Act, a section that depends on the mandatory nature of the Guidelines.⁷³ Accordingly, *Booker* kept the Guidelines in place as advisory, rather than mandatory, and permitted sentencing courts to "tailor the sentence in light of other statutory concerns."⁷⁴ The full *Booker* Court agreed that a judge's exercise of discretion in this way does not violate the Sixth Amendment.⁷⁵ If a sentence was challenged on appeal, the appellate court should review the sentence for procedural and substantive unreasonableness.⁷⁶ And despite striking and severing certain sections of the Sentencing Act that made the Guidelines mandatory, the Supreme Court made clear that sentencing judges must still use the framework of the Guidelines as the starting point when crafting a

⁶⁹ 543 U.S. 226, 245.

⁷⁰ *Id.* at 226–27 (Stevens, J., delivering the opinion of the Court in part).

⁷¹ *Id.* at 232, 244.

⁷² *Id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 233 (Stevens, J., delivering the opinion of the Court in part) ("When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

⁷⁶ *Id.* at 260–61.

sentence.⁷⁷ Federal judges then utilize the statutory factors in 18 U.S.C. § 3553(a) to consider other factors that may warrant a variance from a particular calculated guidelines range.

The cases following *Booker* attempted to clarify this new tension between the advisory role of the Guidelines and a return to an emphasis on judicial discretion in sentencing. For example, in *Rita v. United States*, the Court held that appellate courts may apply a non-binding presumption of reasonableness to a Guidelines-compliant sentence.⁷⁸ The Court reasoned that so long as the sentencing judge has the freedom to sentence outside of the Guidelines, the presumption of reasonableness attributed to a Guidelines-compliant sentence is consistent with *Booker*.⁷⁹ In *Gall v. United States*, the Court held that a circuit court may not establish a rule requiring “extraordinary circumstances” to depart from the Guidelines.⁸⁰ Rather, in applying *Booker*’s call to review sentences for reasonableness, a circuit court should only apply the deferential “abuse-of-discretion” standard on review.⁸¹ And in *Kimbrough v. United States*, the Court found that a sentencing judge has discretion to consider the disparity between the Guidelines’ treatment of crack and powder cocaine.⁸² In other words, the sentencing judge was permitted to find that the Guidelines failed to meet the purposes of sentencing based on a policy disagreement with how the Guidelines calculated the ranges for crack vs. powder cocaine, so long as the sentence was still “reasonable.”⁸³

While the cases immediately following *Booker* indicated a return to heavy reliance on judicial discretion in sentencing, the Supreme Court repeatedly clarified that the Guidelines should be the “starting point and initial benchmark” when a trial judge fashions a sentence.⁸⁴ More recent Supreme Court guidance describes the “important role” the

⁷⁷ *Id.* at 264.

⁷⁸ 551 U.S. 338 (2007).

⁷⁹ *Id.* at 353–54.

⁸⁰ 552 U.S. 38, 47 (2007).

⁸¹ *Id.* at 50–51.

⁸² 552 U.S. 85, 111–12 (2007).

⁸³ *See id.*

⁸⁴ *Gall*, 552 U.S. at 39; *see Rita*, 551 U.S. at 347–48 (explaining that a district court judge should begin all sentencing proceedings by calculating the applicable Guidelines range).

Guidelines play in sentencing.⁸⁵ And despite the advisory nature of the Guidelines, sentencing judges “must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”⁸⁶ Thus, while *Booker* drastically changed the dominance of the Guidelines in sentencing, the Supreme Court has made clear that sentencing judges still face some explicit, if arguably ephemeral, pressure to comply with the Guidelines. In practice, federal judges sentence within the Guidelines roughly 50% of the time based upon variances or Guidelines departures.⁸⁷

C. The Guidelines after *Booker*

Under the current advisory regime, the Guidelines themselves maintain a significant role early in the sentencing process. Long before a defendant appears before a judge for sentencing, lawyers and probation officers have all have reviewed, considered, and opined on the applicability or inapplicability of various parts of the Guidelines. As an initial step, after a defendant is convicted at trial or pleads guilty, a probation officer will conduct a presentence interview with the defendant, covering a range of topics including, among others, family history, criminal history, substance abuse history, financial circumstances, and the defendant’s perspective on the circumstances of his crime.⁸⁸ The information from this interview is placed into a report known as the presentence report (PSR). The PSR becomes the main instrument that the judge uses to evaluate the defendant’s potential Guidelines range.

⁸⁵ *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018).

⁸⁶ *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall*, 552 U.S. at 50, n.6).

⁸⁷ See U.S. SENT’G COMM’N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 7 (“Almost three-quarters (73.7%) of all offenders received sentences under the *Guidelines Manual*, in that the sentence was within the applicable guideline range or was outside the applicable guideline range and the court cited a departure reason from the *Guidelines Manual*. Half (50.4%) of all sentences were within the guideline range, compared to 51.4 percent in fiscal year 2019.”).

⁸⁸ FED. R. CRIM. P. 32(d).

Although it may be advantageous for every defendant to participate in the PSR interview, the defendant is not required to participate.⁸⁹ On request of defense counsel, the probation officer is required to provide notice of the interview and offer the defense attorney the opportunity to attend.⁹⁰ The PSR will also contain an explanation of the Guidelines applicable to the defendant's conviction: identifying all relevant policy statements under the Guidelines, calculating the defendant's criminal history score and the resulting Guideline's range, and detecting any factors that could result in a departure from the Guidelines.⁹¹ At the sentencing hearing, the government and defense are given the opportunity to object to the Guidelines range calculated by the probation officer or other aspects of the PSR the parties disagree on. In practice, and in particularly in my own courtroom, lawyers should file their objections in writing long before they appear at sentencing. Otherwise, the sentencing is likely to be continued to give the court time to consider the arguments of counsel. (Point of personal privilege: File your objections to the PSR early if you don't want to sit and watch me read at sentencing.)

The PSR also contains the probation officer's calculation of the defendant's sentencing range and potential sentencing options under the Guidelines. The sentencing ranges are assessed largely based on the type of crime committed and the defendant's criminal history score. Each defendant is assigned a "base offense level" based on the crime of conviction—defendants convicted of the same crime are assigned the same "base offense level."⁹²

Next, the sentencing ranges for the base level offense can increase or decrease based on any aggravating or mitigating factors for a particular crime, known as "specific offense characteristics" or "adjustments" based on non-crime specific mitigating or aggravating factors common across different crimes.⁹³ For example, the Guidelines offer five broad categories of "adjustments" that may be made to a defendant's base level: victim-related adjustments, the defendant's role in the offense, obstruction and related adjustments, multiple

⁸⁹ See *Mitchell v. United States*, 526 U.S. 314, 326–27 (1999) (holding that the defendant maintains the Fifth Amendment privilege against self-incrimination during the sentencing phase).

⁹⁰ FED. R. CRIM. P. 32(c)(2).

⁹¹ FED. R. CRIM. P. 32(d)(1).

⁹² U.S. SENT'G COMM'N, *supra* note 65, at 13.

⁹³ U.S. SENT'G COMM'N, *supra* note 65 at 13–14.

count adjustments, and adjustments for the defendant's acceptance of responsibility.⁹⁴

Following the calculation of the defendant's offense level is the calculation of the defendant's criminal history score. The defendant's score is calculated based on the instructions in Chapter Four of the Guidelines, and the defendant is placed into a corresponding criminal history category.⁹⁵ The defendant's sentencing range is calculated at the intersection of the defendant's criminal history score and offense level.⁹⁶ Finally, after calculating a defendant's potential sentencing range, the Guidelines then offer approximately 25 categories for reasons that a sentencing judge may choose to depart from the sentence.⁹⁷ The Guidelines explicitly state that there may be additional reasons for a departure not listed in the suggested categories.⁹⁸

In sum, this setup indicates that the sentencing judge is tasked with balancing two competing interests that flow throughout the Guidelines: equalizing sentences and individualizing sentences. The Guidelines attempt to equalize by treating like crimes alike—defendants who commit the same crime are assigned the same base-level offense, and the criminal history score is calculated using the same method for every defendant. Conversely, the Guidelines allow for variance in sentencing outcomes based on the numerous adjustments and departure principles outlined in the Guidelines. The sentencing judge is left with the task of determining when the Guidelines adequately meet the purposes of sentencing and when they do not.

D. Guidelines gaps

Although well beyond the scope of this article, a discussion of the federal sentencing guidelines would not be complete without mentioning areas in which the Commission might consider revising the Guidelines to address ever evolving sentencing concerns. While, after 20 years of federal practice, I now contend with the D.C.

⁹⁴ U.S.S.G §§ 3A—E.

⁹⁵ U.S.S.G. § 4.

⁹⁶ U.S.S.G. § 5.

⁹⁷ U.S.S.G. § 5K.

⁹⁸ U.S.S.G. § 5K2.0.

Sentencing Guidelines, I remain confounded by unresolved federal guidelines issues. That said, the Commission does exemplary work attempting to account for the infinite number of objections, opinions, suggestions, etc. that are leveled at its work. Below, I have highlighted a few examples that bear upon current federal practice and, in my view, should at least be addressed by the Commission as it continues its steady, highly commendable, and necessary work of constant improvement and revision of the Guidelines.

1. Defining a crime of violence

First, the Guidelines need to be amended to address evolving caselaw on the definition and meaning of a crime of violence. The Supreme Court has wrestled with the statutory meaning of this same phrase that has and continues to befuddle practitioners and jurists alike. Putting aside the statutory meaning of a crime of violence jurisprudence that warrants its own separate analysis, the Guidelines themselves do not clearly define this phrase to the satisfaction of most everyone who has tried to discern its applicability during a federal sentencing hearing, particularly in evaluating the defendant's criminal history category.⁹⁹ The Guidelines define a crime of violence as:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).¹⁰⁰

The definition of a crime of violence is especially important in the Guidelines as, throughout the Guidelines, participation in a past crime of violence raises the criminal history category of the defendant. This definition sets the categorical approach as the approach to take when defining a crime of violence. The categorical approach “requires

⁹⁹ See U.S.S.G. § 4B1.1 (career offenders).

¹⁰⁰ U.S.S.G. § 4B1.2.

a court to consider the statutory definition of the crime at issue, rather than the actual facts that gave rise to the conviction.”¹⁰¹

The categorical approach to defining a crime of violence has created a gap in the Sentencing Guidelines because “[f]ederal judges and administrative agencies have varying understandings of the categorical approach, and lower courts are often divided over its use, thus producing inconsistency.”¹⁰² Similar inconsistencies arise in state courts, as states define similar statutes in strikingly different ways, thereby creating the possibility that “defendants who engage in the same conduct may suffer disparate collateral consequences” depending on what state they are in.¹⁰³ As Justice Alito, a recognized opponent of the categorical approach, observed, the categorical approach produces “strange and disruptive resul[ts].”¹⁰⁴

Overall, the lack of a clear definition for a crime of violence leads to the exact issue that the Guidelines were created to remedy—a disparity in sentences. The lack of a clear definition that forces trial and appellate courts to constantly ponder the statutory definition of a given crime without a clear definition to make the determination instead of focusing on the facts of the instant crime of offense results in inconsistent application of the Guidelines and, thus, unintentionally disparate sentencing results. Both practitioners and jurists would benefit from filling this definitional gap, which would limit the likelihood of a Guidelines-generated disparity and better ensure a more predictable criminal history category analysis.

2. Role and utility of guidelines commentary

Second, the Guidelines manual contains extraordinarily specific commentary to complement the calculations provided in the Guidelines; and although the Guidelines go through the rigorous process of congressional review and notice and comment, the

¹⁰¹ Mary Richardson, *Why the Categorical Approach Should Not be Used When Determining Whether an Offense is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(C)*, 67 AM. U. L. REV. 1989, 1993–94 (2018); see also *Taylor v. United States*, 495 U.S. 575, 600–02 (1990).

¹⁰² Richardson, *supra* note 101, at 2002.

¹⁰³ *Id.* at 2002–03.

¹⁰⁴ See *Moncrieffe v. Holder*, 569 U.S. 184, 205 n.11 (2013).

commentary is not required to do so.¹⁰⁵ Despite this, the Supreme Court's decision in *Stinson v. United States* established a plain error test that gives deference to the commentary of the Guidelines, holding that a commentary "must be given 'controlling weight unless it is plainly erroneous or inconsistent'" with the Guidelines.¹⁰⁶ The *Stinson* Court further dictated that the Commission could change a Guideline merely by changing the commentary and not following the typical notice-and-comment process as long as "the guideline which the commentary interprets will bear the construction."¹⁰⁷ In other words, sentencing courts are required to follow the commentary of the Guidelines even when the commentary was not vetted through the proper legislative process. While often helpful to the sentencing judge, the commentary can also contain hyper-specific instructions for sentencing judges that can create illogical results.

An example of this problem, recently examined by the Sixth Circuit in *United States v. Riccardi*, is how the Guidelines' commentary defines "loss."¹⁰⁸ As relevant in *Riccardi*, Application Note 3(F)(i) to Guidelines § 2B1.1(b)(1) (theft offenses) provides a special rule requiring the sentencing court to calculate the "loss" from the defendant's theft of "unauthorized access devices" in calculating the defendant's sentencing range, increasing the sentencing range based on the loss calculation.¹⁰⁹ Under the commentary in this section, "loss" shall not be calculated as less than \$500, despite the actual value of the item.¹¹⁰ In *Riccardi*, the defendant, a postal worker, stole 1,505 gift cards from the mail, 1,322 of which were marked with a face value totaling approximately \$47,000.¹¹¹ However, at sentencing, the sentencing judge, applying the commentary from application note 3(F)(i), calculated the loss as \$500 per gift card, resulting in a loss calculation of \$752,500 and increasing the defendant's sentencing

¹⁰⁵ See 28 U.S.C. § 994(x) (requiring the Guidelines to comply with the process for notice-and-comment rulemaking but omitting the Guidelines commentary from this requirement).

¹⁰⁶ *Stinson v. United States*, 508 U.S. 36, 45 (2000) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

¹⁰⁷ *Id.* at 46.

¹⁰⁸ *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021).

¹⁰⁹ U.S.S.G. § 2B1.1 cmt. n.3(F)(i).

¹¹⁰ *Id.*

¹¹¹ "The government did not identify the values of the remaining 183 gift cards." *Riccardi*, 989 F.3d at 480.

range by 14 levels and placing her sentencing range at the top of the Guidelines.¹¹²

The Sixth Circuit reversed based on new Supreme Court guidance in the related context of an agency's interpretation of its own regulations;¹¹³ however, this example illustrates the problem that can arise from the specific nature of much of the Guidelines' commentary. In seeking to equalize sentences and prevent disparities through specific guidance in the commentary, the result can sometimes bind sentencing judges into unreasonable and illogical outcomes. The Guidelines would benefit from a review of the commentary to examine whether the specific instructions are helpful or hurtful to creating just sentencing outcomes. And finally, the Commission should ensure that substantive rules are actually in the Guidelines themselves as opposed to merely appearing as dicta in the commentary.

IV. Sentencing perspectives

A. A prosecutor's role in sentencing

I first walked through the doors of the Department of Justice (Department) more than 20 years ago, fresh out of a judicial clerkship. The Department became my first legal home. During my clerkship, I watched Assistant United States Attorneys (AUSAs) try cases on behalf of the United States, and I wanted to get in that arena. Having joined the U.S. Army seven years earlier, a career in public service felt right. I donned a suit instead of my Army uniform and took a familiar oath that continues to guide me (particularly as a jurist) today—to “support and defend the Constitution of the United States.”¹¹⁴

Thomas Jefferson wrote, “[T]he most sacred of the duties of a government [is] to do equal [and] impartial justice to all it's [sic]

¹¹² *Id.*

¹¹³ *Id.* at 486–88.

¹¹⁴ See 5 U.S.C. § 3331; 28 U.S.C. § 544 (mandating that “each . . . assistant United States Attorney . . . shall take an oath” of office to faithfully execute his duties); see also 28 U.S.C. § 453 (mandating that every judge of the United States take an oath to “faithfully and impartially discharge and perform all the duties incumbent upon me as [judge] under the Constitution and laws of the United States.”).

citizens.”¹¹⁵ This quote and the system of justice inspired by it are embodied in the Department’s mission:

Justice serves to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.¹¹⁶

These sacred duties plainly remain faithful to Jefferson’s prescient words, which continue to serve as a guiding principle for the women and men who serve throughout the Department. I happen to also find it pretty useful as a judge.

I am grateful that I had the opportunity to grow up as a lawyer in the Department—first in the Antitrust Division, then in the Criminal Division’s Public Integrity Section, and finally, for most of my career, in a U.S. Attorney’s Office. I was fortunate and privileged to learn from seasoned Department veterans who enforced the rule of law with precision and panache. They taught me to make the right choices even when they were the hard choices. They consistently held sacred their duty to seek equal and impartial justice. Those experiences served in significant ways to form the lawyer, person, and now judge that I am today.

Lawyers who have been fortunate enough to serve as AUSAs often say it is the best job that they have ever had. Now, wearing a black dress for a living, I can say it is my second-best job. Even so, I will note that I never tired of standing up in court and saying, “I represent the United States,” as I prosecuted a complex white-collar fraud scheme or a large-scale violent gang case. I stepped into the office each day eager to take on challenges, excited by the chance to make a difference, and motivated by the goal of making our cities, our towns, and our communities better and safer places.

Attorney General Robert Jackson once remarked, “The prosecutor has more control over life, liberty, and reputation than any other

¹¹⁵ Thomas Jefferson, *Note for Destutt de Tracy’s Treatise on Political Economy* (Apr. 6, 1816).

¹¹⁶ DEP’T OF JUST., CHOOSE JUSTICE: GUIDE TO U.S. DEPARTMENT OF JUSTICE FOR LAW STUDENTS AND EXPERIENCED ATTORNEYS, at i (2011).

person in America.”¹¹⁷ Courts exercise authority to rule on the strength of the evidence and the meaning of the law. But the most significant exercises of prosecutorial power are simply not reviewable. Prosecutors have extraordinarily broad authority to decide the crimes they investigate, the individuals they prosecute, and the charges they bring in their prosecutorial efforts. Recognizing the power of the state to bring charges in our system of criminal justice, Attorney General Jackson observed, “If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate.”¹¹⁸ General Jackson went on to explain that “no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning.” In exercising prosecutorial discretion, Jackson explained, the state should only prosecute those cases “in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”¹¹⁹

Department attorneys exercise their discretion consistent with, and bound by, the Department’s Principles of Federal Prosecution. First adopted in 1979 by Attorney General Benjamin Civiletti, these principles do not delineate the results of the exercise of that discretion, but rather, like the Sentencing Guidelines, provide a framework for making those decisions. When prosecutors make decisions in the exercise of their discretion, the wielding of the power of the state places an especially high burden on the state to do so not only consistently with the Constitution, but also in concert with the goal of achieving the broader social policies that deterrence of criminal conduct is designed to achieve.

With these high-minded principles in mind, I will indulge in a bit of practical advice when it comes to sentencing. Prosecutors have a professional and efficiency interest in getting the guidelines calculation correct in front of the sentencing judge to avoid appellate reversal. Bottom line up front, play it straight, even be conservative, or you may be back doing it again a year or two down the line after the appellate court takes a hard look at your creative and aggressive

¹¹⁷ Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

interpretation of the Guidelines that you managed to get a judge to agree to follow. Also, in my own experience as a prosecutor, be mindful that the investigation does not end until sentencing has concluded: If a defendant has not performed well on supervision or in pretrial detention, you should know about that performance and be able to use it when advocating for a sentence before the trial judge. Conversely, if the defendant has performed well during supervision or pretrial detention, you should, in fairness, let the judge know that positive sentencing factor as well.

Your goal as a prosecutor is justice—not the highest number of years of imprisonment. As a prosecutor, you have the job because you demonstrated the potential for good judgment. Do not abuse that authority or dissipate that expectation of good judgment in front of a trial judge by illustrating bad judgment. Prosecutors who fail to differentiate amongst defendants and simply advocate for a maximum or high Guidelines sentence in every case not only fail to do their job, but quickly lose their credibility before the court. For many judges, including this one, the most powerful voices are not the prosecutor and defense counsel, but the victims. Ensure victims are kept apprised of court proceedings. It's not just the law, it's also good sentencing practice because most jurists want to know what the victims feel, think, and consider appropriate—victims also need a place to voice their experience. Effective prosecutors have victims at sentencing to make their voices heard and, in a difficult case, to help keep the judge from unwanted downward departures or variances on a sentence.

Our system of justice is not designed, nor should it be, to capture every criminal act. The power to exercise the state's control over an individual's liberty requires prosecutors to do so thoughtfully and not reflexively. As one federal appellate court observed, "The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith."¹²⁰ Our system of government is not self-executing and requires women and men to show up each day to do the job of government service with wisdom, self-restraint, grace, and

¹²⁰ United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993).

humility. I applaud those who take pride in the Department's traditions and take seriously the principles that guide their work.

B. A defender's role in sentencing

During my early years at the Department, while prosecuting cases, I served in the United States Army Reserves defending soldiers accused of crimes. I began my career in the Army as an infantryman and, after attending law school, I became Judge Advocate assigned to serve as Trial Defense Counsel—a position I held during six of my eight years in the JAG Corps. In those years, I represented countless soldiers accused of crimes ranging from DUI to rape, arson, and other crimes of violence. These were cases where a soldier's career, livelihood, and family security were on the line, and it was my job to ensure that I reached the best outcome I could for my client. As a soldier and a lawyer, my duty to my client was paramount.

But aside from teaching me the basic lesson of a lawyer's duty to client, defense work made me become intimately familiar with the underlying complexity that marks individuals caught up in the criminal justice system. As Clarence Darrow once said:

Strange as it may seem, I grew to like to defend men and women charged with crime. It soon came to be something more than winning or losing of a case. I sought to learn why one man goes one way and another takes an entirely different road. I became vitally interested in the causes of human conduct. This meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him: I was dealing with life, with its hopes and fears, its aspirations and despairs. With me it was going to the foundation of motive and conduct and adjustments for human beings, instead of blindly talking of hatred and vengeance, and that subtle, indefinable quality that men call "justice" and of which nothing really is known.¹²¹

Defense work demonstrates that people are complicated and there are often driving forces behind crimes that humanize the people who

¹²¹ CLARENCE DARROW, *THE STORY OF MY LIFE* 75–76 (1932).

commit them. And most of all, defense work instilled a value in me that still guides my jurisprudence as a judge today: a firm belief that every person is more than the worst thing they have ever done. I could not help but grow to care about the men and women that I represented—as my clients and as people.

I applaud the men and women who wake up every day and choose to be the sole person to stand between their client and the enormous power of the state. As one long-time defender wrote, “It’s always a stacked deck for the state and often the defense attorney’s very best work is simply not good enough to overcome the power and the might.”¹²² Defenders must be “better—tougher, smarter, more creative, more resourceful—in order to level the playing field.”¹²³ Defenders choose a demanding and often unglamorous job; and in doing so, they ensure that no one ever stands alone against the masterful arm of the state. I am thankful to have spent an early portion of my career as a defender learning these invaluable lessons.

Lord Henry Brougham of England famously described a lawyer’s “‘first and only duty’ as ‘[t]o save that client by all means . . . at all hazards and costs to other persons, and, amongst them, to himself.’”¹²⁴ While zealous and tireless defense of a client must remain the defender’s chief aim, all lawyers necessarily must be mindful of their role as officers of the court. As Chief Justice Marshall recognized in *Ex parte Burr*:

[o]n one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved.¹²⁵

Balancing these roles and ensuring effective lawyering was never an easy task, but it has only increased in difficulty given the challenges

¹²² Abbe Smith, *Defending Those People*, 10 OHIO ST. J. CRIM. L. 277, 291 (2012) (quoting MICHAEL CONNELLY, *THE FIFTH WITNESS* 303, 406 (2010)).

¹²³ *Id.* at 291.

¹²⁴ Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647, 648 (2010) (alteration in original) (omission in original).

¹²⁵ *Id.* at 648–49 (alteration in original) (omission in original) (quoting *Ex parte Burr*, 22 U.S. 529, 530 (1824)).

many defendants face. Indeed, “plea bargains and sentencing make up most of lawyers’ criminal practice, fill most of the courts’ dockets, people the probation programs, and load the prison buses.”¹²⁶ Thus, defense attorneys must engage in not only effective, but also innovative, negotiations (that is, diversion) when representing criminal clients. While trial dominates most legal training, sentencing is not an afterthought. Rather, defense lawyers must continue to focus after a finding of guilt on further concerns such as ensuring the court reaches an appropriate punishment and accounts for a client’s need for treatment, counseling, education, and job training.¹²⁷

By the time defense attorneys stand with their clients at sentencings, many defenders feel that the battle has already been lost. Whether there was a long losing fight at trial or a begrudgingly accepted plea agreement, the client is not happy to be next to you at sentencing. In my view, an investigation, including effective use of defense investigators, does not end until sentencing concludes. The utility of lengthy pretrial motions and delays must be considered in the context of alternatively getting a client in early to cooperate with the government, which can be the difference between the government finding out about additional criminal conduct, additional loss amounts, additional sympathetic victims, etc. Once a defendant enters the sentencing phase, either by jury trial or guilty plea, for the dedicated defender, sentencing is where advocacy skills and commitment to the client are truly put to the test and most necessary. Rather than advocating for a not guilty verdict or dismissal, the defender must use their creativity to show the judge why the client is more than just the crime of conviction.

While nearly every client’s objective will be a not guilty verdict, defense counsel must strategize beyond the client’s immediate and legally untrained, often unrealistic objective to provide competent long-term representation, including the possibility of conviction and sentencing. Accordingly, duty-driven defenders prepare themselves and their client for sentencing early in the representation. While most clients hope to never get to sentencing, the harsh reality of criminal

¹²⁶ Cait Clarke & James Neuhard, “From Day One”: *Who’s in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 13 (2004).

¹²⁷ *Id.*

cases is that most clients will—especially in federal court where guilty pleas, not trials, are most common.¹²⁸ Competent and grounded defense counsel must be prepared if and when that moment arrives.

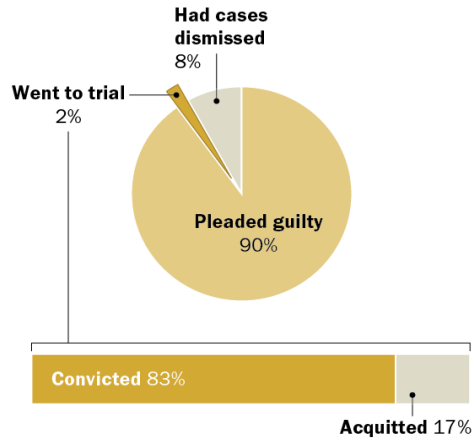
The American Bar

Association has issued helpful guidance on what this preparation should look like in practice. The advisory Criminal Justice Standards provide that defense attorneys shall consider potential issues for sentencing early in representation and throughout the entirety of cases.¹²⁹ This includes basic functions such as learning about the sentencing court’s practices during sentencing, becoming familiar with applicable sentencing guidelines, educating the client about collateral consequences of a conviction,

and investigating diversion options or sentencing alternatives.¹³⁰ The defender should also actively investigate the client’s background, including family and community ties, employment history and goals, and mental and physical health. The trust and cooperation of the client is critical in gathering this information to present a solid

Trials are rare in the federal criminal justice system, and when they happen, most end in convictions

% of federal criminal defendants who ___ in fiscal 2018



Source: Administrative Office of the U.S. Courts.

PEW RESEARCH CENTER

¹²⁸ John Gramblich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> (reporting that, in fiscal year 2018, 90% of federal defendants plead guilty, 8% had cases dismissed, and 2% went to trial. Of the 2% who went to trial, 83% were found guilty.).

¹²⁹ *Criminal Justice Standards for the Defense Function* § 4-8.3, AM. BAR ASS’N (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

¹³⁰ *Id.*

argument as to the client's ability to be rehabilitated and be successful in the community.

Likewise, the defender should be active in crafting a helpful sentencing narrative for the client long before appearing before the judge—many actors play a role in determining a sentencing outcome for a client, and able defense counsel should endeavor to favorably influence anyone who may have a hand in affecting the sentencing outcome. A prominent and practical example of this is the PSR. As discussed more fully above, the PSR is the primary tool that a judge will consider when imposing a sentence on the client. Besides including information about the client's criminal history and corresponding criminal history score, the PSR includes a summary of the client's interview about his family life, childhood, current living circumstances and community support, and physical and mental health.¹³¹ The PSR also contains any statement the client has made about his understanding of his conviction, the impact on any victim and the community, and his remorse about a crime.¹³² Accordingly, the content of the PSR is powerful and can predispose the judge to a particular sentence before even reading a sentencing memorandum or considering allocution.

As the PSR is being prepared, and throughout the sentencing preparation, the defender should actively craft a narrative that is helpful and humanizing for the client. The defender can do this by preparing for the PSR and sentencing much like trial: discuss strategy with the client, prepare the client for the interview, and take advantage of the right to be present while the interview is conducted. The defender should always file a memorandum objecting to aspects of the PSR that are incorrect and highlighting or expanding upon information that is beneficial to the client. The defender is in the best position to assist the client in crafting a report that is helpful to the client's objectives and ultimately persuasive to the sentencing judge.

Additionally, the sentencing hearing gives the defender the opportunity to powerfully present the client's case. In a post-*Booker* sentencing world where the Guidelines are discretionary, the defender has the freedom—and indeed, the duty—to advocate why the client is much more than the box on the Guidelines in which he is categorized.

¹³¹ FED. R. CRIM. P. 32(d).

¹³² *See id.*

The judge has discretion to tailor the sentence to the individual circumstances of the client, and the defender should remind the judge of this freedom in arguing the client's sentencing allocution. Likewise, the defender is not bound by the rules of evidence at the sentencing hearing and, thus, has wide latitude to present a case on behalf of the client. The defender can present letters of support, exhibits, or videos as mitigation evidence on behalf of the client.

Moreover, it is imperative that defenders push back against the Guidelines when necessary. As discussed throughout this article, a primary goal of the Guidelines is to equalize outcomes and prevent sentencing disparities. The Guidelines accomplish this by categorizing each person according to the individual's criminal history and type of crime committed and then spitting out a corresponding sentencing range based on these two factors. From the defender's perspective, this is an extraordinarily limited set of data for the judge to use in deciding about the client's potential loss of liberty. More than just its limitations, this formula can be dehumanizing to the client—the Guidelines quite literally categorize the client into a box based on the worst moments of his life. While advisory guidelines attempt to fix this flaw through caveats such as mitigating factors or departure calculations, these too fall short in capturing the nuance of a client's situation. The formula in the Guidelines simply cannot account for the innumerable complexities often lurking behind a client's circumstances, such as addiction, poverty, or mental illness.

Furthermore, even when advisory, the Guidelines remain the centerpiece of the sentencing process. As the Supreme Court recognized in discussing federal sentencing, the Guidelines are the "benchmark"¹³³ of the sentencing process, and Guidelines-compliant sentences are subject to a non-binding presumption of reasonableness on appeal.¹³⁴ In light of this guidance, a trial judge will naturally feel compelled to begin with a Guidelines-compliant sentence based on the formula computed in the PSR, even if the judge was otherwise inclined to impose a lower sentence. When a judge's starting point is that the Guidelines are presumed reasonable, the defender necessarily faces an initial challenge to overcome that presumption and convince the judge that a lower sentence is warranted and reasonable.

¹³³ *Gall*, 552 U.S. at 49.

¹³⁴ *Rita*, 551 U.S. at 341.

Accordingly, in my own experience, defense counsel must expend significant effort to provide a truly holistic view of the client and demonstrate that a lower sentence is appropriate. Practically, this means the defender has a lot of work before sentencing: meticulously reviewing the PSR for errors, carefully extracting sensitive information from the client, tracking down the client's family members or other support systems, ensuring that the PSR author is fully informed of any mitigating information, preparing the client for the PSR interview and for the sentencing hearing, and writing a sentencing memorandum clearly articulating arguments in favor of the client. In sentencing, the defender should remind the judge that the Guidelines do not, and should not, determine the client's fate. The defender's preparation in these areas is crucial—if the defender does not take these steps on behalf of the client, no one else will.

In sum, sentencing is defense counsel's opportunity to engage in creative advocacy; it is the chance to highlight the aspects of a client that are often swallowed up in the criminal justice system. Sentencing is the opportunity for the defender to show that clients are more than just nameless defendants: They are fathers and mothers, sons and daughters, employees and students, victims of addiction and mental health diagnoses, and valued members of the community despite their crime of conviction. While defense counsel should make clear that these traits do not excuse the crime, these aspects of the client should be highlighted to help the judge arrive at the best possible outcome for the client—and in many cases, argue that the court should not follow the Guidelines. Committed defense counsel who fight for their clients are required for our system of justice to perform. Every defense lawyer must remember that “our criminal justice system, and our faith in it, depends on effective representation on both sides”¹³⁵—including at sentencing.

C. The role of the judge in sentencing

After years of prosecuting and defending cases, in the twilight of my career as a lawyer, I moved into the doldrums of management and the endless administrivia that comes with those positions. Far removed from trial practice, I deeply missed the courtroom. When given the

¹³⁵ Eric Holder, Att'y Gen., U.S. Dep't of Just., Keynote Address at the National Symposium: Indigent Defense (Feb. 17, 2010).

opportunity to join the bench in my adopted hometown of D.C., I jumped at the chance. Now, every day, I experience what I had long sought—the hectic and legally kinetic environment of a very large urban courtroom. The opportunity to stretch my judicial intellect (such as it is) comes through fast-paced motions practice and trial, but the characters and human element of criminal trial work provide me with truly wonderful professional and personal rewards. But as detailed herein, there is the really hard stuff—imposing sentences of incarceration (or not) and depriving fellow citizens of their liberty.

As a starting point, in my view, in imposing sentence, a trial judge provides the “human face to punishment”¹³⁶ in exercising the power of the state. Trial judges must look defendants and victims directly in the eyes, listen to their allocutions, and impose dispassionate and constitutionally sound and reasonable sentences. At times, judges no doubt wish they could simply plug in numbers into a mathematical formula and impose the resulting sentence. Doing so, however, abdicates the very responsibility that judicial officers accept in taking on their positions. While I intermittently understand my teenager’s AP Calculus, I know that the abstract and theoretical algorithms, which he appears to so enjoy but befuddle me, do not serve any practical role in sentencing. Rather, sentencing is done face to face and person to person.

The judge must live with each sentencing decision and the collateral consequences of those decisions as they impact not only the defendant, but the victim, family members, and the public. I submit that judges hone this skillset through steady cultivation of “good judgment” in every sentencing decision, attempting to achieve “a quality of calmness in deliberation, combined with balanced sympathy towards the various interests of the defendant and the criminal justice system.”¹³⁷ As the failures of the indeterminate sentencing model and the mandatory sentencing guidelines schemes illustrate, sentencing is not math, but rather an “irreducibly human capacity for

¹³⁶ Fish, *supra* note 7, at 574 & n.92.

¹³⁷ *Id.* (citing ANTHONY T. KRONMAN, *THE LOST LAWYER* 16 (1993) (“When we attribute good judgment to a person, we imply more than that he has broad knowledge and a quick intelligence. We mean also to suggest that he shows a certain calmness in his deliberations, together with a balanced sympathy toward the various concerns of which his situation . . . requires that he take account.”) (alteration in original)).

judgment It is a trait of character acquired by life experience. It can never be reduced to a body of universal rules.”¹³⁸

The judge, in providing a human face to justice, provides the element of human judgment. A mechanical analysis consisting of binary choices cannot achieve justice, as “genuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories.”¹³⁹ Judgment can only be performed by a person on a person. *Gall v. United States* rejected the use of a rigid mathematical formula in a departure from the Sentencing Guidelines as well.¹⁴⁰ Sentencing simply cannot be reduced to a mathematical formula because “[s]entencing is not, after all, a precise science. Rarely, if ever, do the pertinent facts dictate one and only one appropriate sentence. Rather, the facts may frequently point in different directions so that even experienced district judges may reasonably differ”¹⁴¹ Of course, not all judges will engage in good judgment all the time, but with experience, the confrontation of their principles as examined under appellate review, and the advice and guidelines as provided by the Sentencing Guidelines, judges should be moved closer to good judgment.

An additional and equally important role for judges at sentencing is in “individualiz[ing] the administration of justice.”¹⁴² Judges accomplish this by making a truly customized assessment of every defendant before them. In the same way that judges are the human face to sentencing, they also should see the defendant for his humanity. Judges are most familiar with a particular defendant before them and are “better placed than other actors to observe the defendant and make a decision about the wrongfulness of their actions

¹³⁸ Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254 (1997).

¹³⁹ *Id.* at 1253.

¹⁴⁰ *Gall*, 552 U.S. at 47 (“We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.”).

¹⁴¹ *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008) (citations omitted).

¹⁴² Fish, *supra* note 7, at 573.

and their likelihood of reoffending.”¹⁴³ Judges are provided with comprehensive reports from probation officers, arguments from prosecutors, and information from the defense attorney. Sentencing memoranda and PSRs are relied upon heavily by judges to help them better understand the humanity of the defendant before them. Judges are most familiar with the facts of the criminal case and defendant’s history. They are also able to observe the defendant face to face in the courtroom and listen to the defendant himself speak if he so chooses.

Federal judges make this individualized assessment by taking into account all the factors delineated in 18 U.S.C. § 3553(a). Whether mimicked in state law or simply followed as shadow statutory precepts, most judges utilize these types of statutory factors to aid and guide them in imposing sentence. Section 3553(a) directs the court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing, as set forth below:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.¹⁴⁴

Section 3553(a) further directs the court, in determining the particular sentence to impose, to consider: “(1) the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) the statutory purposes noted above; “(3) the kinds of sentences available;” “(4) the kinds of sentence[s] and the sentencing range” as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; “(6) the need to avoid unwarranted sentencing disparities . . . ; and (7) the need to provide restitution to any victims of the offense.”¹⁴⁵ The trial judge must select a sentence in

¹⁴³ Fish, *supra* note 7, at 573–74.

¹⁴⁴ 18 U.S.C. § 3553(a)(2).

¹⁴⁵ 18 U.S.C. § 3553(a).

light of these factors and all other factors under section 3553(a) and must adequately explain the rationale for its sentence.¹⁴⁶

The judge is provided with this information from the parties during a sentencing hearing. The Supreme Court recognized the special character of these criminal sentencing proceedings:

Highly relevant—if not essential—to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.¹⁴⁷

That principle has been codified for sentencing proceedings in the federal criminal courts by 18 U.S.C. § 3661, which provides that: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁴⁸ The courts have also established that the Confrontation Clause does not apply to sentencing proceedings.¹⁴⁹

Accordingly, the parties (both prosecution and defense) may properly present at sentencing a wide array of information about a defendant’s character and past conduct derived from many sources, including grand jury testimony, affidavits, law enforcement reports, and summary testimony by law enforcement officers.¹⁵⁰ This more

¹⁴⁶ *Gall*, 552 U.S. at 50.

¹⁴⁷ *Williams*, 337 U.S. at 247.

¹⁴⁸ 18 U.S.C. § 3661.

¹⁴⁹ *Williams*, 337 U.S. at 250; *United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994) (“[T]he pre-Guidelines policy of allowing sentencing courts to obtain all relevant sentencing information without the strictures of the right of confrontation remains intact.”); *United States v. Silverman*, 976 F.2d 1502, 1510–11 (6th Cir. 1992).

¹⁵⁰ *See, e.g.*, FED. R. EVID. 1101(d)(3) (the Federal Rules of Evidence do not apply to sentencing proceedings); U.S.S.G. § 6A1.3(a) & cmt.; *Williams*, 337 U.S. at 246 (noting with approval the use of affidavits in sentencing

flexible approach at sentencing is justified by the need for the trial court to have access to the widest possible array of information about the defendant's character and conduct while still preserving its ability to assimilate this information in a proceeding less formal and protracted than a criminal trial.¹⁵¹ In this way, the judge is best situated to observe the defendant in his humanity and take all the required factors into consideration.

Part of the individualized assessment is deciding whether a departure from the guidelines is needed. As *Gall* articulated, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”¹⁵² The judge always maintains the

proceedings); *Francis*, 39 F.3d at 809–811 (“[A] sentencing judge is free to consider a wide range of information, including hearsay evidence, regardless of its admissibility at trial.”); *United States v. Gonzalez-Vazquez*, 34 F.3d 19, 25 (1st Cir. 1994); *United States v. Zuleta-Alvarez*, 922 F.2d 33, 36 (1st Cir. 1990) (grand jury testimony is presumptively reliable for sentencing purposes); *United States v. Terry*, 916 F.2d 157, 160–62 (4th Cir. 1990) (“[T]he trial court may properly consider uncorroborated hearsay evidence that the defendant has had an opportunity to rebut or explain.”); *United States v. Manuel*, 912 F.2d 204, 207 (8th Cir. 1990); *United States v. Roberts*, 881 F.2d 95, 105 (4th Cir. 1989) (“Hearsay evidence has long been allowed in sentencing proceedings.”); *United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986); *United States v. Fatico*, 579 F.2d 707, 712 (2d Cir. 1978) (“Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means.”).

¹⁵¹ See *Williams*, 337 U.S. at 250–51 (“The type and extent of this information [needed at sentencing] make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral [procedures]. . . . The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.”); *United States v. Prescott*, 920 F.2d 139, 144 (2d Cir. 1990) (“‘over-burdened trial courts would be greatly disserved’ by mandating time-consuming [sentencing] hearings”); *Manuel*, 912 F.2d at 207; *United States v. Agyemang*, 876 F.2d 1264, 1271 (7th Cir. 1989); *Pugliese*, 805 F.2d at 1123.

¹⁵² *Gall*, 552 U.S. at 52.

all-important task of making an individualized assessment in each and every case before them. The Guidelines range merely offers the judge another factor to be considered in an attempt to correct any disparity of sentencing amongst defendants.¹⁵³ Judges must “not presume that the Guidelines range is reasonable.”¹⁵⁴ Rather the judge must make “an individualized assessment based on the facts presented.”¹⁵⁵ Judges can then better understand if they are departing from what is typically done and should articulate a reason for this departure.¹⁵⁶ In considering the Guidelines, judges should make their sentences appellate-proof, as best they can, in order to not go through the same difficult decision again. Judges should go into detail in addressing party arguments and individual facts within each sentencing factor. In essence, it is a lot like middle school math—show your work; do not just keep it in your head, put it in the transcript. And to get past the problem of sentencing looking like a math test, judges should state plainly that they would give the same sentence regardless of any Guideline calculation.

To achieve the full purposes of sentencing, judges must recall their own humanity and see the humanity in the defendants that appear before them. Judges must always make an individualized assessment of every defendant. Judges are best equipped with the information provided by the parties and with the ability to see and hear the defendant to achieve a reasonable sentence. In doing so, judges must remain flexible in their response to any new or unique information as it is presented to them in real time. In this way, judges play the

¹⁵³ *Id.* at 59 (“[T]he Guidelines are only one of the factors to consider when imposing sentence . . .”).

¹⁵⁴ *Id.* at 50.

¹⁵⁵ *Id.*

¹⁵⁶ D.C. VOLUNTARY SENTENCING GUIDELINES MANUAL § 5.2.5 (D.C. SENT’G COMM’N 2020) (under the District of Columbia Sentencing Guidelines, if a judge does not give a guidelines compliant sentence then they are required to explain in writing the reason for the deviation) (“The sentencing data form provides a place to enter the aggravating or mitigating factor(s) the judge relied upon in sentencing outside of the box. If the judge uses one of the ‘catchall’ provisions, he or she must state the basis upon which he or she relied and why it is a substantial and compelling reason of comparable gravity with the enumerated factors.”).

all-important role of both humanizing and individualizing justice at sentencing.

V. Conclusion

As the government official charged with carrying out public policy when imposing sentences, judges must exercise their decision making in a holistic fashion that takes into account the statutory factors, the advisory Guidelines, the individual nature of the crimes, the defendant, and the victim, as well as balance the deterrent and rehabilitative purposes of sentencing. Judges make sentencing decisions in concert with the objective public policy goals of sentencing and the broader criminal justice system while accounting for the subjective facts and circumstances of individual defendants and their criminal conduct. This is no easy task, and it is one that rightly causes a court to engage in a demanding process in an effort to reach a reasonable sentence. Sentencing procedures vary greatly by jurisdiction and even among individual judges in the same courthouse.

As a sentencing judge, the statutory factors and the body of case law surrounding sentencing policy are highly informative, but sentencing guidelines have proven to be a critical advisory component in any judge's effort to avoid unconstitutionally disparate outcomes and reach a just sentence. Every sentencing decision necessarily involves an individualized assessment of the offender and the offense, but the Guidelines provide a considered and thoughtful effort to assist the courts in reducing disparities among offenders.

By virtue of their position, training, and experience, judges are entrusted to make difficult sentencing decisions. In reaching those decisions, however, courts do not need to unnecessarily divine an appropriate sentence solely from their own experiences or just the arguments of counsel. Rather, advisory guidelines aid a judicial officer in their consideration of objective and consensus sentencing policy. By failing to appropriately account for the broader policy objectives encapsulated in the Sentencing Guidelines, a sentencing judge very much risks imposing disparate sentences and thereby failing to achieve the broader ends of justice. Do we always get it right? No. Do we aim to achieve justice? Of course. Do we fall short? Yes. Recognizing that in the end a public official makes their decision not in a vacuum but in studious and conscientious commitment to principle, George Washington in his 1796 Farewell Address observed:

How far in the discharge of my official duties, I have been guided by the principles which have been delineated, the public records and other evidences of my conduct must witness to you and to the world. To myself, the assurance of my own conscience is, that I have at least believed myself to be guided by them.¹⁵⁷

Advisory guidelines illuminate acceptable sentencing policy and principles that aid a court in reaching a reasonable sentence. Beyond that, judges simply do their human best to further the cause of justice constitutionally.

About the Authors

Judge James Crowell was nominated by the President and confirmed by the U.S. Senate in 2019 as an Associate Judge on the Superior Court for the District of Columbia. He received a B.A. in History and French from Hampden-Sydney College and his J.D. from Boston University School of Law. Following law school, Judge Crowell clerked for Judge Charles A. Pannell Jr. of the United States District Court, Northern District of Georgia. After his clerkship, Judge Crowell joined the Department through the Attorney General's Honors Program. Over the course of his career with the Department, Judge Crowell served as the Director of the Executive Office for United States Attorneys, Principal Associate Deputy Attorney General, Chief of Staff to the Deputy Attorney General, and as a long-time AUSA in the District of Maryland, where he served as Criminal Chief. Judge Crowell has served in the United States Army Reserves for 26 years in the Infantry, JAG, and Civil Affairs.

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¹⁵⁷ Washington's Farewell Address, 1796, George Washington's Mount Vernon, <https://www.mountvernon.org/education/primary-sources-2/article/washington-s-farewell-address-1796/> (last visited June 10, 2021).

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International & Territorial Border Searches: The Border- Search Exception as Applied in the U.S. Territories of the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, & Puerto Rico

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I. Introduction

Searches of persons and property at our nation's borders "have a unique status in constitutional law."¹ The Fourth Amendment prohibits unreasonable searches and seizures and often requires warrants supported by probable cause for searches or seizures.² Border searches, however, differ from interior searches because of, among other things, the government's vested interest in protecting the integrity of our sovereign borders.³ Indeed, the "longstanding

¹ *United States v. Ezeiruaku*, 936 F.2d 136, 142 (3d Cir. 1991) (quoting *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984)).

² U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

³ *United States v. Montoya de Hernandez*, 473 U.S. 531, 537–40 (1985) ("[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.") (citation omitted). "Since the founding of our Republic, Congress has granted the Executive plenary

recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.”⁴ As such, routine searches of “the persons and effects of entrants” do not require “[any] reasonable suspicion, probable cause, or warrant.”⁵ Certain types of more intrusive searches, such as involuntary X-rays of a person, which courts often refer to as non-routine searches, require reasonable suspicion.⁶

authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.” *Id.* at 537 (citing *United States v. Ramsey*, 431 U.S. 606, 616–17 (1977)). Warrantless border searches are authorized by statute. *See, e.g.*, 8 U.S.C. §§ 1225(d)(1), 1357(c) (authorizing, *inter alia*, immigration officers “to board and search” any “conveyance” believed to be bringing aliens into the United States); 19 U.S.C. §§ 482(a) (authorizing the stop and search of “any vehicle, beast, or person” regarding merchandise “subject to duty”), 1467, 1496, 1499, 1581, 1582 (authorizing, *inter alia*, custom officers to inspect, examine, and search of persons, baggage and merchandise “unladen” from vessels “arriv[ing] at a port or place in the United States”); *see also* 14 U.S.C. § 522 (authorizing the Coast Guard to “at any time go on board . . . any vessel subject to [U.S.] jurisdiction, . . . address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel”).

⁴ *Ramsey*, 431 U.S. at 619; *see also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973).

⁵ *Montoya de Hernandez*, 473 U.S. at 538. Routine border searches do not require a search warrant, even in the absence of reasonable suspicion, because “[t]he Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.” *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (upholding a warrantless border search of a vehicle without reasonable suspicion, including removal and disassembly of the gas tank); *see, e.g.*, *United States v. Cotterman*, 709 F.3d 952, 967 (9th Cir. 2013) (holding that manual search of a hard drive is routine while a forensic search is more intrusive and thus non-routine); *United States v. Camacho*, 368 F.3d 1182, 1185–86 (9th Cir. 2004) (holding that use of a “radioactive density measuring device” that poses “no significant or detectable risk of harm to a motorist” is a routine search); *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002) (holding that a pat-down is a routine search).

⁶ *Flores-Montano*, 541 U.S. at 152; *see, e.g.*, *Montoya de Hernandez*, 473 U.S. at 541–42 (alimentary canal search); *United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir. 2009) (controlled tire deflation device); *Brent v.*

Ashley, 247 F.3d 1294, 1302 (11th Cir. 2001) (strip-search); *United States v. Mosquera-Ramirez*, 729 F.2d 1352, 1353 (11th Cir. 1984) (x-ray of an individual).

A circuit split exists as to whether forensic searches of electronics are routine or non-routine. *Compare, e.g., Cotterman*, 709 F.3d at 962–68 (forensic search of computer is non-routine due to its “comprehensive and intrusive nature” that “implicat[es] substantial personal privacy interests” and thus requires reasonable suspicion), *and United States v. Kolsuz*, 890 F.3d 133, 144 (4th Cir. 2018) (same), *with United States v. Touse*, 890 F.3d 1227, 1233–34 (11th Cir. 2018) (holding that a forensic search of cell phone is routine because the heightened requirement of reasonable suspicion only applies to non-routine searches of persons, not non-routine searches of property); *see also* Gretchen C.F. Shappert, *The Border Search Doctrine: Warrantless Searches of Electronic Devices after Riley v. California*, 62 DOJ J. FED. L. & PRAC., no. 6, 2014. *Cotterman* described a forensic search of electronics as “essentially a computer strip search,” and highlighted that such searches may “deprive [the individual] of their most personal property for days (or perhaps weeks or even months, depending on how long the search takes).” *Cotterman*, 709 F.3d at 966, 967. *Touse*, meanwhile, firmly states that “[p]roperty and persons are different,” cabins application of *United States v. Riley* to the search-incident-to-arrest context, and rejects the proposition that a traveler’s privacy can outweigh “the paramount interest [of the sovereign] in protecting . . . its territorial integrity.” *Touse*, 890 F.3d at 1232–37 (citations omitted) (alterations in original).

The Ninth Circuit, alone among the circuits, has held—when addressing only the government’s interests in criminal prosecution—that a forensic search requires reasonable suspicion that the electronic device contains digital contraband. *See United States v. Cano*, 934 F.3d 1002, 1008, 1016–19 (9th Cir. 2019). *Cano* further concluded that “cell phone searches at the border, *whether manual or forensic*, must be limited in scope to a search for digital contraband.” *Id.* at 1007 (emphasis added). Several other circuits have specifically rejected that standard. *See Alasaad v. Mayorkas*, 988 F.3d 8, 20 (1st Cir. 2021) (“As to plaintiffs’ distinction between evidence of contraband and contraband itself, the border search exception is not limited to searches for contraband itself rather than evidence of contraband or a border-related crime.”); *United States v. Williams*, 942 F.3d 1187, 1190–91 (10th Cir. 2019) (rejecting an argument that “border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband” and that “because border agents did not suspect [the defendant] of either of these types of crimes, they were prevented from searching his laptop and cell

In a recent case out of the Virgin Islands, *United States v. Baxter*, the Third Circuit Court of Appeals held that warrantless searches of packages mailed from the continental United States to the U.S. Virgin Islands (USVI) are permissible under the border-search exception to the Fourth Amendment.⁷ The court held that border searches at internal customs borders are analogous to border searches at international borders,⁸ regardless of whether goods or people are traveling into or out of the U.S. customs zone.⁹

The *Baxter* decision, discussed in more detail in the USVI section of this article, shines a light on how the distinct status of U.S. territories and their individual histories affects the application of federal search and seizure law. The decision also underscores the unique position of America's territories in the context of border-search law.

II. U.S. territories and the Fourth Amendment

The United States has fourteen territories, five of which are inhabited: American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the Commonwealth of Puerto Rico, and the USVI.¹⁰ The remaining nine are uninhabited or have

phone” because officers are not required “to close their eyes to suspicious circumstances”); *Kolsuz*, 890 F.3d at 143–44 (“The justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border.”).

⁷ 951 F.3d 128, 136 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1269 (2021).

⁸ *Baxter*, 951 F.3d at 133 (“[T]he rationale of the Supreme Court’s international border-search cases applies with equal force at the customs border that Congress established between the mainland United States and the Virgin Islands.”).

⁹ *Id.* at 136. (“[T]he direction of travel does not impact the applicability of the border-search exception.”).

¹⁰ *How are U.S. states, territories, and commonwealths designated in the Geographic Names Information System?*, U.S. GEOLOGICAL SURVEY, https://www.usgs.gov/faqs/how-are-us-states-territories-and-commonwealths-designated-geographic-names-information-system?qt-news_science_products=0#qt-news_science_products (last visited Aug. 24, 2021).

only periodic populations.¹¹ Under what is known as the Territorial Clause of the Constitution, Congress has plenary “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property” of the United States.¹² Moreover, by virtue of their status as unincorporated possessions under the control of the United States, the Constitution does not apply in its entirety to the inhabited territories.¹³

The Supreme Court first determined whether constitutional rights apply to unincorporated territories, and to what extent, in a series of decisions known as the *Insular Cases*.¹⁴ In the *Insular Cases*, the

¹¹ *Id.* Those territories include Baker Island, Howland Island, Jarvis Island, Palmyra Atoll, Johnston Island, Kingman Reef, Midway Islands, Wake Island, and Navassa Island. *Id.* Additionally, two uninhabited territories are currently contested: Bajo Nuevo Bank and Serranilla Bank. *Id.* The International Court of Justice understands these islands to be a “Joint Regime Area” under the joint administration of Colombia and Jamaica. *See Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 624, ¶ 163 (Nov. 19).

¹² U.S. CONST. art. IV, § 3, cl. 2.

¹³ An incorporated territory is a territory “destined for statehood from the time of acquisition, and the Constitution” applies to such a territory “with full force.” *Examining Bd. of Eng’rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). An unincorporated territory is a territory that does “not possess[] that anticipation of statehood.” *Id.* Only fundamental constitutional rights apply of their own force to such a territory. *Id.* The five inhabited territories are unincorporated territories. *Definitions of Insular Area Political Organizations*, U.S. DEPT OF THE INTERIOR, <https://www.doi.gov/oia/islands/politicatypes> (last visited Aug. 24, 2021).

¹⁴ The first *Insular Cases* were decided on May 27, 1901, and dealt with the validity of commercial tariffs between the United States and its territories. *See De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that a territory of the United States cannot be treated as a foreign country under tariff laws); *Goetze v. United States*, 182 U.S. 221 (1901) (same); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that Puerto Rico ceased to be a foreign nation upon the signing of the peace treaty wherein Spain ceded Puerto Rico to the United States); *Armstrong v. United States*, 182 U.S. 243 (1901) (same); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that tariffs imposed between Puerto Rico and the continental United States under Puerto Rico’s Organic Act did not violate the Uniformity Clause); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901) (holding that vessels conducting trade between

Supreme Court held that certain rights are “fundamental” and apply to all areas under the jurisdiction of the United States, including unincorporated territories, while other rights are not.¹⁵ For example,

Puerto Rico and the continental United States are engaged in domestic “coasting trade” rather than foreign trade). Later cases dealt with the applicability of constitutional rights within the territories. *See Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that “most” of the Bill of Rights applied in Hawaii upon annexation by the United States but not those that “are not fundamental in their nature,” such as the Fifth Amendment requirement for indictment by grand jury and the Sixth Amendment requirement for conviction by a unanimous jury); *Dorr v. United States*, 195 U.S. 138 (1904) (concluding that the Territorial Clause—which empowers Congress to make laws governing U.S. territories—does not require such laws to incorporate a right to trial by jury); *Ocampo v. United States*, 234 U.S. 91 (1914) (holding the Constitution to not apply “of its own force” in U.S. territories, and thus, Fifth Amendment grand jury rights were not applicable in the Philippines absent a specific enactment by Congress); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (declining to extend the Sixth Amendment right to trial by jury to unincorporated Puerto Rico absent a legislative enactment). *But see Rassmussen v. United States*, 197 U.S. 516 (1905) (recognizing the territory of Alaska as “incorporated” within the United States and, thus, applying the Constitution therein); *Reid v. Covert*, 354 U.S. 1 (1957) (plurality) (finding that the United States cannot act against its citizens abroad in disregard of their constitutional rights, thereby recognizing the right to a civilian trial by jury for civilian family members of the armed forces overseas, but distinguishing the Insular Cases). A third wave of cases dealt with social welfare benefits. *See Califano v. Torres*, 435 U.S. 1 (1978) (per curiam) (finding no Fifth Amendment violation in withdrawing Social Security benefits from U.S. citizens who move to Puerto Rico); *Harris v. Rosario*, 446 U.S. 651 (1980) (finding no Fifth Amendment violation in granting U.S. citizens in Puerto Rico lower levels of reimbursement in federal aid programs and reaffirming Congress’s power under the Territorial Clause to treat territories differently from states as long as there is a rational basis for doing so).

¹⁵ *Downes*, 182 U.S. at 290–91 (White, J., concurring) (“[T]here is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, . . . [however] it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. . . . [T]his does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that . . . there may nevertheless be restrictions of so fundamental a nature

the Supreme Court concluded that the Sixth Amendment right to trial by jury and the Fifth Amendment right to indictment by grand jury “are not fundamental in their nature” and “concern merely a method of procedure” and, as such, do not extend to the territories.¹⁶

Following the logic and reasoning of the *Insular Cases*, only fundamental rights apply of their own force to the inhabited territories.¹⁷ Thus, certain rights provided by the U.S. Constitution do not apply to the inhabited territories unless Congress makes them applicable by legislation.¹⁸ Congress’s “power to . . . make all needful Rules and Regulations respecting the Territory or other Property,” combined with local history and subsequent court decisions, has created a wide variety of laws, regulations, and local practices among the inhabited territories.¹⁹ Recognizing and acknowledging these differences is especially important insofar as protection and enforcement of the United States’ borders is concerned. This article will discuss relevant statutes and case law regarding the territorial

that they cannot be transgressed, although not expressed in so many words in the Constitution.”).

¹⁶ *Dorr*, 195 U.S. at 144–45.

¹⁷ This holding has been criticized in both subsequent case law and academia. See, e.g., Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57 (2013); Juan R. Torruella, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283 (2007); Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should be Taught in Law School*, 21 J. GENDER RACE & JUST. 395 (2018); Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. F. 284 (Oct. 2020). Courts are reluctant to extend the *Insular Cases* any further. See, e.g., *Reid*, 354 U.S. at 14 (“[N]either the [Insular] cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine”); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that a statute denying federal courts jurisdiction to hear alien detainees at Guantanamo Bay’s habeas corpus actions that were pending at the time of its enactment was an unconstitutional suspension of writ of habeas corpus). *But see Califano*, 435 U.S. 1; *Harris*, 446 U.S. 651.

¹⁸ See, e.g., *Dorr*, 195 U.S. 138; 48 U.S.C. § 1561 (codifying a bill of rights for the Virgin Islands).

¹⁹ U.S. CONST. art. IV, § 3, cl. 2.

borders. This article also analyzes how prosecutors, the courts, and agencies can ensure the integrity of our nation's borders while upholding the rights of individuals. It also briefly touches on territorial immigration checkpoints and federal immigration law as applied to the territories.

Fourth Amendment protections against unreasonable searches and seizures or similar protections apply in the inhabited territories as they do in the states. The Court has never explicitly held that Fourth Amendment rights are fundamental constitutional rights that apply “of their own force” in the territories absent a federal determination to extend those rights.²⁰ But regardless of whether those rights are fundamental, Fourth Amendment protections against unreasonable

²⁰ In *Torres v. Puerto Rico*, the Supreme Court held that the Fourth Amendment applied to Puerto Rico but relied heavily on implicit Congressional determinations rather than the fundamentalness of the right. 442 U.S. 465 (1979). Although “Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling[,] . . . Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico.” *Id.* at 470. “[B]ecause the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress’ ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.” *Id.* The Court concluded that Congress had implicitly determined that the Fourth Amendment applied because: (1) “[f]rom 1917 until 1952, Congress by statute afforded equivalent personal rights to the residents of Puerto Rico”; (2) “[w]hen Congress authorized the people of Puerto Rico to adopt a constitution, its only express substantive requirements were that the document should provide for a republican form of government and ‘include a bill of rights’”; and (3) “[a] constitution containing the language of the Fourth Amendment . . . was adopted by the people of Puerto Rico and approved by Congress.” *Id.* Thus, the Court determined that the Fourth Amendment applied because “[b]oth Congress’ implicit determinations in this respect and long experience establish that the Fourth Amendment’s restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness.” *Id.*; see also *Downes*, 182 U.S. at 282 (White, J., concurring) (the fundamental or “natural rights” include “the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, [sic] to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments”).

searches and seizures or similar protections now apply in the U.S. territories as they do in the states. Puerto Rico's Constitution and Supreme Court case law provide that the Fourth Amendment applies in the Commonwealth of Puerto Rico.²¹ The Fourth Amendment applies to the USVI²² and Guam through their respective Organic Acts,²³ and to the CNMI through the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" and its constitution,²⁴ and similar protections apply to American Samoa through its Revised Constitution.²⁵

As previously noted, the Fourth Amendment, both in the states and in the federal territories, does not require warrants for stops and searches at the nation's borders because the sovereign and its public officials have the right to protect the United States by stopping and searching persons and property both entering and leaving the country.²⁶ Authorized agents may initiate border searches without a

²¹ *Torres*, 442 U.S. at 471; P.R. CONST. art. II, § 10; see also *Buenrostro v. Collazo*, 973 F.2d 39, 43 (1st Cir. 1992) ("The protections of the Fourth Amendment are fundamental to the rights of all American citizens and apply unreservedly in Puerto Rico."); *Lopez Lopez v. Aran*, 844 F.2d 898, 902 (1st Cir. 1988).

²² 48 U.S.C. § 1561 ("The right to be secure against unreasonable searches and seizures shall not be violated.").

²³ 48 U.S.C. §§ 1421b(c), (u); see also *United States v. Drake*, 543 F.3d 1080, 1088 (9th Cir. 2008) (holding that Guam's Organic Act provides protection equal to the Fourth Amendment to the residents of Guam).

²⁴ H.R.J. Res. 549, 94th Cong. (1976) ("Section 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendments 1 through 9 . . ."); N. MAR. I. CONST. art. I, § 3 ("The right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizures shall not be violated."); see also *Commonwealth v. Lin*, 2014 MP 6 (N. Mar. I. 2014) (applying Fourth Amendment jurisprudence to a search conducted under CNMI territorial law).

²⁵ AM. SAMOA CONST. art I, § 5 ("Protection against unreasonable searches and seizures").

²⁶ See, e.g., *Montoya de Hernandez*, 473 U.S. at 537–40; see also *supra* notes 3–4. Although the Supreme Court has only addressed incoming border

warrant, probable cause, or in many cases, even reasonable suspicion.²⁷

III. Federal customs and immigration law in the territories

Congress has exercised its authority to treat the inhabited territories differently than it treats the states and differently from each other, including in the customs and immigration contexts. Significant for our purposes, the Smoot–Hawley Tariff Act, also known as the Tariff Act of 1930, originally defined the “United States” to include “all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.”²⁸ In other words, the Act included the continental

searches in its binding holdings, it has indicated in *dicta* that outgoing border searches are permissible. *See* *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 63 (1974) (“If reporting of income may be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the Secretary’s regulations here.”). The federal circuit courts of appeals have uniformly endorsed outgoing border searches. *See* *United States v. Boumelhem*, 339 F.3d 414, 422–23 (6th Cir. 2003); *United States v. Beras*, 183 F.3d 22, 26 (1st Cir. 1999); *United States v. Oriakhi*, 57 F.3d 1290, 1297 (4th Cir. 1995); *Ezeiruaku*, 936 F.2d at 143; *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991); *United States v. Udofot*, 711 F.2d 831, 839 (8th Cir. 1983); *United States v. Ajlouny*, 629 F.2d 830, 834 (2d Cir. 1980); *United States v. Stanley*, 545 F.2d 661, 665–67 (9th Cir. 1976).

²⁷ *Montoya de Hernandez*, 473 U.S. at 539. Some courts have concluded that a search cannot be considered a border search under the Fourth Amendment if not conducted by a party specifically authorized to conduct the search by statute. *See, e.g.,* *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979) (finding that a search conducted at a border checkpoint by a Federal Bureau of Investigation agent cannot be analyzed under the border search doctrine because the statute authorizing the search, 19 U.S.C. § 482, only authorizes customs or immigration officers to conduct such a search); *see also* *United States v. Alfonso*, 759 F.2d 728, 735 (9th Cir. 1985) (rejecting argument that participation in a search by non-customs agents nullified the classification as a border search when the non-customs agents were assisting customs agents who also participated in the search).

²⁸ Tariff Act of 1930, ch. 497, art. IV, § 401(k), 46 Stat. 590, 708 (1930) (codified at 19 U.S.C. § 1401(h)).

United States and the then-territories of Alaska, Hawaii, and Puerto Rico as part of the U.S. customs zone.²⁹ The Act, in conjunction with other federal laws, still excludes the inhabited U.S. territories, other than Puerto Rico, from the U.S. customs zone.³⁰

Congress has also treated the territories differently with respect to customs administration. Customs administration of Guam, American Samoa, and the CNMI is under the authority of those territories' respective governments.³¹ For the USVI, administering the territorial customs zone is the responsibility of U.S. Customs and Border Protection (CBP).³² Because Puerto Rico is part of the U.S. customs zone, CBP administers U.S. customs laws in that territory.³³ As this article demonstrates, border search procedures and practices vary

²⁹ *Id.*; see also *Rasmussen*, 197 U.S. at 523 (noting the applicability of United States customs law to Alaska since 1868).

³⁰ 19 U.S.C. § 1401(h). The statute currently defines "United States" to include for customs purposes "all Territories and possessions of the United States except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the Island of Guam." *Id.* In addition, the CNMI Covenant provides that: (1) "[t]he Northern Mariana Islands will not be included within the customs territory of the United States"; (2) "[t]he Government of the Northern Mariana Islands may, in a manner consistent with the international obligations of the United States, levy duties on goods imported into its territory from any area outside the customs territory of the United States and impose duties on exports from its territory"; and (3) "[i]mports from the Northern Mariana Islands into the customs territory of the United States will be subject to the same treatment as imports from Guam into the customs territory of the United States." H.R.J. Res. 549, 94th Cong. (1976).

³¹ 19 C.F.R. § 7.2(b). Importation into these territories is not governed by the Tariff Act of 1930. *Id.*

³² 48 U.S.C. §1406i; 19 C.F.R. § 7.2(c). Importation into the USVI is governed by Virgin Islands law. 48 U.S.C. §1406i; 19 C.F.R. § 7.2(c). Where no Virgin Islands law or federal law specifically applies, federal laws and regulations are a guide to be complied with "as nearly as possible." 19 C.F.R. § 7.2(c). Tariff classification and duty rates are established by the Virgin Islands legislature. *Id.*

³³ See 19 U.S.C. § 1401(h) (carving specific territories out of the U.S. customs zone but not Puerto Rico); see also 19 C.F.R. § 101.3 (listing San Juan and Ponce as Customs Ports of Entry).

across the U.S. territories as a result of different local laws, federal statutes, and case law.

The Customs Administrative Act of 1938 provides specific authorization to inspect, examine, and search persons and property within the U.S. customs zone.³⁴ As a result, customs officers are authorized to inspect, examine, and search persons, baggage, and merchandise discharged or removed from vessels arriving in U.S. ports regardless of whether those people or items have been previously inspected.³⁵ They are also permitted to board any vessel or vehicle in their district or outside of their district to examine the manifest and other relevant documents,³⁶ to examine the vessel or vehicle, and to search persons or property onboard the vessel or vehicle.³⁷ In addition, they are authorized to apprehend and stop vehicles or vessels, and use “all necessary force to compel compliance.”³⁸ Persons entering the United States are also subject to possible detention and search by customs officers pursuant to federal law and regulations.³⁹

Immigration law also applies differently in the territories. Federal immigration law generally extends to Guam, the CNMI, the USVI, and Puerto Rico, but it does not apply to American Samoa.⁴⁰ Federal immigration law, however, also provides that certain aliens leaving Guam, the CNMI, the USVI, or Puerto Rico cannot be admitted into other parts of the United States.⁴¹ Indeed, to enforce that provision, the federal government operates immigration checkpoints at

³⁴ Customs Administrative Act of 1938, ch. 679 §§ 11–18, 52 Stat. 1077 (1938). That Act also authorized certain searches in the USVI. *See id.* at 1083 (codified at 19 U.S.C. § 1467).

³⁵ 19 U.S.C. § 1467; *see also* 19 C.F.R. § 162.6. Customs officers are similarly authorized to search persons, baggage, and merchandise discharged or removed from vessels arriving in USVI ports. 19 U.S.C. § 1467.

³⁶ 19 U.S.C. § 1581(a).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 19 U.S.C. § 1582.

⁴⁰ 8 U.S.C. § 1101(a)(38).

⁴¹ 8 U.S.C. § 1182(a), (d)(7) (making certain standards for inadmissibility “applicable to any alien who shall leave Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States”).

territorial airports.⁴² Thus, while generally applying federal immigration law to Guam, the CNMI, the USVI, and Puerto Rico, Congress has essentially created separate immigration zones for those territories.⁴³

IV. The United States Virgin Islands

The USVI consists of three major islands and scores of smaller islands and cays. The territory was purchased by the United States from Denmark in 1917. Statutory provisions at the time of the transfer enabled Danish customs laws to remain in effect, thereby creating a separate customs territory.⁴⁴ This structure continues to present day, with some modifications.⁴⁵

The USVI, like all of the inhabited U.S. territories, except for Puerto Rico, is outside the U.S. customs zone.⁴⁶ Unlike in the other territories addressed in this article, CBP enforces the USVI's territorial customs laws.⁴⁷ As previously noted, although the USVI is generally considered part of the United States for immigration purposes, federal

⁴² See, e.g., *United States v. Pollard*, 326 F.3d 397, 402 (3d Cir. 2003) (describing the operation of the airport immigration checkpoint in the USVI); *Lopez Lopez*, 844 F.2d at 900–01 (describing the operation of the airport immigration checkpoint in Puerto Rico).

⁴³ See 8 C.F.R. § 235.5(a) (“In the case of any aircraft proceeding from Guam, the Commonwealth of the Northern Mariana Islands . . . , Puerto Rico, or the United States Virgin Islands destined directly and without touching at a foreign port or place, to any other of such places, or to one of the States of the United States or the District of Columbia, the examination of the passengers and crew required by the Act may be made prior to the departure of the aircraft, and in such event, final determination of admissibility will be made immediately prior to such departure.”).

⁴⁴ 48 U.S.C. § 1395; see also *Couvertier v. Gil Bonar*, 173 F.3d 450, 452 (1st Cir. 1999).

⁴⁵ See 48 U.S.C. §§ 1394–96; see generally *Paradise Motors, Inc. v. Murphy*, 892 F. Supp. 703, 704–06 (D.V.I. 1994) (describing the “precarious shoals that emerge at the confluence of Virgin Islands and federal law” owing to the history between the USVI and the United States with regard to the customs territory).

⁴⁶ 19 U.S.C. § 1401(h).

⁴⁷ 19 C.F.R. § 7.2(c).

immigration law provides that certain aliens are not admissible into the rest of the United States from the USVI.⁴⁸

The Third Circuit exercises appellate jurisdiction over the District Court of the Virgin Islands,⁴⁹ which is an Article IV court established by the territory's Organic Act.⁵⁰ The Third Circuit has addressed the applicability of the border-search exception to the USVI in *United States v. Hyde*⁵¹ and *United States v. Baxter*⁵² and the constitutionality of immigration checkpoints between the USVI and the rest of the United States in *United States v. Pollard*.⁵³ In *Hyde*, the Third Circuit upheld a warrantless, suspicionless search of an individual flying from the USVI to Florida.⁵⁴ The court found that “the interest of the United States in warrantless searches without probable cause” at the customs border is “little different from its interest in such searches at its international borders” and the “reasonable expectations of individual privacy” at the customs border to be not “materially greater” than that of travelers at an international border.⁵⁵

The court determined that the United States' interest in warrantless searches without suspicion of criminal activity is strong because: (1) “Congress has the authority to create a border for customs p[ur]poses between the Virgin Islands and the rest of the country”; (2) “[s]hortly after the United States acquired the Virgin Islands from Denmark in 1917, Congress exercised that authority”; and (3) “[r]outine warrantless border searches without probable cause . . . appear to be as essential to the accomplishment of the objects of that customs border as similar traditional searches have universally been recognized to be to the objectives of traditional

⁴⁸ See 8 U.S.C. §§ 1101(a)(38), 1182(a), (d)(7).

⁴⁹ 28 U.S.C. §§ 41, 1291.

⁵⁰ U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall . . . make all needful Rules and Regulations respecting the Territory . . . belonging to the United States”); 48 U.S.C. §§ 1612(a) (“The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States.”), 1614(a) (establishing that the court's judges are appointed by the President and confirmed by the United States Senate for ten-year terms).

⁵¹ 37 F.3d 116 (3d Cir. 1994).

⁵² 951 F.3d 128 (3d Cir. 2020).

⁵³ 326 F.3d 397 (3d Cir. 2003).

⁵⁴ *Hyde*, 37 F.3d at 117.

⁵⁵ *Id.* at 122.

customs systems at international borders.”⁵⁶ After all, “Congress . . . specifically authorized customs inspections when travelers enter the United States from the Virgin Islands and other United States possessions in the same manner as if the traveler had come from a foreign country.”⁵⁷ It also determined that travelers’ privacy interests at the customs border do not outweigh the significant governmental interest because “border searches have been consistently conducted at the border between the Virgin Islands and the mainland since the United States acquired the Virgin Islands” and “[w]hile first time visitors to the [USVI] may not have specific awareness of” those searches, “there is sufficient public knowledge of the distinctive status of the Virgin Islands to alert such travelers to the possibility of border inquiries not experienced at state lines.”⁵⁸

For years, courts in the USVI construed *Hyde* to authorize searches of people and packages at the customs border between the USVI and the U.S. customs zone whether the person or package was traveling into the U.S. customs zone from the USVI or vice versa.⁵⁹ For example, the Appellate Division of the District Court of the Virgin Islands⁶⁰ applied *Hyde* and held that agents could conduct a border search when the defendant flew from the U.S. customs zone into the

⁵⁶ *Id.* at 121–22.

⁵⁷ *Id.* at 121 (citing 19 U.S.C. § 1467).

⁵⁸ *Id.* at 122.

⁵⁹ Before *Hyde*, the District Court of the Virgin Islands had concluded that the border search exception applied to individuals entering the Virgin Islands from the United States customs zone. *See United States v. Chabot*, 531 F. Supp. 1063, 1069–70 (D.V.I. 1982).

⁶⁰ Before the creation of the Virgin Islands Supreme Court, the Appellate Division of the District Court exercised appellate jurisdiction over appeals from the local Superior Court. *See* 48 U.S.C. § 1613a(a). Judges of the local courts can be assigned to the district court by the chief judge of the United States Court of Appeals for the Third Circuit (who can also assign other federal judges to the court). *See* 48 U.S.C. § 1614(a). Appellate division panels, however, consist of the chief judge of the district court and two other judges assigned to the district court, with the caveat that no more than one judge on a panel can serve as a judge on a court established by the local legislature. *See* 48 U.S.C. § 1613a(b).

USVI.⁶¹ The district court also held that the border-search exception applied to packages mailed from the USVI into the U.S. customs zone.⁶²

More recently, the district court began to question *Hyde*'s applicability. In *Barconey*, the district court held that CBP officers could not conduct a border search when individuals flew from the U.S. customs zone into the USVI.⁶³ In reaching that conclusion, the district court construed *Hyde* to hold

that a warrantless and suspicionless routine customs search at the internal customs border between the United States and the Virgin Islands *may* be reasonable for Fourth Amendment purposes if: (1) the search is federally authorized; and (2) the United States' interest in regulating the flow of persons and effects across the border outweighs the individual's reasonable expectation of privacy at the border.⁶⁴

The court then concluded that *Hyde* could not be read to permit searches of passengers flying from the U.S. customs zone into the USVI because no federal regulation or statute authorized the search.⁶⁵

⁶¹ David v. Gov't of Virgin Islands, 51 V.I. 993, 1003 (D.V.I. App. Div. 2009) (“David has failed to present, and the Court is unaware of, any valid legal authority for the proposition that the border between the U.S. Virgin Islands to the mainland operates only one-way. On the contrary, a person who enters the U.S. Virgin Islands from the continental United States, like a person traveling in the opposite direction, is considered to have crossed a border within the meaning of the border search exception to the warrant requirement.”).

⁶² United States v. Smith, Crim. No. 2010-2, 2010 WL 2243869, at *3 (D.V.I. June 1, 2010) (“Hyde’s holding is controlling in this case. If a traveler can be searched without a warrant or probable cause when headed from the Virgin Islands to Florida, a package that has left the Virgin Islands, and entered the U.S. customs territory when it arrives in Puerto Rico, can also be searched without a warrant.”).

⁶³ United States v. Barconey, No. 17-cr-00011, 2019 WL 137579, at *12 (D.V.I. Jan. 8, 2019).

⁶⁴ *Id.* at *9.

⁶⁵ *Id.* at *9–12. The United States contended that the search was sufficiently authorized. *See, e.g.*, United States’ Surreply, United States v. Barconey, No. 17-cr-00011 (D.V.I. Oct. 15, 2018), ECF No. 94. The Third Circuit has not addressed the issue.

For that reason, the court did not address the weighing of interests.⁶⁶ The district court nevertheless declined to suppress the evidence on other grounds.⁶⁷

In *Baxter*, a different district court judge held that the border-search exception did not apply to packages sent from the U.S. customs zone to the USVI after re-weighing the governmental and private interests.⁶⁸ *Baxter* mailed two packages containing guns from South Carolina to the USVI.⁶⁹ Relying on their border-search authority, CBP officers opened the packages in St. Thomas without a warrant.⁷⁰ The defendant argued that the contents of the search should be suppressed.⁷¹

The district court agreed, holding that *Hyde* did not authorize border searches of packages shipped to the USVI from the U.S. customs zone.⁷² The court distinguished *Hyde* because: (1) “[w]ith respect to the individual’s interest, it is unclear how long the United States has been conducting routine warrantless searches of incoming mail”; (2) “there is less cause to find ‘sufficient public knowledge of the distinctive status of the Virgin Islands to alert’ those sending mail to the Virgin Islands that their packages may be searched without a warrant” because “[i]ndividuals departing the Virgin Islands for the United States pass through a customs checkpoint” which provides “an obvious signal to travelers that leaving the Virgin Islands and entering a state is somewhat different than traveling from one state to another,” whereas “[i]ndividuals entering the Virgin Islands from a state pass through no such obstacles”; and (3) no federal statute authorized the search.⁷³

⁶⁶ *Barconey*, 2019 WL 137579, at *12.

⁶⁷ *Id.* at *13–16.

⁶⁸ *United States v. Baxter*, No. 17-cr-00024, 2018 WL 6173880, at *14 & n.7 (D.V.I. Nov. 26, 2018), *vacated and remanded*, 951 F.3d 128 (3d Cir. 2020).

⁶⁹ *Id.* at *1–2.

⁷⁰ *Id.*

⁷¹ *Id.* at *2.

⁷² *Id.*

⁷³ *Id.* at *14 n.7. The district court acknowledged the existence of a federal regulation that authorized the search, but concluded that the regulation “seem[ed] at odds with another regulation.” *Id.* at *14 n.7.

The Third Circuit reversed the district court judge's decision in *Baxter* and held that the border-search exception permits warrantless searches of packages traveling in both directions across the customs border between the United States and the USVI.⁷⁴ The court drew on two threads of border search cases. First, border searches of inbound individuals are permissible at the U.S. customs border with the USVI.⁷⁵ Second, border searches of outbound luggage are permissible at the international border.⁷⁶ Finally, the court emphasized that similar interests justify warrantless border searches of outbound packages regardless of whether the border is an international border or the customs border between the United States and the USVI.⁷⁷

The Third Circuit has also drawn parallels between border searches and immigration checkpoints in the USVI. In *Pollard*, the defendant attempted to board an airplane traveling from the USVI to New York.⁷⁸ An Immigration and Naturalization Service (INS) officer questioned her at an airport checkpoint regarding her citizenship.⁷⁹ Although the defendant claimed to be a U.S. citizen, the officer suspected she was lying and referred her to secondary inspection, where the defendant confessed she was not a U.S. citizen.⁸⁰ The defendant was then charged with violating 18 U.S.C. § 911 by falsely representing that she was a U.S. citizen.⁸¹ The district court subsequently suppressed her statement on several bases, including that the airport immigration checkpoint violated the Fourth Amendment.⁸²

The Third Circuit reversed for multiple reasons. It determined that *Hyde* “squarely supports the constitutionality of the Checkpoint under Fourth Amendment analysis,” because its reasoning applied equally in the customs and the immigration contexts.⁸³ Acknowledging that while “there are differences between customs interests and

⁷⁴ *Baxter*, 951 F.3d at 128.

⁷⁵ *Id.* at 131 (citing *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994)).

⁷⁶ *Id.* at 135–36 (citing *United States v. Ezeiruaku*, 936 F.2d 136 (3d Cir. 1991)).

⁷⁷ *Id.* at 136 & n.16.

⁷⁸ *Pollard*, 326 F.3d at 400.

⁷⁹ *Id.* at 400, 402.

⁸⁰ *Id.*

⁸¹ *Id.* at 402.

⁸² *Id.* at 405.

⁸³ *Id.* at 413–14.

immigration interests,” there is also “no reason why the balancing test would yield different results when applied to the Checkpoint.”⁸⁴

Applying the balancing test, the Third Circuit determined that *Hyde* supported the constitutionality of the Checkpoint because: (1) “[w]hile the power of Congress used in *Hyde* was the power to regulate commerce, here, the power at issue is the power to regulate immigration—which is at least equally as compelling” and “the Government clearly has as great an interest in interdicting aliens as it does in regulating customs”; and (2) “[t]he intrusion on an individual’s interests that results from the questioning at the Checkpoint likewise does not seem to exceed the intrusion that results from a customs inspection” and “the expectation of privacy is equally as low.”⁸⁵

In sum, federal agencies exercise border-search authority in the USVI on behalf of the United States and the USVI government, and that authority extends to both searches at the international border between the USVI and foreign countries and searches at the customs border between the USVI and the U.S. customs zone. Authorities may also conduct searches at immigration checkpoints between the USVI and the rest of the United States.

V. Guam

The island territory of Guam, located in Micronesia in the western Pacific, was ceded by Spain to the United States in 1898 under the Treaty of Paris that ended the Spanish–American War.⁸⁶ The Guam Organic Act of 1950 established U.S. citizenship for its residents, a legislative body, and a bill of rights.⁸⁷

⁸⁴ *Id.* at 414.

⁸⁵ *Id.*; see also *United States v. Mora-Santana*, 99 F. App’x 397, 399 n.3 (3d Cir. 2004) (not precedential) (“[W]hile *Hyde* addressed only the government’s interest in establishing customs checkpoints, we recently explained that the nature of the checkpoint, i.e., whether customs or immigration, does not alter our analysis.” (citing *Pollard*, 326 F.3d at 414)).

⁸⁶ Treaty of Peace between the United States of American and the Kingdom of Spain (“Treaty of Paris”) art. II, Dec. 10, 1898, 30 Stat. 1754, 1755 (“Spain cedes to the United States . . . the island of Guam in the Marianas or Ladrones.”).

⁸⁷ Organic Act of Guam, 64 Stat. 384, 81 Cong. Ch. 512 (codified as amended at 48 U.S.C. §§ 1421–1428e).

Guam, like all of the inhabited U.S. territories except for Puerto Rico, is outside the U.S. customs zone.⁸⁸ Guam is responsible for its own customs enforcement⁸⁹ through the Guam Customs and Quarantine Agency (CQA).⁹⁰ The Director of the CQA is responsible for promulgating the rules and regulations necessary for the CQA to carry out air and maritime cargo and passenger inspections.⁹¹ The Guam Code authorizes Guam Customs officers to seize controlled substances and forged or counterfeited goods, and to “arrest persons” who import such substances and goods.⁹² CQA agents are also authorized to examine any baggage arriving in Guam “from a point outside the United States of America, including the Commonwealth of the Northern Mariana Islands.”⁹³ Further, Governor’s Memorandum 33-52 authorized Guam Customs officers to inspect persons, baggage, and merchandise arriving on Guam, and it appears to remain good law.⁹⁴

⁸⁸ 19 U.S.C. § 1401(h); 19 C.F.R. § 7.2(a).

⁸⁹ 19 C.F.R. § 7.2(b). In *Barush v. Calvo*, the Ninth Circuit stated that “[t]he Secretary of the Treasury has delegated to the Government of Guam the authority to administer United States customs in Guam.” 685 F.2d 1199, 1201 & n.3 (9th Cir. 1982). The Ninth Circuit subsequently identified that statement as inaccurate and clarified that Congress itself delegated customs authority to Guam by excluding Guam from the United States customs zone in the Tariff Act of 1930. *Guam v. Sugiyama (Sugiyama I)*, 846 F.2d 570, 571–72 (9th Cir.) (per curiam), *amended on denial of reh'g*, 859 F.2d 1428 (9th Cir. 1988).

⁹⁰ 5 GUAM CODE ANN. § 3127 (2020). The Guam Customs and Quarantine Division was housed in the Guam Department of Commerce until 1994, when the Guam Legislature established the Division as its own agency: the Guam Customs and Quarantine Agency. Guam Pub. L. 22-112 (1994). For an overview of customs authority in Guam, see ELWAY IKEDA, ET. AL., *GUAM CUSTOMS STUDY: FINDING THE GAPS AND CLOSING THE BREACHES* 4–5 (2019).

⁹¹ 5 GUAM CODE ANN. §§ 73144, 73151 (2020).

⁹² 5 GUAM CODE ANN. § 73102 (2020).

⁹³ 5 GUAM CODE ANN. § 73126 (2020); *see also* 5 GUAM CODE ANN. § 73128 (authorizing inspection of imports).

⁹⁴ *See Sugiyama I*, 846 F.2d at 573 n.2 (Skopil, J., dissenting) (“While section 47124 authorizes only the search of baggage, the Governor’s Memorandum is not inconsistent with this legislative grant of authority. Further, although the Guam legislature repealed the 1939 Tariff Schedule and Customs Regulations and other Memoranda, the legislature did not repeal the Governor’s Memorandum 33-52.”).

Although Guam, like other territories, is considered part of the United States for immigration purposes,⁹⁵ federal immigration law provides that certain aliens are inadmissible into the rest of the United States from Guam.⁹⁶

The Ninth Circuit exercises appellate jurisdiction over the District Court of Guam,⁹⁷ which is an Article IV court established by the territory's Organic Act.⁹⁸ The Ninth Circuit has addressed border searches involving Guam on several occasions. In 1982, in the first such case, *Barush v. Calvo*, the court considered the constitutionality of warrantless luggage searches by Guam government officials when the luggage traveled by sea to Guam from the CNMI.⁹⁹ It concluded that such searches did not violate the Fourth Amendment. The outcome, however, was closely linked to the specific political circumstances present at the time: The Northern Mariana Islands and the United States had entered into a Covenant to establish the CNMI as a commonwealth in union with the United States in 1975, but the Northern Mariana Islands' status as a U.N. Trust Territory of the Pacific Islands was not yet formally revoked.¹⁰⁰ Thus, "[s]ince the Northern Marianas ha[d] not yet fully gained the political status of a United States territory, it [was] proper that a customs search be conducted of persons traveling from the Northern Marianas to Guam."¹⁰¹ Notwithstanding the Ninth Circuit's emphasis on the Northern Mariana Islands' status as a U.N. Trust Territory as a basis

⁹⁵ 8 U.S.C. § 1101(a)(38).

⁹⁶ 8 U.S.C. § 1182(a), (d)(7).

⁹⁷ 28 U.S.C. §§ 41, 1291.

⁹⁸ See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall . . . make all needful Rules and Regulations respecting the Territory . . . belonging to the United States"); 48 U.S.C. § 1424(b) ("The District Court of Guam shall have the jurisdiction of a district court of the United States"); 48 U.S.C. § 1424b ("The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court of Guam who shall hold office for a term of ten years").

⁹⁹ 685 F.2d 1199, 1200, 1202 (9th Cir. 1982).

¹⁰⁰ *Id.*; see also H.R.J. Res. 549, 94th Cong. (1976).

¹⁰¹ *Barusch*, 685 F.2d at 1200, 1202; see also *Guam v. Sugiyama (Sugiyama II)*, 859 F.2d 1428, 1429 (9th Cir. 1988), *amending* 846 F.2d 570, 572 (9th Cir. 1988) (per curiam) ("In 1985 Rota was part of the Trust Territory of the Pacific Islands as was Palau.").

for supporting warrantless border searches of luggage transported from the Northern Mariana Islands to Guam, subsequent case law strongly suggests that, since Guam and the CNMI are in separate customs zones, searches of people and goods traveling between the two territories should be guided by principles analogous to the border search exception to the Fourth Amendment as applied between a territory and the U.S. customs zone.¹⁰²

The Ninth Circuit has since applied the border-search exception bi-directionally.¹⁰³ In *United States v. Vance*, the defendant arrived in Guam from Honolulu “look[ing] dazed and glassy eyed” and “seemed to have difficulty understanding and responding to [the customs officer’s] questions.”¹⁰⁴ Vance’s flights were also “suspiciously short”; despite claiming to have been on “a vacation,” the defendant spent \$800 for “less than 24 hours” in Hawaii.¹⁰⁵ The secondary inspection customs officer found Vance and his answers suspicious and proceeded to search Vance’s luggage and conduct a pat down.¹⁰⁶ The pat down revealed the defendant was “wearing two sets of underwear” which is “unusual” for Guam’s climate.¹⁰⁷ Despite the double underwear, the defendant “had a suspicious bulge in his crotch area.”¹⁰⁸ With this reasonable suspicion, the customs officer conducted a strip search, and narcotics “fell out” when the defendant “pull[ed] down his underwear.”¹⁰⁹ The Ninth Circuit held that “Vance was subjected to a border search when he entered Guam.”¹¹⁰ Further, the court determined that the sequence of searches was constitutionally permissible: The initial questioning of the defendant and the search of his luggage “required no suspicion,” the pat down was appropriately

¹⁰² See, e.g., *United States v. Wall* (Wall I), No. 07-cr-00025, 2009 WL 10697305, at *9 (D. Guam May 10, 2009) (“[T]he court finds that the search of the DHL package [traveling from the continental United States to Guam] was made pursuant to the border search and extended border search provisions contained in 5 GUAM CODE ANN. § 73102(2).”), *aff’d*, 378 F. App’x 639 (9th Cir. 2010) (not precedential).

¹⁰³ *United States v. Vance*, 62 F.3d 1152 (9th Cir. 1995).

¹⁰⁴ *Id.* at 1155.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1155–56.

¹⁰⁹ *Id.* at 1156.

¹¹⁰ *Id.*

conducted with “minimal suspicion,” and the customs officer possessed the requisite “real suspicion” to conduct the strip search.¹¹¹

The Ninth Circuit has also applied the extended border-search doctrine to the territories.¹¹² In *United States v. Wall*, an anonymous tip alerted a DEA task force officer in Guam that a DHL package containing crystal methamphetamine (“ice”) had been sent from Washington State to Guam.¹¹³ The informant provided the tracking number, and the DEA task force officer placed a “lookout” on the package with Guam CQA.¹¹⁴ In a subsequent in-person meeting with the informant, agents learned that the anticipated recipient of the package purportedly previously received a similar DHL package containing “ice.”¹¹⁵ Once the package arrived, Guam CQA drug detector dogs conducted a “cursory sniff” with negative results.¹¹⁶ An x-ray of the package at the Guam International Airport, however, identified the contents as “a substance suspicious in nature consistent with drug importation.”¹¹⁷ Agents obtained a search warrant from a federal magistrate, and a Guam CQA customs officer opened the package, revealing 118.9 grams of crystal methamphetamine.¹¹⁸ The contents of the package were “replaced with a ‘sham’ product,” and the package was reinserted into the mail delivery system.¹¹⁹ Shortly thereafter, the agents arrested Wall at a DHL office after he retrieved the package.¹²⁰

Wall appealed the district court’s denial of a motion to suppress the narcotics, arguing that the search warrant affidavit failed to establish

¹¹¹ *Id.*

¹¹² Extended border searches “occur after the actual entry has been effected and intrude more on an individual’s normal expectation of privacy [and] must be justified by ‘reasonable suspicion’ that the subject of the search was involved in criminal activity.” *Guzman-Padilla*, 573 F.3d at 877–78 (citation omitted).

¹¹³ *Wall I*, 2009 WL 10697305, at *1.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

probable cause.¹²¹ The Ninth Circuit agreed, concluding that the informant's tips should have been given little weight because "the informant had no track record of reliability, did not reveal her/his basis of knowledge, and did not provide any predictive information about future events."¹²² Further, this "uncorroborated tip, coupled with an unsupported conclusion that the contents of a package are 'consistent with contraband,'" did not establish probable cause to justify a search.¹²³ The Ninth Circuit remanded the case to the district court to determine whether Guam customs officers were statutorily authorized to search the package and whether the good-faith exception to suppression applied.¹²⁴

On remand, the district court first considered whether the Guam customs officers possessed the authority to search the contents of the DHL package as a border search under the particular facts of the case.¹²⁵ Guam law permits Guam customs officers to conduct warrantless searches for controlled substances imported into the territory.¹²⁶ In *Wall*, however, the package arrived "un-manifested" (not listed on the airline manifest), and thus, CQA released the package to DHL without a customs search.¹²⁷ That same day, Guam customs officers retrieved the package from DHL, which was located on airport property.¹²⁸ The customs officer "found it suspicious that the package was not listed on the manifest," that "the label was handwritten" when the package was supposedly "coming from a business," and that the package "was taped in all corners," which would conceal scents from canines.¹²⁹ In addition, an x-ray revealed that the package's actual contents did not match the customs declaration claiming that it contained plush toys and bath products.¹³⁰

¹²¹ *Id.*; see also *United States v. Wall* (Wall II), 277 F. App'x 704 (9th Cir. 2008) (not precedential).

¹²² *Wall II*, 277 F. App'x at 706 (footnote removed).

¹²³ *Id.*

¹²⁴ *Id.* at 707.

¹²⁵ *Wall I*, 2009 WL 10697305, at *3.

¹²⁶ *Id.*; see also *United States v. Rowland*, 464 F.3d 899, 904 (9th Cir. 2006); 5 GUAM CODE ANN. § 73102(2).

¹²⁷ *Wall I*, 2009 WL 10697305, at *3.

¹²⁸ *Id.*

¹²⁹ *Id.* at *4.

¹³⁰ *Id.*

Guam customs officers proceeded to open the package and locate the narcotics.¹³¹

The defendant argued that Guam customs officers “lost the chance” to conduct a border search when they initially released the package to DHL.¹³² The district court, however, stressed that when Guam customs officers retrieved the package from DHL, the package was “still in the stream of transit.”¹³³ There was no evidence that the package had been opened.¹³⁴ Moreover, “DHL is not a private party but, like the post office, it is an entity charged with keeping the integrity of packages until they reach their designated recipients.”¹³⁵

The district court also rejected defendant’s claims that the actual search was conducted by Drug Enforcement Administration (DEA) agents who lacked authority under Guam law to conduct a border search.¹³⁶ Testimony by a Guam customs agent indicated that the search was conducted by Guam CQA officials, and not by DEA agents.¹³⁷

The district court determined that the extended border-search doctrine applied.¹³⁸ When a search is conducted away from the border or the functional equivalent thereof, agents must have reasonable suspicion to conduct the search.¹³⁹ The court concluded that the intelligence report, the tracking number, the informant’s disclosure that the defendant previously sent ice in a DHL package purportedly containing bath products, the fact that the package was not listed on the manifest, and the results of the x-ray examination established reasonable suspicion, and thus, permitted an extended border search.¹⁴⁰

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* (“A border search is valid only if conducted by officials specifically authorized to conduct such searches.” (citing *United States v. Whiting*, 781 F.2d 692, 696 (9th Cir. 1986))); *see also* Tariff Act of 1930, ch. 497, art. IV, § 401(k).

¹³⁷ *Wall I*, 2009 WL 10697305, at *4.

¹³⁸ *Id.* at *4.

¹³⁹ *Id.* at *5.

¹⁴⁰ *Id.*

The district court also concluded that the *Leon* good faith exception to the exclusionary rule applied.¹⁴¹ The Ninth Circuit had previously determined that the search warrant was not supported by probable cause.¹⁴² The district court reviewed the entire record and found: No evidence that (1) the agents had “knowingly or recklessly included false information in the affidavit supporting the search warrant”; or that (2) “the Magistrate Judge acted in any manner other than that of a neutral and detached arbiter . . . or that the search warrant . . . [was] so obviously deficient that an officer could not rely on the warrant’s validity.”¹⁴³ Thus, the court concluded that the officers executing the warrant reasonably relied on its validity because the magistrate judge issued a facially valid warrant.¹⁴⁴ Because the search warrant was executed in good faith, the contents of the search need not be suppressed.¹⁴⁵

The defendant appealed a second time, and the Ninth Circuit reviewed the district court’s border search conclusions.¹⁴⁶ Significantly, the Ninth Circuit did *not* address the *Leon* good-faith exception in its opinion; the firm basis for the Guam CQA’s warrantless border search mooted any discussion of the validity of, or reliance on, the warrant obtained.¹⁴⁷ The court reiterated that a warrantless extended border search is permissible “if (1) under the totality of the circumstances, it is reasonably certain that the contraband subject to search crossed the border and (2) the search is

¹⁴¹ *Id.* at *6–8; *see also* *United States v. Leon*, 468 U.S. 897, 920 (1984) (finding that evidence seized in reasonable good faith reliance upon a facially valid warrant is not subject to the exclusionary rule, even if the warrant is later determined to be based on an insufficient showing of probable cause).

¹⁴² *Wall I*, 2009 WL 10697305, at *6; *see also Wall II*, 277 F. App’x at 704.

¹⁴³ *Wall I*, 2009 WL 10697305, at *7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* “The principal purpose of the exclusionary rule is to deter police misconduct, and in most cases in which a police officer has obtained a warrant from a magistrate, ‘there is no police illegality and nothing to deter.’” *Id.* at *6 (quoting *Leon*, 468 U.S. at 920–21).

¹⁴⁶ *United States v. Wall (Wall III)*, 378 F. App’x 639 (9th Cir. 2010) (not precedential).

¹⁴⁷ *Id.* at 640 (“Because the search was a permissible extended border search, we affirm the district court’s order without reaching Wall’s other arguments.”).

supported by reasonable suspicion.”¹⁴⁸ Because both conditions were met, the extended border search of the DHL package was permissible.¹⁴⁹ The Ninth Circuit emphasized that even the fact that “a cursory search or no search occurred at the time of the initial border crossing does not prevent later searches from coming under the rules of border searches.”¹⁵⁰

The Ninth Circuit has also upheld border searches conducted by immigration authorities in Hawaii when a defendant traveled from Guam to Hawaii. In *United States v Tsai*, an INS agent in Guam stopped two individuals who were attempting to board a flight to Hawaii without proper documentation.¹⁵¹ While the aircraft they attempted to board was still in flight to Hawaii, INS agents determined that the defendant, who was aboard the flight, was assisting the two other individuals to enter the United States illegally.¹⁵² INS agents in Hawaii stopped the defendant for questioning upon disembarking the flight.¹⁵³ After interviewing the defendant, the inspector searched the defendant’s briefcase and luggage and discovered inculpatory documents.¹⁵⁴

The defendant sought to suppress evidence obtained through the search, but the Ninth Circuit upheld the search as a constitutional, routine border search.¹⁵⁵ The court reasoned that the INS “enjoys the specific statutory authority” to conduct warrantless baggage searches of such individuals,¹⁵⁶ and the search of the defendant’s briefcase was “customary [and] relatively uninvasive” and, thus, routine in nature.¹⁵⁷

¹⁴⁸ *Id.* at 640 (citing *United States v. Sahanaja*, 430 F.3d 1049, 1054 (9th Cir. 2005)).

¹⁴⁹ *Id.* at 641.

¹⁵⁰ *Id.*

¹⁵¹ 282 F.3d 690, 692–93 (9th Cir. 2002).

¹⁵² *Id.* at 693.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 696–97.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 695. “The scope of the search clearly placed it within our cases’ definition of a routine border search, requiring neither warrant nor individualized suspicion.” *Id.* at 696.

Relatedly, in *United States v. Rowland*, the Ninth Circuit relied on customs zone principles in Guam to interpret a criminal statute.¹⁵⁸ In that case, an informant provided identifying information to the DEA regarding Rowland and his plans to travel from Hawaii to Guam with methamphetamine.¹⁵⁹ The DEA shared this information with Guam CQA, and Rowland was placed on a “watch list.”¹⁶⁰ When Rowland deplaned in Guam, he was not required to pass through federal immigration or customs checkpoints.¹⁶¹ He was, however, required to complete a Guam customs agriculture declaration form, wherein he stated that he did not possess “prohibited items or controlled substances.”¹⁶²

Rowland was referred to a Guam customs officer for a secondary inspection due to his presence on the “watch list.”¹⁶³ CQA’s initial questioning of Rowland and search of his bag did not reveal any incriminatory information.¹⁶⁴ Rowland, however, was “nervous and sweating mildly.”¹⁶⁵ The customs officer proceeded to ask Rowland if he had “any weapons or narcotics on his person,” to which Rowland responded, “Yes, I have dope on me.”¹⁶⁶ A strip search revealed 464 grams of methamphetamine strapped in packets around Rowland’s waist.¹⁶⁷ Following his indictment, the defendant filed a motion to suppress, alleging, *inter alia*, that the Guam customs officers lacked probable cause and reasonable suspicion to believe that Rowland was engaged in criminal activity.¹⁶⁸ The government argued that defendant’s stop constituted a border search that did not require reasonable suspicion or probable cause.¹⁶⁹ The district court declined to reach the border-search issue and held that the custom officer’s stop was supported by reasonable suspicion and that the defendant’s

¹⁵⁸ (*Rowland I*) 464 F.3d 899 (9th Cir. 2006).

¹⁵⁹ *Id.* at 902.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 902–03.

¹⁶⁷ *Id.* at 903.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

own statement that he had “dope on his body” furnished probable cause to conduct a search of his person.¹⁷⁰

On appeal, the Ninth Circuit first addressed whether Guam customs officers had the statutory authority to detain Rowland under the facts of the case. Without statutory authority to conduct a stop, the evidence would have been potentially subject to suppression.¹⁷¹ Under territorial law, Guam CQA officers are statutorily authorized to seize narcotics “imported into Guam” and arrest the importer.¹⁷² Thus, the Ninth Circuit addressed whether narcotics arriving in Guam on a flight from Hawaii were “imported into Guam” within the Guam statutory scheme.¹⁷³

Rowland argued that drugs “imported into Guam” must arrive in Guam from a foreign country.¹⁷⁴ Because his flight from Hawaii was a nonstop *domestic* flight, Rowland posited that Guam CQA lacked the requisite authority to stop and question him under Guam’s drug laws.¹⁷⁵ Following this line of reasoning, he concluded that “domestic,” as set forth in the Guam Code, should be defined as “of or relating to a country’s internal affairs,” and therefore, “importation” must implicate non-domestic or foreign activities, such as airline flights from another country.¹⁷⁶

The Ninth Circuit rejected Rowland’s reasoning, noting that Rowland relied on the common dictionary definition of the term “import” while failing to apply the statutory definition plainly contained in the Guam Code.¹⁷⁷ “Import,” under the customs title of the Guam Code, means “with respect to any article, any bringing in or introduction of such article into any area of Guam.”¹⁷⁸ Thus, when the territorial code prohibits “import[ing] into Guam any controlled substance,” it prohibits importation regardless of whether the

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 904 (citing *United States v. Juda*, 46 F.3d 961, 968 (9th Cir. 1995)).

¹⁷² *Id.*; 5 GUAM CODE ANN. § 73102(1)–(2); 9 GUAM CODE ANN. §§ 67.205, 67.600–.608.

¹⁷³ *Rowland I*, 464 F.3d at 904.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 905.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

controlled substance comes from another country or from the United States.¹⁷⁹ Therefore, the Ninth Circuit held that “it is an act of importation to bring drugs into Guam from the United States” under Guam law and that “Guam Customs officers are statutorily authorized to stop and seize individuals they suspect of bringing drugs to Guam, even if the persons arrived on a flight originating in the United States.”¹⁸⁰

More significantly for our purposes, the Ninth Circuit went on to state, “Even if we were not convinced by the plain language of the statute, we would reach the same conclusion based on the structure of Guam customs law. Guam is not part of the United States customs territory, and has its own customs zone.”¹⁸¹ The court reasoned that it “makes sense that, for purposes of Guam customs law, any item arriving from outside of Guam—even if coming from the United States—is subject to customs inspection” because “an item passing from the United States into Guam leaves one customs territory, and its administration, and enters another.”¹⁸² Thus, Guam’s territorial laws prohibiting illicit drug importation applied to Rowland’s transportation of drugs between Hawaii and Guam.¹⁸³

The remaining issue was whether Guam CQA, with its clear statutory authority to conduct stops related to drug importation, required reasonable suspicion to do so. The government argued that Rowland was lawfully “stopped” and searched pursuant to the border-search exception at the internal customs border when he was referred to secondary inspection.¹⁸⁴ Under this view, Guam CQA did not require suspicion to refer Rowland to secondary inspection or to conduct searches because the CQA was exercising the territory’s customs border-search authority.¹⁸⁵

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (citing 19 U.S.C. § 1401(h)); *see also* 19 C.F.R. §§ 7.2(a) (noting that Guam is “outside the customs territory of the United States”), 7.2(b) (“The customs administration of Guam is under the Government of Guam.”).

¹⁸² *Rowland I*, 464 F.3d at 905.

¹⁸³ *Id.*

¹⁸⁴ Brief for Appellee at 5, *United States v. Rowland*, No. 05-10375, 2005 WL 4155282 (9th Cir. Oct. 26, 2005); Transcript of Oral Argument, *Rowland*, 2006 WL 6021717 (9th Cir. June 13, 2006).

¹⁸⁵ *Id.*

The Ninth Circuit concluded, however, that reasonable suspicion was sufficient to justify the search and that the totality of the circumstances supported the reasonableness of the stop.¹⁸⁶ As a result, the court saw no need to also consider whether the stop was justified by the border-search exception.¹⁸⁷ Notably, when addressing an ineffective assistance of counsel claim several years later on collateral attack, the district court commented, “it is highly possible that had the Ninth Circuit addressed the border-search issue it would have concluded that the petitioner was subjected to a border search.”¹⁸⁸ Thus, the application of the border-search doctrine in these situations is not foreclosed; indeed, in light of the Ninth Circuit’s other cases addressing territorial border searches, it is likely that it would have affirmed on that basis if the court had reached that issue.

Comparing the Ninth Circuit’s analysis of “importation” in *Rowland* with the court’s earlier analysis in *United States v. Cabaccang* underscores the differences between federal law and territorial law.¹⁸⁹ The defendants in *Cabaccang* were charged with a variety of federal

¹⁸⁶ *Rowland I*, 464 F.3d at 907–09 (“[T]he Guam Customs officer in this case was statutorily authorized to stop Rowland if he reasonably suspected that Rowland was trafficking in a controlled substance . . . [and] the totality of the circumstances in this case provided ‘specific and articulable facts which . . . reasonably warrant[ed]’ the stop at Guam Customs.”) (second alteration in original).

¹⁸⁷ *Id.* at 909 n.4 (“Because we conclude that the stop was justified by reasonable suspicion, we express no opinion on whether Rowland’s stop at Guam Customs was a ‘border search’”).

¹⁸⁸ *Rowland v. United States (Rowland II)*, No. 07-cv-00027, 2010 WL 2104656, at *9 n.8 (D. Guam May 20, 2010). In defense counsel’s own words, he considered the border search question to be the most concerning. *Id.* at *7 (“[Defense counsel] explained that his strategy was to address the border search issue first, because they had ‘no chance of surviving’ if Guam was deemed to be an international border and the exception applied.”).

¹⁸⁹ Compare *Rowland I*, 464 F.3d at 906 (“The statute in *Cabaccang* prohibited transportation of drugs into the United States, and the critical question was whether passage through international airspace rendered drugs ‘imported.’ Here, there has been no suggestion that the drugs were imported due to passage through international airspace; instead, we know that the drugs were ‘imported’ because they were introduced ‘into any area on Guam’ from outside of Guam.”), with *United States v. Cabaccang (Cabaccang I)*, 332 F.3d 622 (9th Cir. 2003) (en banc).

offenses stemming from a scheme to transport methamphetamine from California to Guam, crossing an internal customs border via “mules” on direct flights and via the U.S. mail, and to distribute the narcotics within Guam.¹⁹⁰ The primary issue on appeal was whether passage through international airspace from California to Guam rendered the drugs “import[ed] into the United States from any place outside thereof.”¹⁹¹ *Rowland* relied upon the definition of “import” under Guamanian territorial law, while *Cabaccang* analyzed “import” as defined in federal law, which makes it unlawful “to import into the United States from any place outside thereof” certain controlled substances.¹⁹²

Before *Cabaccang*, Ninth Circuit decisions held that transporting drugs from inside of the United States through international airspace to another point within the United States constituted importation.¹⁹³ After a careful analysis of the statute’s wording, application, and history, the Ninth Circuit concluded, “to the extent that any doubt remains, the scope of the statute is sufficiently ambiguous to invoke the rule of lenity.”¹⁹⁴ Text, statutory structure, and history failed to establish that the government’s position that travel through international airspace constituted importation was unambiguously correct; thus, the issue was resolved in the defendant’s favor.¹⁹⁵

The court, however, emphasized that its decision did not leave the defendants unpunished. Criminal conduct chargeable as “importation” under section 952 implicates possession with intent to distribute methamphetamine under 21 U.S.C. § 841.¹⁹⁶ The court noted that

¹⁹⁰ *Cabaccang I*, 332 F.3d at 623–24.

¹⁹¹ *Id.* at 624 (emphasis omitted).

¹⁹² Compare 9 GUAM CODE ANN. § 67.601(a), with 21 U.S.C. § 952(a).

¹⁹³ See *Sugiyama I*, 846 F.2d at 572, overruled by *Cabaccang I*, 332 F.3d at 634–35; *United States v. Perez*, 776 F.2d 797 (9th Cir. 1985), overruled in part by *Cabaccang I*, 332 F.3d at 634–35 & 635 n.21 (“Because we confine our holding to the transport of drugs on an aircraft that travels nonstop through international airspace en route between two United States locations, we express no opinion on the continuing vitality of *Perez* with respect to the maritime transport of drugs in international waters.”); see also *United States v. Cabaccang (Cabaccang II)*, 16 F. App’x 566 (9th Cir. 2001) (not precedential), *rev’d en banc*, 332 F.3d 634 (9th Cir. 2003).

¹⁹⁴ *Cabaccang I*, 332 F.3d at 635.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

“each of the Cabaccang brothers will still serve a life sentence for his involvement in the methamphetamine ring,” and the “decision does nothing more than prevent the government from charging as importation conduct that can only be characterized as the domestic transport of drugs.”¹⁹⁷ Together, the *Cabaccang* and *Rowland* decisions emphasize the need for prosecutors to undergo a careful analysis of differences between federal law and territorial law when making charging decisions that may implicate both.

VI. Commonwealth of the Northern Mariana Islands

The CNMI is comprised of “14 islands in the western Pacific Ocean, just north of Guam and 3,200 miles west of Hawaii.”¹⁹⁸ Before the political establishment of the Commonwealth, the Northern Mariana Islands were part of the U.N. Trust Territory of the Pacific Islands.¹⁹⁹ As such, the United States administered the islands on behalf of the United Nations.²⁰⁰ The Northern Mariana Islands began the process of officially becoming a U.S. territory in 1975, with the Islands’ passage of the “Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America.”²⁰¹ The covenant was approved by a joint resolution of

¹⁹⁷ *Id.* at 636.

¹⁹⁸ U.S. GOV’T ACCOUNTABILITY OFF., COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: RECENT ECONOMIC AND WORKFORCE TRENDS 4 (2020).

¹⁹⁹ S.C. Res. 21, 17 (Apr. 2, 1947) (“The United States of America is designated as the Administering Authority of the Trust Territory.”).

²⁰⁰ *Id.* The U.N. Security Council terminated the Trusteeship Agreement in 1990, determining that “the objectives of the Trusteeship Agreement have been fully attained.” S.C. Res. 683 (Dec. 22, 1990). For a brief summary of the history and structure of the Trust Territory and Trust Agreement, see *Gale v. Andrus*, 643 F.2d 826, 828–35 (D.C. Cir. 1980).

²⁰¹ 48 U.S.C. § 1801; H.R.J. Res. 549, 94th Cong. (1976) (“Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the ‘Commonwealth of the Northern Mariana Islands’, in political union with and under the sovereignty of the United States of America.”). The Covenant marked “the first United States acquisition of populated territory in over fifty years.” Arnold H. Liebowitz, *The Marianas Covenant Negotiations*, 4 *FORDHAM INT’L L.J.* 19, 21 (1980).

Congress in 1976.²⁰² The Commonwealth then adopted its own constitution in 1977 and set a new government in 1978.²⁰³ In 1986, the U.N. “concluded that the Government of the United States had satisfactorily discharged its obligations as the Administering Authority under the terms of the Trusteeship Agreement” and terminated the Northern Mariana Islands’ status as a trusteeship; the CNMI’s Covenant with the United States was thus declared fully effective as of late 1986.²⁰⁴ The CNMI Covenant granted the CNMI the right of self-governance over internal affairs and the United States complete authority over matters relating to foreign affairs and defense.²⁰⁵

CBP is the federal agency responsible for enforcing customs and border laws for the U.S. Customs Zone, but CBP does not administer territorial customs law.²⁰⁶ Immigration and Customs Enforcement (ICE) is responsible for enforcing U.S. immigration laws, and its investigative authority within the CNMI includes investigations of violations of the Immigration and Nationality Act, as well as investigations related to bulk cash smuggling, cybercrime, and child pornography.²⁰⁷

The CNMI, like Guam, is outside the U.S. customs zone²⁰⁸ and is responsible for its own customs enforcement.²⁰⁹ The CNMI Division of

²⁰² See H.R.J. Res. 549, 94th Cong. (1976).

²⁰³ *Constitution*, COMMONWEALTH L. REVISION COMM’N, <https://cnmilaw.org/cons.php#gsc.tab=0> (last visited Aug. 25, 2021).

²⁰⁴ Proclamation No. 5564, § 1, 51 Fed. Reg. 40399 (Nov. 3, 1986).

²⁰⁵ See H.R.J. Res. 549, 94th Cong. (1976).

²⁰⁶ U.S. GOV’T ACCOUNTABILITY OFF., COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: DHS SHOULD CONCLUDE NEGOTIATIONS AND FINALIZE REGULATIONS TO IMPLEMENT FEDERAL IMMIGRATION LAW 6 & n.18 (2010).

²⁰⁷ *Id.* at 6 n.21. Before 2008, the Northern Mariana Islands were not subject to federal immigration law. *United States v. Yong Jun Li*, 643 F.3d 1183, 1184 (9th Cir. 2011). Congress subsequently extended federal immigration law to the Northern Mariana Islands, with some exceptions. See 48 U.S.C. §§ 1806–08; see also 8 U.S.C. § 1101(a)(38) (including the CNMI in the definition of the “United States”). The transition period for implementing of U.S. immigration law in the CNMI began in 2009 and will end in 2029. 48 U.S.C. § 1806(2).

²⁰⁸ See 19 U.S.C. § 1401(h).

²⁰⁹ See *id.*; 19 C.F.R. § 7.2(b); *Sugiyama I*, 846 F.2d at 571–72; see generally U.S. GOV’T ACCOUNTABILITY OFF., NORTHERN MARIANA ISLANDS: PROCEDURES FOR PROCESSING ALIENS AND MERCHANDISE 3 (2000).

Customs Service is “responsible for the facilitation of trade, collection of revenue through the enforcement of excise taxes on imported goods and identifying and seizing prohibited (contraband) items imported to and exported from the CNMI.”²¹⁰ The Division of Customs Service also “safeguards all ports of entry which includes the Seaport, Airport and U.S. Postal, from any importation of contrabands, narcotics, illegal drugs and dutiable commodities.”²¹¹

Although the CNMI, like most of the other inhabited territories, is generally treated as part of the United States for immigration purposes, federal immigration law provides that certain aliens are not admissible into the rest of the United States from the CNMI.²¹²

The Ninth Circuit exercises appellate jurisdiction over the District Court for the Northern Mariana Islands,²¹³ which is an Article IV court established by the territory’s Organic Act.²¹⁴ When confronted with border-search issues, the District Court has affirmed that routine border searches do not require probable cause.²¹⁵ But in recent years,

²¹⁰ *About the Division*, DIV. OF CUSTOMS SERVS., <https://www.finance.gov.mp/customs-services.php> (last visited Aug. 25, 2021); see also 70 N. MAR. I. ADMIN. CODE § 10.1 (2019); 6 N. MAR. I. CODE § 2304(a)(1) (authorizing the CNMI Customs Service to inspect mail at the United States Post Offices in the Commonwealth).

²¹¹ *About the Division*, CNMI DIVISION OF CUSTOMS SERVICES, <https://www.finance.gov.mp/customs-services.php> (last accessed Dec. 7, 2020); see also 70 N. MAR. I. ADMIN. CODE § 10.1 (2019).

²¹² See 8 U.S.C. §§ 1101(a)(38), 1182(a), (d)(7).

²¹³ 48 U.S.C. § 1821(a) (“The Northern Mariana Islands shall constitute a part of the same judicial circuit of the United States as Guam.”); 28 U.S.C. §§ 41, 1291. The District Court for the Northern Mariana Islands is not an Article III court; the District Court judge is appointed by the President with the advice and consent of the Senate for a term of ten years. See 48 U.S.C. § 1821(b).

²¹⁴ 48 U.S.C. § 1822 (“The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States”).

²¹⁵ See *Yu Min Zhao v. United States*, No. 15-cv-00019, 2016 WL 4004575, at *3 (D. N. Mar. I., July 25, 2016) (“Searches and seizures to examine persons ‘crossing the border into this country, are reasonable simply by virtue of the fact that they occur at the border.’” (citation omitted)); *United States v. Jung*, No. 95-cr-00024, 1996 WL 33482410, at *1 (D. N. Mar. I. Jan. 12, 1996) (“[T]he search of the defendant . . . was a ‘border search’ or its functional equivalent, for which no probable cause is required.”).

courts in the territory have had only limited engagement with issues pertaining to border-search authority. Nevertheless, insofar as federal law treats Guam and the CNMI similarly, it is unlikely that the Ninth Circuit would treat the CNMI any differently than it treats Guam.

VII. American Samoa

American Samoa is the only U.S. insular territory in the southern hemisphere. Located approximately 2,600 miles southwest of Hawaii, its five volcanic islands and two coral atolls cover a land area of approximately 76 square miles.²¹⁶ American Samoa is an unorganized, unincorporated territory of the United States.²¹⁷ The matai, the Samoan chiefs, ceded the territory to the United States via two deeds,²¹⁸ and the U.S. Congress formally ratified the cessions in 1929.²¹⁹ At that time, Congress provided that “until it established a governmental structure for the territory ‘all civil, judicial, and military powers in American Samoa shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct.’”²²⁰ The Department of the Navy governed

²¹⁶ U.S. GOV'T ACCOUNTABILITY OFF., *AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS* 4 (2008); *see also Understanding the Population of American Samoa*, U.S. CENSUS BUREAU, (2020), https://www.census.gov/content/dam/Census/programs-surveys/sis/resources/2020/sis_2020map_americansamoa_k-12.pdf.

²¹⁷ Leulumoega Su'esu'e Lutu, Att'y Gen., Am. Sam., Speech at The University Of San Diego (Feb. 3, 1986) (“As it does not have an organic act, it is unorganized; as the corpus of the United States Constitution does not apply to American Samoa, it is unincorporated.”).

²¹⁸ CHIEFS OF TUTUILA, *CESSION OF TUTUILA AND AUNU'U* (1900), <https://new.asbar.org/cession-of-tutuila-and-aunuu/>; DIST. JUDGE OF TUTUILA, *CESSION OF MANU'A ISLANDS* (1904), <https://new.asbar.org/cession-of-manua-islands/>; *see also* Sean Morrison, *Foreign in A Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 *HASTINGS CONST. L.Q.* 71, 77 (2013) (“The Instruments of Cession granted sovereignty to the United States, but protected the communal land and the power of the Samoan chiefs, generally known as *matai*.”). In 1925, the United States formally extended sovereignty over Swain's Island and made the island part of American Samoa. Act of March 4, 1925, 43 Stat. 1357 (codified at 48 U.S.C. § 1662).

²¹⁹ Act of February 20, 1929, 45 Stat. 1253 (codified at 48 U.S.C. § 1661).

²²⁰ *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 376 (D.C. Cir. 1987) (cleaned up) (quoting 48 U.S.C. § 1661(c)).

the territory from 1900 to 1951, when the President transferred the authority to govern the territory to the Department of the Interior, where it remains today.²²¹ American Samoa's first constitution was adopted in 1960.²²² A revised constitution went into effect in 1967.²²³ Since 1983, only an Act of Congress may amend the Revised Constitution of American Samoa.²²⁴

U.S. customs and immigration laws do not govern customs and immigration in American Samoa because the territory is outside of the customs territory of the United States²²⁵ and not considered part of the United States for immigration purposes.²²⁶ Indeed, American Samoans are U.S. nationals, but not U.S. citizens.²²⁷

American Samoa operates its own customs and immigration programs according to its own laws and independent from federal oversight. U.S. agencies, such as CBP, have no role in operating the American Samoa customs or immigration programs, and goods

²²¹ Exec. Order No. 10264, 16 Fed. Reg. 6417 (June 29, 1951), *revoking* Exec. Order No. 125-A (Feb. 19, 1900).

²²² See Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 347 (2008).

²²³ *Id.* at 331 n.46; *see also* AM. SAMOA CONST. art V, § 11.

²²⁴ 48 U.S.C. § 1662a.

²²⁵ 19 U.S.C. § 1401(h).

²²⁶ 8 U.S.C. § 1101(a)(38) (defining the term "United States" for immigration purposes to exclude American Samoa and include the other inhabited territories); *see also* *Immigration Office*, DEP'T OF LEGAL AFFS., <https://www.legalaffairs.as.gov/copy-of-immigration-office-1> (last visited Aug. 25, 2021) ("American Samoa is the only United States Territory that has retained oversight of its own borders . . . Specifically, the Immigration Office ensures lawful entry of all travelers into and out of the Territory.").

²²⁷ 8 U.S.C. § 1408(1); *see also* *Fitisemanu v. United States*, No. 20-4017, 2021 WL 2431586 (10th Cir. June 15, 2021) (affirming the constitutionality of 8 U.S.C. § 1408(1)); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) ("Unlike those born in the United States' other current territorial possessions—who are statutorily deemed American citizens at birth—[8 U.S.C. § 1408(1)] . . . designates persons born in American Samoa as non-citizen nationals.").

imported into the territory are not inspected by federal customs officers nor subject to federal tariffs.²²⁸

American Samoa is also the only inhabited U.S. insular territory that does not have a U.S. Attorney's Office or a court that exercises the jurisdiction of a U.S. district court.²²⁹ The High Court of American Samoa²³⁰ has limited jurisdiction to adjudicate certain federal issues,

²²⁸ U.S. GOV'T ACCOUNTABILITY OFF., AMERICAN SAMOA: PERFORMING A RISK ASSESSMENT WOULD BETTER INFORM U.S. AGENCIES OF THE RISKS RELATED TO ACCEPTANCE OF CERTIFICATES OF IDENTITY, at 1, 7, 9 (2010).

²²⁹ See *Barlow v. Sunia*, No. 18-cv-00423, 2019 WL 5929736, at *1 (D. Haw. Nov. 12, 2019). For an analysis of possible federal court options for American Samoa and their relative merits, see U.S. GOV'T ACCOUNTABILITY OFF., AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 4 (2008). See also Uilisone Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246 (2009).

²³⁰ The Constitution of American Samoa provides for the creation of local courts, including the High Court of American Samoa. The High Court consists of the Chief Justice, an Associate Justice, Acting Associate Justices, and at least five associate judges. See AM. SAMOA CODE ANN. §§ 3.021, 3.1001, 3.1004. American Samoan statutes are available on the website of the American Samoan Bar Association at <https://new.asbar.org/legal-resources/code-annotated/code-annotated-by-title-and-chapter/>.

The Secretary of the Interior appoints the Chief Justice, Associate Justice, and Acting Associate Justices of the court and may remove the Chief Justice and Associate Justice for cause. See AM. SAMOA CONST., art. III, § 3; AM. SAMOA CODE ANN. § 3.1001. Upon recommendation of the Chief Justice, the Governor of American Samoa appoints the associate judges, who are confirmed by the American Samoan Senate. AM. SAMOA CODE ANN. § 3.1004. "Associate Judges 'are typically traditional Samoan leaders with knowledge of local customs.'" Hodel, 830 F.2d at 377 (citing a brief submitted by the American Samoan Government). The Chief Justice may, for cause, remove associate judges from the court. AM. SAMOA CODE ANN. § 3.1004(d).

The High Court has three divisions: the Trial Division, the Lands and Tittle Division, and the Appellate Division. AM. SAMOA CODE ANN. § 3.0207. The trial division of the High Court has jurisdiction over, among other things, felony criminal cases and the Appellate Division can review its decisions (and decisions of other territorial adjudicative bodies) on appeal. AM. SAMOA CONST., art. III, § 1; AM. SAMOA CODE ANN. § 3.0208(a)(2),(c); see also *id.* § 3.0221 (describing procedure for determining the prevailing opinion in the Appellate Division).

such as food safety, animal protection, conservation, and shipping issues.²³¹ Its jurisdiction may also extend to other federal matters not specifically delegated by Congress: A district court in California recently ruled that the High Court of American Samoa has jurisdiction to hear a wrongful death suit brought in the United States by surviving family members of a fisherman who drowned after falling from a gangway while attempting to board a ship in Pago Pago.²³²

Issues of federal law arising in American Samoa are usually adjudicated in the U.S. District Courts in Hawaii or the District of Columbia.²³³ One such case, *United States v. Gurr*, exemplifies the

It is unclear how procedural rules governing habeas corpus apply to adjudications of the High Court of American Samoa. In *Barlow*—in which an American citizen convicted by the High Court and incarcerated in American Samoa argued that his detention was unlawful under the 14th Amendment—the federal district court in Hawaii transferred his 28 U.S.C. § 2241 petition to the U.S. District Court for the District of Columbia, because the Secretary of the Interior was a proper respondent. 2019 WL 5929736, at *2. At the time of the drafting of this article, the D.C. court has not resolved the substantive issues raised by the habeas petition. *See Barlow v. Sunia*, 643 F. Supp. 2d 51 (D.D.C. 2009).

²³¹ *See, e.g.*, 7 U.S.C. §§ 2146(c) (granting “the highest court of American Samoa” jurisdiction over cases involving the “transportation, sale, and handling of certain animals”), 8314(c)(1) (animal health protection), 87f (grain standards); 15 U.S.C. § 1825(d)(6) (protection of horses); 21 U.S.C. §§ 467c, 674 (meat inspections); 49 U.S.C. § 30102(a)(13) (motor vehicle safety); *see also* U.S. GOV’T ACCOUNTABILITY OFF., AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 2 (2008).

²³² *See Miller v. Tri Marine Fish Co., LLC*, No. CV 18-4946, 2019 WL 1751827 (C.D. Cal. Jan. 22, 2019).

²³³ *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 2 (2008). These issues are litigated in those venues primarily for two reasons. First, the federal criminal venue statute provides that “[t]he trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district,” including in American Samoa, shall be: (1) “in the district in which the offender . . . is arrested or is first brought”; or (2) “if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender . . . or if no such residence is known the indictment or information may be filed in the District of Columbia.” 18 U.S.C. § 3238. The District of

applicability of the border-search doctrine to American Samoa.²³⁴ Gurr, a manager of the American Samoa Government Employees Federal Credit Union, was indicted by a District of Columbia grand jury for a series of credit union fraud-related offenses.²³⁵ Flying from American Samoa to Hawaii, he was arrested on federal charges at the Honolulu Airport.²³⁶ U.S. Customs officials searched his luggage and recovered “financial documents taken from the credit union.”²³⁷ He was subsequently convicted, and on appeal, he challenged the district court’s denial of his motion to suppress documents seized at the airport.²³⁸ He contended that even if customs officials possessed legal authority to conduct a routine border search, the warrantless search

Hawaii is “the federal district court nearest to American Samoa.”
United States v. Kil Soo Lee, 472 F.3d 638, 640 (9th Cir. 2006).

Second, the District Court for the District of Columbia exercises limited review over decisions of the High Court of American Samoa, due to that territory’s unique judicial structure. *See, e.g., Hodel*, 830 F.2d at 383–87. Because the Executive Order transferring authority over the territory to the Secretary of the Interior broadly authorized the Secretary to “take such action as may be necessary and appropriate, and in harmony with applicable law,” the Secretary “possesses plenary authority over the judicial system of American Samoa.” *Id.* at 376. With this authority, the Secretary of the Interior may review decisions issued by the High Court. *See Hodel*, 830 F.2d at 384 (rejecting an argument that the Secretary of the Interior lacked authority to review and reverse decisions of the High Court because: (1) “[t]he Congress has delegated its judicial power with respect to American Samoa to the President, who has in turn delegated it to the Secretary”; and (2) “[t]he Congress, that is, could have, so far as Article III is concerned, provided that the Secretary himself would exercise the judicial power in American Samoa”). The D.C. District Court has jurisdiction over the Secretary of the Interior, and, thus, that “court is competent to judge the Secretary’s administration of the government of American Samoa by constitutional standards and, if necessary, to order the Secretary to take appropriate measures to correct any constitutional deficiencies.” *King v. Morton*, 520 F.2d 1140, 1144 (D.C. Cir. 1975); *see also Hodel*, 830 F.2d 374. ²³⁴ 471 F.3d 144 (D.C. Cir. 2006).

²³⁵ *Id.* at 147.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

was unreasonable due to the presence of FBI agents on site at the time of the search.²³⁹

The D.C. Circuit Court of Appeals rejected Gurr's various arguments.²⁴⁰ It reasoned that the U.S. Customs Service is authorized to routinely inspect every international traveler without a warrant.²⁴¹ The search of Gurr's luggage after his nonstop flight from American Samoa to Hawaii was a border search at "the functional equivalent" of the border.²⁴² "Cooperation among federal agencies," such as the FBI's request that U.S. Customs retain the financial documents, does not "render[] a border search unlawful."²⁴³ Further, the distinction that Gurr attempted to "draw between contraband and documentary evidence of a crime," as to what can be seized during a search, was "without legal basis."²⁴⁴ Finally, Gurr's challenges to jurisdiction and venue in the District of Columbia rather than American Samoa, "where the crimes occurred," were "meritless."²⁴⁵

²³⁹ *Id.* at 148.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 147–48 (citing *United States v. Galloway*, 316 F.3d 624, 629 (6th Cir. 2003)); *see also* 19 U.S.C. § 1582. The defendant did not challenge Customs' statutory authority. *Gurr*, 471 F.3d at 148.

²⁴² *Gurr*, 471 F.3d at 148 (quoting *Almeida-Sanchez*, 413 U.S. at 273).

²⁴³ *Id.*

²⁴⁴ *Id.* at 149.

²⁴⁵ *Id.* at 154–55. Title 18 of the U.S. Code applies in American Samoa, and the American Samoan courts do not have jurisdiction over Title 18 violations of federal law. *Id.* at 154; 18 U.S.C. §§ 5, 3231. Thus, the case had to be adjudicated in a U.S. District Court, which has "exclusive, original jurisdiction of all offenses against the law of the United States." *Gurr*, 471 F.3d at 154. Venue was proper because *even though* "Gurr last resided in American Samoa and was arrested in Hawaii after voluntarily entering the United States, he was not arrested or 'first brought' into the United States until after he was indicted in the District of Columbia." *Id.* at 155; *see also* 18 U.S.C. § 3238.

The Ninth Circuit reached similar conclusions regarding federal offenses committed in American Samoa and prosecuted in the District of Hawaii. *See, e.g., Kil Soo Lee*, 472 F.3d 638 (rejecting the defendant's claim that the High Court of American Samoa has exclusive jurisdiction to prosecute Title 18 offenses). In *Kil Soo Lee*, the court held that American Samoan law does not incorporate Title 18, but that, regardless, federal district courts could not "be

In sum, the federal border-search doctrine is of minimal consequence to federal agencies in American Samoa because the territorial government is responsible for customs and immigration. Federal agencies, however, may conduct border searches of people and effects traveling from American Samoa into the U.S. customs zone and, presumably, vice versa.

VIII. Commonwealth of Puerto Rico

The Commonwealth of Puerto Rico is located approximately 1,000 miles southeast of Florida. It consists of four large islands and many smaller islands, with a total land area of approximately 3,500 square miles.²⁴⁶ Like Guam, Puerto Rico became an unincorporated American territory when it was ceded to the United States in 1898 by Spain after the Spanish–American War.²⁴⁷

Initially, the U.S. military controlled the islands, but Congress soon created a local government, a Puerto Rico Supreme Court, and a federal district court with the passage of the Foraker Act in 1900.²⁴⁸ In 1917, Puerto Ricans obtained U.S. citizenship, a new governmental framework, and a Bill of Rights through the Jones Act.²⁴⁹ The authority of the district court in Puerto Rico expanded, and the court

deprived of jurisdiction” as provided by federal law. 472 F.3d at 642. The federal courts would still have “concurrent jurisdiction.” *Id.* at 643. American Samoa is not a judicial district under federal law; thus Hawaii can be a proper venue even when an individual is arrested in American Samoa as long as they are “first brought” to Hawaii. *Id.* at 644; *see* 18 U.S.C. § 3238.

²⁴⁶ R. SAM GARRETT, CONG. RSCH. SERV., POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 9 (2011).

²⁴⁷ Treaty of Paris, art. II (“Spain cedes to the United States the island of Porto Rico”); *see also supra* note 87.

²⁴⁸ Act of Apr. 12, 1900 (Foraker Act), ch. 191, 31 Stat. 77. The Foraker Act also notably established Spanish subjects within the territory as “citizens of Porto Rico” rather than the United States. *Id.* § 7.

²⁴⁹ Jones Act, ch. 145, 39 Stat. 951 (1917). A further amendment in 1947 allowed Puerto Ricans to elect their own governor rather than receiving one appointed by the President, with the advice and consent of the Senate. Organic Act of Puerto Rico Amendment, Pub L. No. 80-362, § 1, 61 Stat. 770, 770–71 (1947).

was incorporated into the First Circuit.²⁵⁰ The U.S. District Court for the District of Puerto Rico is now an Article III district court.²⁵¹

In 1950, Congress enacted a law enabling Puerto Ricans to develop their own constitution.²⁵² Once the Puerto Rican people approved the constitution, Congress ratified their decision,²⁵³ and the territory achieved commonwealth status in 1952.²⁵⁴

As noted earlier in this article, Puerto Rico is the only inhabited U.S. territory located inside the U.S. customs zone.²⁵⁵ Thus, customs border searches of persons and property traveling between the United States and Puerto Rico are not permitted.²⁵⁶ Persons and property traveling between Puerto Rico and other territories outside the U.S. customs zone, however, such as the neighboring USVI, are

²⁵⁰ Jones Act, ch. 145 § 41–43, 39 Stat. 951 (1917); *see also* Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1868 (2016).

²⁵¹ Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (establishing life tenure for judges thereafter appointed to the U.S. District Court for the District of Puerto Rico); *see also* Aurelius Inv., L.L.C. v. Puerto Rico, 915 F.3d 838, 849 (1st Cir. 2019) (stating that “Puerto Rico which although still an unincorporated territory has had, since 1966, an Article III court” and is an exception to the “perdurance” of non-Article III courts in the territories), *rev'd on other grounds sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., L.L.C., 140 S. Ct. 1649 (2020).

²⁵² Act of July 3, 1950, ch. 446, 64 Stat. 319; *see Sánchez Valle*, 136 S. Ct. at 1866.

²⁵³ Act of July 3, 1952, Pub. L. No. 447, 66 Stat. 327.

²⁵⁴ P.R. CONST. pmbl; *see generally* 48 U.S.C. §§ 731b–e. The U.N. Resolution subsequently removing Puerto Rico from the U.N.’s List of Non-Self-Governing Territories and described the Commonwealth status as “a political association which respects the individuality and the cultural characteristic of Puerto” and as an exercise of the Puerto Rican peoples’ “right to self-determination,” and “expressing their will in a free and democratic way.” G.A. Res. 748 (VIII), at 26 (Nov. 27, 1953).

²⁵⁵ 19 U.S.C. § 1401(h); *see also supra* note 30.

²⁵⁶ *Cf.* Torres, 442 U.S. at 472–73 (holding that there is no “intermediate border” between Puerto Rico and the United States that could justify Puerto Rican territorial agents operating pursuant to the border search doctrine, nor does Puerto Rico have the sovereign authority to conduct border and customs control).

subject to search and inspection, and the border-search exception to the Fourth Amendment applies to such travel.²⁵⁷

Issues regarding border searches in Puerto Rico have been adjudicated by the First Circuit and the U.S. District Court for the District of Puerto Rico in much the same way as those issues have been adjudicated by other courts located within the U.S. customs zone. For example, *United States v. Molina-Gómez* addressed an airport search of a defendant's laptop and PlayStation following international travel.²⁵⁸ The CBP computer system "flagged" Molina for questioning because it was his third short trip to Colombia in four months.²⁵⁹ At secondary inspection, Molina's answers to CBP officers' questions were inconsistent and raised additional questions.²⁶⁰ He could not provide the last names of his supposed friends in Colombia, nor had his airline ticket been purchased with a credit card, as he claimed.²⁶¹

CBP officers inspected Molina's belongings: his laptop, PlayStation, and three cell phones.²⁶² The search raised various additional red flags that the court later acknowledged contributed to "reasonable suspicion": (1) the laptop "contained no data despite being an older model"; (2) text messages revealed monetary transactions involving approximately \$8,000; and (3) the phones contained plane tickets for next-day travel, contradicting a statement Molina made to CBP officers.²⁶³ CBP officers suspected that Molina was smuggling narcotics, but neither a pat down of Molina nor an x-ray of his belongings revealed contraband.²⁶⁴ Because a narcotics detection canine "showed interest" in the laptop and the PlayStation, CBP retained those items when Molina was released by CBP and permitted to enter the United States.²⁶⁵

²⁵⁷ See, e.g., *United States v. Reyes*, No. 92-337, 1993 WL 151880 (D.P.R. Apr. 23, 1993) (upholding a border search of a boat and its occupants in Puerto Rico after they arrived from the USVI).

²⁵⁸ 781 F.3d 13 (1st Cir. 2015).

²⁵⁹ *Id.* at 16.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 17, 20.

²⁶⁴ *Id.* Molina also consented to a medical exam to ascertain whether he was "carrying drugs internally." *Id.* The results were negative. *Id.*

²⁶⁵ *Id.*

A CBP forensic chemist disassembled the electronics and discovered approximately one and a half kilograms of heroin.²⁶⁶ Molina was arrested when he returned to the airport to retrieve his property.²⁶⁷ After waiving his *Miranda* rights, Molina admitted (1) that the laptop and PlayStation belonged to him; (2) that he had taken them to Colombia; and (3) that he had intended to transport them to New York.²⁶⁸

Molina filed a motion to suppress the heroin and the statements he made during questioning as obtained in violation of his Fourth and Fifth Amendment rights respectively.²⁶⁹ The district court denied the motion. Molina entered a conditional guilty plea and appealed the denial of his motion.²⁷⁰

On appeal, the First Circuit first analyzed whether the warrantless search of the laptop and PlayStation constituted an unreasonable search and seizure.²⁷¹ Because international airports are the “functional equivalent” of an international border, the border-search exception applied.²⁷² While routine searches of persons and property do not require any level of suspicion, non-routine searches require reasonable suspicion.²⁷³

Molina was unable to point to any act or conduct by CBP that supported his argument that the search of the electronics was non-routine or unreasonable.²⁷⁴ The First Circuit concluded that it “need not categorize the search as either routine or non-routine because . . . even assuming the search was non-routine, reasonable suspicion existed to justify the search.”²⁷⁵ Molina’s pattern of travel

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 17–18.

²⁷⁰ *Id.* at 18.

²⁷¹ *Id.*

²⁷² *Id.* at 19 (citing *United States v. Robles*, 45 F.3d 1, 5 (1st Cir. 1995)).

²⁷³ *Id.*; see also *supra* notes 5–6.

²⁷⁴ *Molina-Gómez*, 781 F.3d at 19.

²⁷⁵ *Id.* at 19–20. On the second, unrelated issue of Fifth Amendment rights, Molina alleged that the CBP officers’ questioning of him in “a small windowless room” violated his rights because he was not given his *Miranda* warnings. *Id.* at 21. The “rules surrounding *Miranda* at the border are more relaxed,” see *id.* at 22 (citing *United States v. Long Tong Kiam*, 432 F.3d 524,

and the results of the secondary baggage inspection “easily [gave] rise to a reasonable suspicion that Molina was attempting to smuggle narcotics.”²⁷⁶

Courts have affirmed federal authority with regard to comparable issues, such as extended border searches,²⁷⁷ the authority of Puerto Rican police officers cross-designated as federal customs officers to conduct border searches at the functional equivalent of the border in Puerto Rican waters,²⁷⁸ and CBP’s customs authority at the sea boundary of the United States around Puerto Rico.²⁷⁹ There is a paucity of case law challenging border searches and extended border searches in the Commonwealth of Puerto Rico and the First Circuit. The logical conclusion from this noticeable lack of case law is that the law is so well established that border searches in Puerto Rico are not commonly challenged.

Case law also makes it clear that, because Congress placed Puerto Rico inside the U.S. customs zone, the Puerto Rican government lacks authority to create an internal border between itself and the rest of

529 (3d Cir. 2006)), due to the unique situation and the “strong governmental interest in controlling our borders,” *see id.* at 22. Detention of a person at a border security office, from which the individual is not free to leave while a search occurs, is not necessarily “custody” for *Miranda* purposes. *Id.* (quoting *United States v. Fernández-Ventura*, 132 F.3d 844, 846–47 (1st Cir. 1998)). “Relaxed” rules, however, do not mean ‘no rules’” *Id.* at 22; *see also* *United States v. Butler*, 249 F.3d 1094, 1100 (9th Cir. 2001). The First Circuit concluded that based on the totality of the circumstances, Molina was in custody and subject to interrogation during secondary questioning. *Molina-Gomez*, 781 F.3d at 23. The court emphasized: (1) “the small, windowless room . . . with at least two CBP officers”; (2) the “one and-a-half to two hours of custody”; and (3) the “not routine” nature of the questioning. *Id.* at 19–23. The questioning was “not routine” because CBP was not “probing whether or not to admit Molina into the country,” but rather “their suspicions of Molina’s involvement with drug smuggling activity.” *Id.* at 23. Thus, CBP’s failure to advise Molina of his *Miranda* rights constituted a Fifth Amendment violation, and his statements should have been suppressed. *Id.* at 24 & n.8.

²⁷⁶ *Id.* at 20.

²⁷⁷ *United States v. Perez-Rivera*, 247 F. Supp. 2d 108 (D.P.R. 2003).

²⁷⁸ *United States v. Victoria-Peguero*, 920 F.2d 77 (1st Cir. 1990).

²⁷⁹ *United States v. Andujar-Aponte*, No. 09-00096, 2009 WL 5874320 (D.P.R. Nov. 10, 2009).

the U.S. customs zone.²⁸⁰ In *Torres v. Puerto Rico*, the U.S. Supreme Court addressed the constitutionality of a Puerto Rican law that permitted territorial police officers to search the luggage of any person who traveled from the United States to Puerto Rico.²⁸¹ Puerto Rico asked the Court to apply the border-search exception to such searches by recognizing “an ‘intermediate border’ between the Commonwealth and the rest of the United States” based on “its unique political status” and “the fact that its borders as an island are in fact international borders with respect to all countries except the United States.”²⁸² The Court rejected that suggestion.²⁸³ It reasoned that “[t]he authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity” and, for that reason, the United States is “entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry.”²⁸⁴ It then held that Puerto Rico lacked that authority to exclude because “Puerto Rico has no sovereign authority to prohibit entry into its territory; as with all international ports of entry, border and customs control for Puerto Rico is conducted by federal officers.”²⁸⁵

Lastly, turning to immigration, the First Circuit has upheld an immigration checkpoint between Puerto Rico and the rest of the United States as a permissible immigration checkpoint.²⁸⁶

²⁸⁰ See generally *Torres*, 442 U.S. 465.

²⁸¹ *Id.*

²⁸² *Id.* at 472.

²⁸³ *Id.* (“The decisions on which Puerto Rico seeks to erect its theory of ‘intermediate boundaries’ do not reflect any geographical element of Fourth Amendment doctrine, however, but are based on a variety of considerations which have no bearing on this case.”).

²⁸⁴ *Id.* at 472–73.

²⁸⁵ *Id.* at 473. Although other territories similarly lack sovereign authority to prohibit entry into their territory, Congress has delegated customs authority to other territorial governments (except for the Virgin Islands) by excluding them from the U.S. customs zone. See *Sugiyama I*, 846 F.2d at 571–72; 28 U.S.C. §§ 41, 1291.

²⁸⁶ See *Lopez Lopez*, 844 F.2d at 901–09.

IX. Conclusion

Congress exercises plenary power over the territories. In the customs and immigration context, it has, over many years, exercised that power to treat the inhabited territories differently from the states and, in some cases, differently from each other. Variations in the application of federal law and congressional oversight are due in part to the different historical and cultural contexts of the respective territories and to the historical periods during which the territories were acquired by the United States.

Congress included one inhabited territory in the U.S. customs zone (Puerto Rico) and excluded the others. And in general, it permits the inhabited territories outside the U.S. customs zone to administer their own customs laws, but in one such territory (the USVI) provides for federal administration of those laws. In the immigration context, Congress has generally provided that federal immigration law applies in all but one inhabited territory (American Samoa). In all other inhabited territories (including Puerto Rico, which is part of the U.S. customs zone), however, Congress nevertheless provides that certain aliens are not admissible into the rest of the United States from those territories.

Federal prosecutors and agency representatives should be mindful of these differences because they affect agencies' ability to conduct border searches in several ways. First, they may limit the authority of both federal and territorial agencies to conduct border searches. For example, by placing Puerto Rico in the U.S. customs zone, Congress precluded customs searches of people and goods traveling between Puerto Rico and the 50 states.

Second, these differences affect the allocation of border-search authority between federal and territorial agencies. By leaving most of the inhabited territories outside the U.S. customs zone, Congress has limited federal authority to conduct customs searches and authorized those territories to enforce their own customs laws (except, as noted above, in the USVI, where federal agencies enforce territorial customs laws). Because border-search authority is applied somewhat differently across the various territories, prosecutors and federal agency personnel must familiarize themselves with territorial law, as well as federal law, to insure correct application and enforcement.

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Retcon: How a Comic Book Word Can be Used as a Handy Rhetorical Weapon

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I. Retcon defined

A recent sentencing case created a circuit split the Supreme Court may choose to resolve. In *United States v. Bryant*, the Eleventh Circuit decided that the Sentencing Commission’s policy statement dealing with federal compassionate release motions applied to those filed by inmates, significantly narrowing the available grounds for relief.¹ Amidst all the important sounding words in that opinion, Judge Andrew Brasher used an offbeat one: “retconning.”² While this word has appeared in only five cases (all decided over the last two years), it may be coming into its own.³

This portmanteau (derived from “retroactive continuity”) began to appear in comic-book-fan forums in the 1980s.⁴ As a verb, a retcon occurs when a later author introduces new information involving an earlier work about the same event or character in a manner that

¹ 996 F.3d 1243, 1248 (11th Cir. 2021), *pet. for cert. filed*, 20-1732 (2021) (discussing U.S.S.G. § 1B1.13).

² *Id.* at 1260. “It is telling that our sister circuits can give these clauses an operative meaning only by retconning them.” *Id.*

³ See Josh Blackman, *Has the Word “Retcon” Entered The Legal Vernacular?*, VOLOKH CONSPIRACY, (Aug. 6, 2021), <https://reason.com/volokh/2021/08/06/has-the-word-retcon-entered-vernacular/>. The other four are: *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 439, n.3 (3d Cir. 2019); *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1190 (11th Cir. 2020) (Rosenbaum, J. dissenting); *Infanzon v. Allstate Ins. Co.*, 335 F.R.D. 305, 313 (C.D. Cal. 2020); and *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661, 697, n.29 (E.D. Va. 2020).

⁴ Merriam-Webster, *A Short History of ‘Retcon’*, <https://www.merriam-webster.com/words-at-play/retcon-history-and-meaning> (last visited Sept. 1, 2021) (apparently, the phrase *retroactive continuity* was first used in a 1973 book about theology, not about comic books).

changes the meaning of the earlier work, usually without contradicting it.⁵ The word is likely here to stay in the legal world as there are the similarities between the serialized, episodic fiction of comic books and the serialized, episodic non-fiction written by judges.

II. Retcons in literature

A. Cap and Bucky

One famous example (well, famous among comic book fans) involves Captain America. For the unacquainted, Cap's name is Steve Rogers, he is bedecked in stars and stripes, he wields a shield, he battles villains of every description, and he is the living embodiment of the American Dream.⁶ Cap was created by Jack Kirby and Joe Simon, two sons of immigrants from the Lower East Side of New York City.⁷ The first cover of Cap's comic book is glorious: These two Jewish creators had their hero deck Hitler.⁸ That was in March of 1941, nine months *before* the United States entered the war after the bombing of Pearl Harbor.⁹ Imitating their own art, both Simon and Kirby went on to

⁵ See *id.*; see also *Retcon*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/345224> (last visited Sept. 1, 2021). By contrast, a later work that contradicts the earlier work about the same event or character would usually be called a reboot or a retelling.

⁶ See e.g. Jack Kirby, *Captain America's Bicentennial Battles*, in MARVEL TREASURY SPECIAL FEATURING CAPTAIN AMERICA'S BICENTENNIAL BATTLES, Jun. 1, 1976; Mark Gruenwald & Tom Morgan, *Captain America No More!*, in 1 CAPTAIN AMERICA, no. 332, at 23, Aug. 1, 1987 ("I cannot represent the American Government; the President does that. I must represent the American people. I represent the American Dream, the freedom to strive to become all that you dream of being.") (emphasis removed).

⁷ Carolyn McNamara, "*Sentinel of Liberty*": *Captain America on the Home Front in WWII*, UNIV. OF TEX. (Oct. 2, 2015), <https://research.utexas.edu/showcase/articles/view/sentinel-of-liberty-captain-america-on-the-home-front-in-wwii>.

⁸ *Id.* (the McNamara article includes a picture of the cover).

⁹ *Id.* Although (perhaps) hard to believe now, Simon and Kirby received threats and hate mail from isolationists like the American First Committee and the German-American Bund (the latter eventually became Cap's fictional enemy in the fifth issue). *Id.*; Marvel Comics, *Captain America Comics*, in CAPTAIN AMERICA: THE CLASSIC YEARS 215–224 (1998) (reprinting Joe Simon & Jack Kirby, *Killers of the Bund* (1941)). When three hooligans showed up in the office's lobby "to show [Kirby] what real Nazis would do to his Captain America," he "rolled up his sleeves and headed downstairs." Spencer Ackerman, *Captain America's Creator Spent a Lifetime Punching Nazis*,

serve their country honorably during the war (Kirby fought the Nazis as a scout in General George Patton's Third Army).¹⁰ Although Simon and Kirby eventually returned to comics (and Kirby eventually returned to Cap), others would produce stories about Cap and Bucky after they left.¹¹

Notably, Cap's sidekick, James Buchanan "Bucky" Barnes, also appeared on that first cover and in that first story.¹² After gallantly fighting the Axis Powers, Cap and Bucky were honorably discharged after the war and fought crime instead.¹³ Although the company, Marvel (then known as Timely), sold about a million copies a month of *Captain America Comics* during the war, sales eventually sagged, and Cap and Bucky's adventures ended in 1949.¹⁴ The team briefly returned in 1954 (this time to confront Communists) but was cancelled again that same year.¹⁵

DAILY BEAST (Aug. 27, 2017), <https://www.thedailybeast.com/captain-americas-creator-spent-a-lifetime-punching-nazis>. "The Nazis—cowards then as now—had already fled." *Id.*

¹⁰ McNamara, *supra* note 7; Ackerman, *supra* note 9; John Morrow, JACK KIRBY COLLECTOR SEVENTY-FIVE PRESENTS: KIRBY AND LEE: STUF' SAID! 10 (1st ed. 2019). As a scout, Kirby also imitated art by drawing maps while reconnoitering Nazi-held territory. Ackerman, *supra* note 9.

¹¹ See Interview by James Van Hise with Jack Kirby (Nov. 1983), in THE JACK KIRBY COLLECTOR no. 25, at 5–6, 8, 10 (1999).

¹² Simon & Kirby, *supra* note 9, (reprinting Joe Simon & Jack Kirby, *Case No. 1. Meet Captain America* (1941)). For various reasons (many of them unconvincing), publishers change details in reprinted comics. For example, when Marvel reprinted the fourth issue of *The Avengers* in 1992, it changed details on the cover, it reprinted the pages out of order, and it changed the coloring in at least one panel (page six, panel two)—perhaps because the then-unnamed villain would eventually look different when he eventually appeared in full in a later issue. See generally Mark Gruenwald & Rik Levins, *Operation: Galactic Storm Part 15*, in 1 CAPTAIN AMERICA no. 400, May 1, 1992 (reprinting Stan Lee & Jack Kirby, *The Real Captain America Lives Again!* (1964)). I may have missed various and sundry other heresies.

¹³ McNamara, *supra* note 7.

¹⁴ *Id.* Note that, although the last issue of *Captain America's Weird Tales* was published in 1950, the title character was nary to be found within its pages. *Captain America Comics*, CHRISTIE'S, <https://www.christies.com/en/lot/lot-310258> (last visited Sept. 1, 2021).

¹⁵ McNamara, *supra* note 7.

In 1964, Captain America resurfaced (courtesy of Kirby and Stan Lee).¹⁶ This time, Cap is found alone by Eskimos, frozen in a block of ice.¹⁷ After being rescued and coming to, he explains that Bucky died during World War II trying to stop an experimental drone plane filled with explosives.¹⁸ The plane exploded over the North Atlantic, sending Cap into the drink, along with whatever remained of his pal Bucky.¹⁹ Ed Brubaker, who authored Captain America comics during this century, recounted, as “a kid, I didn’t understand that this was a retcon, so when I went to my first San Diego Comic-Con, I searched all the dealers[] booths for the actual [40s-era issue of Captain America where Bucky got blown up . . . and found out that it didn’t actually exist.”²⁰

In comic books, retcons are not necessarily bad; they can invite readers to reimagine years’ worth of old stories. But this one had its flaws. If Cap and Bucky slept with the fishes, who were the guys in the post-war comics? Writers in the 1970s filled that plot hole, explaining that three men secretly impersonated Cap during the post-war period (and two others impersonated Bucky).²¹

¹⁶ Stan Lee & Jack Kirby, *Captain America Lives Again!*, in 1 AVENGERS, no. 4, Mar. 1, 1964. *But see* Stan Lee & Jack Kirby, *The Human Torch Meets Captain America*, in 1 STRANGE TALES no. 114, at 18 Nov. 1, 1963 (an imposter pretended to be Captain America in 1963, ostensibly to test whether the market wanted Cap to return).

¹⁷ Lee & Kirby, *Captain America Lives Again!*, *supra* note 16, at 2–3. Much ink has been spilled about this creative team and era. *See e.g.* Morrow, *supra* note 10; Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 125–127 (2d Cir. 2013).

¹⁸ Lee & Kirby, *Captain America Lives Again!*, *supra* note 16, at 7.

¹⁹ *Id.*; *see also* Roy Thomas & John Buscema, *Death be not proud!*, in 1 AVENGERS no. 56, Sept. 1, 1968 (expanding on this story).

²⁰ Marvel Comics, CAPTAIN AMERICA WINTER SOLDIER, Afterword (2014). Note that the word *retcon* can be used as a noun, *see id.*, as a verb, *Bryant*, 996 F.3d at 1260, or as an adjective. *Gogel*, 967 F.3d at 1190 (Rosenbaum, J. dissenting) (“Either way we look at it—under our binding case law or under the Majority Opinion’s retcon interpretation of it—this record, when viewed in the light most favorable to Gogel, establishes a material issue of fact that requires denial of summary judgment.”).

²¹ Steve Englehart et al., *The Secret Origin of Captain America*, in 1 CAPTAIN AMERICA AND THE FALCON no. 155, Nov. 1, 1972; Roy Thomas & Frank Robbins, *What If the Invaders had Stayed Together After World War Two?*, in 1 WHAT IF? No. 4, Aug. 1, 1977; *see also* J.M. DeMatteis et al., *Four men . . . One legend . . . Captain America. Today . . . all four put the legend to the test.*, in 1 CAPTAIN AMERICA ANNUAL no. 6, Jan. 1, 1982.

Writers continue to retcon this story. In a 2005 tale, Brubaker wrote Bucky back to life.²² In 1945, the Soviets found his frozen form, revived him, and reprogramed him into an assassin called the Winter Soldier (and gave him a robotic arm to replace the one that was dismembered when the drone plane detonated).²³

B. Sherlock and Doyle

Although the word *retcon* is new, the concept is not. Take the late Victorian-era detective Sherlock Holmes as an example. In 1903, much to the delight of his readers, Sir Arthur Conan Doyle recounted in “The Adventure of the Empty House,” that the great Holmes had not perished after all.²⁴ Doyle all but told his audience a decade before that the hero died in “The Final Problem,” tumbling to his death—while locked in mortal combat with the odious Professor Moriarty—into the depths of the Reichenbach Falls.²⁵ “Even to-day one shudders at the enormity of the deed. He killed Holmes! The outcry was instant, sincere, and voluminous. (A letter from the distaff side [to Doyle] began, ‘You Beast!’)”²⁶ Despite Holmes’s popularity, Doyle was concerned that Holmes distracted his readership from his more

²² Marvel Comics, *supra* note 20 (reprinting Ed Brubaker & Steve Epting, *Out of Time Part 6* (2005)); *Id.* (reprinting Ed Brubaker et al., *The Winter Soldier Part 3* (2005)).

²³ *Id.*

²⁴ A. Conan Doyle, *The Adventure of the Empty House*, in *THE RETURN OF SHERLOCK HOLMES* 3–30 (McClure, Phillips & Co. 1905). Although first published in book form in 1905, readers of *The Strand* magazine in England (and of *Collier’s Weekly* in the United States) learned of these “momentous tidings” in October of 1903. Howard Haycraft, *The Profile Emerges*, in *PROFILE BY GASLIGHT* 12, 17 (Edgar W. Smith ed., 1944).

²⁵ A. Conan Doyle, *The Final Problem*, in 2 *THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND FIFTY-SIX SHORT STORIES COMPLETE* 301–318 (William S. Baring-Gould ed., Wings Books 1992); Vincent Starrett, *A Selected Bibliography*, in *THE PRIVATE LIFE OF SHERLOCK HOLMES* 185, 186–187 (1934) (noting that the *Memoirs of Sherlock Holmes*, which collected this tale, were originally published from 1892–1893).

²⁶ Haycraft, *supra* note 24, at 16; *see also* Vincent Starrett, *The Methods of Mr. Sherlock Holmes*, in *THE PRIVATE LIFE OF SHERLOCK HOLMES* 18, 34 (1934) (in this retelling, the letter to Doyle begins instead “You brute.”)

supposedly consequential works, which few cared for by comparison.²⁷ “I saw that I was in danger of having my hand forced, and of being entirely identified with what I regarded as a lower stratum of literary achievement.”²⁸

Perhaps eventually accepting a life lived in a shadow of his own making, Doyle relented by 1903 and explained that Holmes’s compatriot, Dr. John H. Watson, M.D., bungled in believing that Holmes tumbled.²⁹ Holmes believed he had to trick poor Dr. Watson into thinking him dead because Holmes was concerned for his own safety.³⁰ Holmes actually spent the intervening years in Tibet, Persia, Khartoum (then part of Mahdist Sudan), and France, respectively, until he learned of the “very remarkable Park Lane Mystery” and returned to foggy London to solve it alongside Dr. Watson.³¹ We rarely get to choose for what we are remembered. So it was with Doyle.

III. Retcon as a legal argument

A. Bryant

As a rule, these literary creators strove for an unbroken and consistent narrative (sometimes told over the course of decades). When the audience believes a retcon is poor, many may rightly think the later author disrespectful of the earlier author or work. This

²⁷ See e.g. Heywood Broun, *Sherlock Holmes and the Pygmies*, in PROFILE BY GASLIGHT 3, 4–8 (Edgar W. Smith ed. 1944); Starrett, *supra* note 26, at 31–34.

²⁸ Starrett, *supra* note 26, at 32.

²⁹ See Doyle, *supra* note 24, at 9–15. Perhaps Doyle was ready to relent before 1903. He published *The Hound of the Baskervilles* in serial form from 1901–1902, but it was not a retcon. Although set prior to Holmes’s apparent death, it did not change the meaning of any of his earlier adventures. Starrett, *supra* note 25, at 187; A. Conan Doyle, *The Hound of the Baskervilles*, in 2 THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND FIFTY-SIX SHORT STORIES COMPLETE 3–113 (William S. Baring-Gould ed., Wings Books 1992) (this book’s annotations show that the *Hound* was likely set in 1888).

³⁰ Doyle, *supra* note 24, at 13–14.

³¹ *Id.* at 14; William S. Baring-Gould, “You May Have Read of the Remarkable Explorations of a Norwegian Named Sigerson . . .”, in 2 THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND FIFTY-SIX SHORT STORIES COMPLETE 320–325 (Wings Books 1992). Holmes’s shadow lingers. In 2019, the Royal Mint honored Doyle’s 160th birthday by issuing a 50p coin, but it bore the likeness of Holmes. Roger Johnson & Jean Upton, *Sherlock in the U.K. 2020*, in BAKER STREET ALMANAC 2021 65, 74 (Ross E. Davies et al. eds., 2021).

literary rule might, at first glance, seem to work like stare decisis—authors should generally “stand by yesterday’s decisions,” even if that means “sticking to some wrong [ones].”³² Original continuity, then, is set aside when the author believes there is “special justification” to do so, like to correct an inconsistency.³³ But a true retcon is sneakier than a frontal attack upon old precedent; it adds new information, generally without contradicting the old but, nonetheless, alters the meaning of the earlier work.³⁴

Two recent sentencing decisions illustrate this sneaky principle.³⁵ In *Bryant*, the original author was the Sentencing Commission, which, at the direction of Congress, limited the circumstances for which federal prisoners could receive a sentence reduction (ubiquitously called a “compassionate release”) by defining a vague phrase—“extraordinary and compelling reasons”—found in 18 U.S.C. § 3582(c)(1)(A)(i).³⁶ When the Commission published its policy statement and application notes defining the phrase in 2007 (and when it clarified its definition in 2016), there was only one avenue by which an inmate could obtain compassionate release—the BOP had to file the motion on the prisoner’s behalf.³⁷ Then in 2018, Congress amended the statute in the First Step Act, allowing defendants to file compassionate release motions on their own.³⁸

At a glance, the text of the Commission’s definition of “extraordinary and compelling reasons” seems like it might apply only to BOP-filed motions because the policy statement begins with the words “Upon motion of the Director of the Bureau of Prisons.”³⁹ Does the

³² See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (citation omitted).

³³ See *id.* at 456.

³⁴ Similarly, people who intentionally give contradictory statements are not engaging in a retcon. They are just lying.

³⁵ For those not familiar with federal sentencing practice, the United States Sentencing Commission, an independent agency, produces guidelines, policy statements, and application notes. See United States Sentencing Commission, <https://www.ussc.gov/> (last visited Sept. 1, 2021). As an overly simple explanation, these writings either bind or guide federal judges.

³⁶ See *Bryant*, 996 F.3d at 1247; 28 U.S.C. § 994(t).

³⁷ *Bryant*, 996 F.3d at 1249–1250, 1260.

³⁸ First Step Act of 2018, Pub. L. No. 115-391, § 603 132 Stat. 5194, 5239; see also *Bryant*, 996 F.3d at 1247, 1250.

³⁹ U.S.S.G. § 1B1.13.

Sentencing Commission’s tight definition of “extraordinary and compelling reasons” apply to defendant-filed motions? To answer that question, one should ask and answer a different question: Did Congress, the author second-in-time, change the meaning of the Commission’s work? Federal courts that have answered these questions have acted as a sort of author (third-in-time), interpreting both Congress’s words and the Commission’s. Other than the Eleventh Circuit, every other circuit has found that the Commission’s policy statement was textually limited to BOP-filed motions, so its definition of “extraordinary and compelling reasons” was inapplicable to defendant-filed motions.⁴⁰ Without an applicable policy statement, the phrase “extraordinary and compelling reasons” in all these circuits is presumably limited only by the plain meaning of those words and whatever an appellate court would consider an abuse of discretion.⁴¹

Instead of writing defensively as he wrote a lopsided circuit split into existence, Judge Brasher’s opinion hurled the word *retcon* as an epithet, aimed at every other court of appeals that considered the same question: “It is telling that our sister circuits can give these clauses an operative meaning only by retconning them.”⁴² To retcon here is to err, the court reasoned, as “[i]t is ‘a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time’ of enactment.”⁴³ The policy statement’s prefatory clause: “Upon motion of the Director of the Bureau of Prisons” was meaningless when it was written because it parroted the text of the statute in place at the time. “And, as a general matter, ‘a prefatory clause does not limit or expand the scope of the operative clause.’”⁴⁴ “Instead, ‘operative provisions should be given effect as operative provisions, and prologues as prologues.’”⁴⁵

The meaning of the operative part of the statute (most notably the part that defines “extraordinary and compelling reasons”) was not changed by the First Step Act. So, when determining the meaning of

⁴⁰ See *Bryant*, 996 F.3d at 1252 (collecting cases from seven circuits); see also *United States v. Long*, 997 F.3d 342, 358 (D.C. Cir. 2021) (decided after—and disagreeing with—*Bryant*).

⁴¹ See e.g. *United States v. Hunter*, No. 21-1275, 2021 WL 3855665 at *3–11 (6th Cir. July 28, 2021); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

⁴² *Bryant*, 996 F.3d at 1260.

⁴³ *Id.* (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019)).

⁴⁴ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008)).

⁴⁵ *Id.* (citing *Heller*, 554 U.S. at 579, n.3).

“extraordinary and compelling reasons,” it “makes very little sense to say that the policy statement distinguishes between a BOP-filed motion and some other kind of motion that did not exist when the policy statement was adopted.”⁴⁶

Regardless of whether you, dear reader, find *Bryant* incisive or misguided, the word *retcon* was well-deployed in its quest to persuade.

B. Jones

In comic books as in law, retcons are not necessarily bad. For example, some opinions are as clear as swampy muck and require a retcon. In *Miller v. Alabama*, the Supreme Court held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders.”⁴⁷ Such offenders could still receive life without parole, but only if the “sentencer follow[s] a certain process—considering an offender’s youth and attendant characteristics—before imposing [that] particular penalty.”⁴⁸ The Supreme Court later determined, in *Montgomery v. Louisiana*, that *Miller* applied retroactively to cases that had become final after direct review.⁴⁹

Few were happy with the opinion in *Montgomery* because it made different areas of the law “more conceptually challenging and jurisprudentially opaque than they already were.”⁵⁰ Most notably, the Court made a hash of the Eighth Amendment. The Court held that “*Miller* did not require trial courts to make a finding of fact regarding a child’s incorrigibility” before sentencing the defendant to life without parole.⁵¹ As Justice Thomas put it, the *Montgomery* Court then made a “Janus-faced demonstration” and contradicted its own holding in the same paragraph.⁵² The *Montgomery* opinion strongly suggested that a

⁴⁶ *Id.* (citation omitted).

⁴⁷ 567 U.S. 460, 479 (2012) (citation omitted).

⁴⁸ *Id.* at 483.

⁴⁹ 577 U.S. 190, 206 (2016). Full disclosure: I was one of the lawyers that represented Louisiana in that ill-fated case. I understand if you believe me to be like the fox scorning the supposedly sour grapes here. See Aesop, *The Fox & the Grapes*, in *THE AESOP FOR CHILDREN* (1919).

⁵⁰ *E.g.* Douglas A. Berman, *Montgomery’s Messy Trifecta*, 73 Nat’l Law. Guild Rev. 103, 107 (2016).

⁵¹ *Montgomery*, 577 U.S. at 211.

⁵² *Jones v. Mississippi*, 141 S. Ct. 1307, 1325 (2021) (Thomas, J., concurring).

sentencer must make a factual finding that the homicide was not the result of “transient immaturity”: “That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.”⁵³ “These statements cannot be reconciled.”⁵⁴ One professor who “authored an amicus brief advocating for the outcome the Supreme Court reached in *Montgomery*” lamented that “the majority opinion in *Montgomery* turns the already puzzling Eighth Amendment picture of . . . *Miller* into a jurisprudential M.C. Escher painting largely because, as Justice Scalia observed in his *Montgomery* dissent, ‘the majority is not applying *Miller*, but rewriting it.’”⁵⁵

Something had to be done. So, the Supreme Court took up *Jones v. Mississippi*, probably to retcon *Montgomery*.⁵⁶ While denying that it was overruling *Montgomery*, the majority required sentencers to consider mitigating evidence, but it found that a finding of incorrigibility was not required to impose a life without parole sentence.⁵⁷ In fact, the majority and the dissent each proposed a retcon, while the concurrence opted to overrule *Montgomery*.⁵⁸ Regardless of whether you think that *Jones*’s strained majority opinion, its disdainful concurrence, or its dyspeptic dissent most persuasive on the Eighth Amendment question, each sought to patch the holes in the Court’s earlier work without logical leaks. In this way, both the majority and the dissent proposed a good retcon, despite contradicting part of *Montgomery*. At the top, a retcon was defined in part as changing the meaning of an earlier work, *usually* without contradicting it. This would be the exception to the rule—where a work contradicts itself, a retcon will naturally contradict the earlier

⁵³ *Montgomery*, 577 U.S. at 211.

⁵⁴ *Jones*, 141 S. Ct. at 1326 (Thomas, J., concurring).

⁵⁵ Berman, *supra* note 50, at 104 (quoting *Montgomery*, 577 U.S. at 225 (Scalia, J., dissenting)).

⁵⁶ See *Jones*, 141 S. Ct. at 1311.

⁵⁷ *Id.* at 1314–1315, 1318–1319, 1321.

⁵⁸ *Id.*; see also *id.* at 1323, 1327 (Thomas, J., concurring) (proposing that *Montgomery* be overruled outright); *id.* at 1331, 1337, 1339–1340 (Sotomayor, J., dissenting) (proposing that *Montgomery* should be retconned to require a finding of permanent incorrigibility/irreparable corruption, that is, that the homicide was not the product of “transient immaturity”).

work in part. Here, there was no faithful way to retcon a faithless opinion.

If you did not understand the word *retcon* before, now you do. You too can loose this locution upon your adversaries. Aim true.

About the Author

Colin Clark is an Assistant United States Attorney in Baton Rouge, Louisiana. He has been both a local and a state prosecutor in Louisiana and has primarily focused on appellate work. He is willing to read his comics (or his Sherlock Holmes books for that matter) to his wife, Lindsay; to his daughter, Samantha; and to his cats and dogs. But none seem all that interested.

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Note from the Editor-in-Chief

Sentencing has been described as “proceedings [that] showcase official power vividly and, sometimes, individual recalcitrance, repentance, outrage, compassion, sorrow, occasionally forgiveness—profound human dimensions that cannot be captured in mere transcripts or statistics.”¹ This issue is devoted to the increasingly complex area of federal sentencing law. And it’s not just about statutory maximums, mandatory sentences, and advisory sentencing guidelines. Federal sentencing today includes the biggest changes in criminal justice in decades with the First Step Act and Fair Sentencing Act. These topics intertwine and— as you will see from our articles—are often maddeningly complex. Our authors, though, are up to the challenge. You’ll find clear, comprehensive discussions on the categorical approach, the First Step Act, crack sentencing reform, and other timely, practical issues. In addition, as a bonus, we include an exhaustive analysis of the border-search exception in the U.S. territories, as well as an entertaining look at the word “retcon,” which recently started appearing in judicial opinions. As they say on late-night TV commercials, “All this and more!”

Putting an issue to bed, especially one with this length and breadth, isn’t easy. Fortunately, the Office of Legal Education has a great Publications Team: Addison Gantt, Managing Editor; Phil Schneider, Associate Editor; and our law clerks, Rachel Buzhardt, Rebekah Griggs, and Mary Harriet Moore served as point of contact for this issue and corralled these busy attorneys (and one judge) into writing for us. Thanks to all of you. (If I could, I’d offer each of you your choice of the “As Seen on TV” Flowbee, Pocket Fisherman, or Shake Weight.)

Until next issue, please take care and stay safe.

Chris Fisanick
Columbia, South Carolina
September 2021

¹ D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2d 147 (2011).