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Retroactive Justice: Toward Fundamental Fairness in Resentencing Crack Cocaine Offenders under Section 404 of the First Step Act

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RETROACTIVE JUSTICE: TOWARD FUNDAMENTAL FAIRNESS IN RESENTENCING CRACK COCAINE OFFENDERS UNDER SECTION 404 OF THE FIRST STEP ACT

INTRODUCTION

In a rare bipartisan moment under the Trump presidency, Congress passed a celebrated criminal justice reform package, the First Step Act of 2018.[1] The law was necessary to begin remedying decades of an unduly harsh and discriminatory drug sentencing regime, which ushered in the era of mass incarceration.[2] Section 404 of the First Step Act mitigates that injustice by allowing prisoners sentenced under the 100:1 crack cocaine to powder cocaine sentencing ratio to move to be resentenced under the Fair Sentencing Act of 2010's 18:1 sentencing ratio.[3]

This reform holds great promise. Take, for example, the story of Gary Rhines, who is heralded as the face of the First Step Act. [4] Mr. Rhines was a victim of society, forced to traffic drugs as a preteen to support parents struggling with addiction, who garnered a

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

2. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59–60 (2010) ("Drug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000.").

3. First Step Act of 2018 § 404, 21 U.S.C. § 841 note (Application of Fair Sentencing Act). While the United States Code refers to "cocaine base" and "cocaine hydrochloride," this Comment uses the common terms "crack cocaine" and "powder cocaine," respectively. The ratios reflect the quantity of powder cocaine needed to trigger the same mandatory minimum sentence as crack cocaine. Thus, under 100:1, 500 grams of powder cocaine triggered the same five-year mandatory minimum sentence as five grams of crack cocaine. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1302(a)(2), § 1010(b)(1)–(2), 100 Stat. 3207, 3207-15 to -17 (current version at 21 U.S.C. § 841(b)). Under 18:1, the five-year mandatory minimum triggering weight for crack cocaine is increased to twenty-eight grams. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841).

4. Jesse Wegman, *How Would You Spend a Life Sentence?*, N.Y. TIMES (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/opinion/first-step-act.html [https://perma.cc/QCC7-3AVF].

criminal record at a young age.[5] Those prior offenses earned him a mandatory life sentence at the age of twenty-eight, when he was convicted as a participant in the sale of sixty-six grams of crack cocaine.[6] Though he stood no chance of regaining his freedom, Mr. Rhines bettered himself over fourteen years in prison through drug treatment, education, and professional training.[7] In 2019, under section 404 of the First Step Act, Mr. Rhines's remaining sentence was vacated, and he was resentenced to time served.[8] Unfortunately, because of the law's problematic and arbitrary implementation, Mr. Rhines's story is not representative of most offenders petitioning to be resentenced under section 404.

Section 404 is arbitrarily implemented because it is written ambiguously. The law leaves two open questions for courts to decide: (1) the authority of the court to impose a new sentence or modify the existing sentence, and (2) what updates in sentencing guidelines and caselaw to apply, if any.[9] Regarding the first question, if the court decides to impose a new sentence, it conducts a comprehensive review of the prisoner's character, background, and rehabilitation, allowing the prisoner to fully present his case to the court, as the court did in resentencing Mr. Rhines.[10] In contrast, if the court decides merely to modify the existing sentence, it defaults to the findings of the original court, and denies the prisoner the basic human dignity to be present at his own hearing and address the court.[11]

In answering the second question, the court must decide whether it will conduct a "time machine" resentencing and return to the legal landscape at the time of the original conviction to resentence, or resentence according to present law at the time of the

5. *Id.*

6. *Id.* This drug quantity is approximately equivalent to the weight of a pack of M&Ms. *Id.*

7. *Id.*

8. *Id.* While his federal sentence was thus completed, Pennsylvania incarcerated him for one more year because his 1998 offense violated his parole. *Id.* He will be released in October of 2020. *Id.*

9. *See, e.g.*, United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *3–10 (E.D. Va. June 19, 2019).

10. United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4 (M.D. Pa. May 31, 2019) ("[T]he only appropriate way to thoroughly evaluate Rhines' characteristics . . . is to have him appear in open court and provide him with an opportunity to fully allocute.").

11. *Compare id.* at *5, *with Jones,* 2019 U.S. Dist. LEXIS 216110, at *8–9.

defendant's motion.[12] Mr. Rhines was eligible for full relief because the court chose not to use the time machine method.[13] The court's choice to apply the time machine method or present law weighs especially heavily on defendants who were originally sentenced as "career offenders," and those who had drug weights attributed to them in the presentence report that were significantly greater than the amount of the offense. These issues are particularly salient because they are legal issues which greatly enhance a defendant's sentence and are areas of law that have seen significant change in the last decade.

The overlap of these two open questions has led to four different methods of resentencing prisoners under section 404.[14] In Method I, the court imposes a new sentence, but applies the time machine approach.[15] Method II applies the more limited procedure of a sentence modification and the same time machine approach.[16] Method III again applies the more limited sentence modification, but rejects the time machine approach and modifies following current law.[17] Finally, in Method IV, courts impose a new sentence and apply all current sentencing guidelines and caselaw; this amounts to a full plenary resentencing.[18]

In analyzing these four methods, this Comment argues that Method IV best serves fundamental fairness in sentencing, in congruence with the purpose of the First Step Act. To resolve its arbitrary implementation, section 404 must be amended to require a full plenary resentencing in accordance with all updated sentencing guidelines and caselaw in effect at the time of the resentencing. This was the approach taken by the court in resentencing Mr.

12. *Compare* United States v. Hegwood, 934 F.3d 414, 418 (5th Cir. 2019) ("The district court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act."), *with Jones*, 2019 U.S. Dist. LEXIS 216110, at *14 ("The Court will not climb into a time machine and try to figure out what the government might have done years ago when charging the defendant.").

13. *Rhines*, 2019 U.S. Dist. LEXIS 115868, at *4–5.

14. The classifications of district court approaches to implementing section 404 as Methods I, II, III, and IV are my own.

15. *See, e.g.*, *Hegwood*, 934 F.3d at 418–19.

16. *See, e.g.*, United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592, at *4–5 (D. Neb. Mar. 28, 2019).

17. *See, e.g.*, *Jones*, 2019 U.S. Dist. LEXIS 216110, at *10, *14.

18. *See, e.g.*, United States v. Payton, No. 07-20498-1, 2019 U.S. Dist. LEXIS 110292, at *10–12 (E.D. Mich. July 2, 2019).

Rhines to time served.[19] While the Supreme Court could rule Method IV is the correct interpretation of the statute, Congress is the more appropriate actor and should capitalize on the present appetite for reform to amend the law to accomplish its intent.

Part I of this Comment introduces the First Step Act, the goals of Congress in implementing it, the historical context from which it emerged, and the four methods by which it is being implemented. Part II analyzes and evaluates Methods I–IV, arguing that Method IV uniquely fulfills the goals of Congress. Part III proposes an amendment to section 404 which would remove ambiguity and require courts to resentence according to Method IV. Lastly, this Comment concludes with a summary of its argument and a call for change.

I. BACKGROUND

A. *The First Step Act of 2018*

1. The Law

In 2018, Congress passed the First Step Act, which "moderately overhaul[ed] the criminal justice system . . . usher[ing] in small changes to the 'tough-on-crime' prison and sentencing laws of the 1980s and 1990s that led to an explosion in federal prison populations and costs."[20] The law assists ex-offenders with reentry, creates good-time credit, reduces sentencing guidelines, and makes certain reforms retroactive.[21] An extraordinary bipartisan effort, the First Step Act's passage was a result of conservative fiscal concern for the budget required to sustain a prison population which had ballooned to 220,000 in 2013, and a growing awareness among progressives of the injustice of mass incarceration.[22] Indicative of

19. United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4–5 (M.D. Pa. May 31, 2019); Wegman, *supra* note 4.

20. United States v. Simons, 375 F. Supp. 3d 379, 384 (E.D.N.Y. 2019).

21. *First Step Act*, ESP INSIDER EXPRESS (U.S. Sentencing Comm'n, Wash., D.C.), Feb. 2019, at 1 [hereinafter INSIDER EXPRESS], https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf [https://perma.cc/6A4R-J9UF].

22. *See* H.R. REP. NO. 115-699, at 23–24 (2018) (suggesting public safety is undermined by the increasing percentage of the Department of Justice budget dedicated to prisons); Vivian Ho, *Criminal Justice Reform Bill Passed by Senate in Rare Bipartisan Victory*, GUARDIAN (Dec. 19, 2018, 7:29 AM EST), https://www.theguardian.com/us-news/2018/dec/18/first-step-act-criminal-justice-reform-passes-senate [https://perma.cc/WKD4-NB3B]; Wegman, *supra* note 4 (reporting 2013 prison population).

the underlying racial dynamics, the growing impatience with criminalizing drug addiction is at least partially attributable to the opioid crisis ravaging white communities and causing a shift in perspective "from warfare to welfare."[23]

Embodying the shift from war on drugs to treatment, Title IV of the First Step Act addresses sentencing reform.[24] Specifically, the Act reduces and restricts enhanced mandatory minimums for prior drug felonies (section 401), broadens the existing safety valve of 18 U.S.C. § 3553(f), which increases the number of offenders that courts are allowed to sentence without regard to mandatory minimums (section 402), and reduces the severity of "stacking" multiple offenses involving firearms under 18 U.S.C. § 924(c) (section 403).[25]

Subsequently, section 404 of the First Step Act makes the Fair Sentencing Act of 2010 retroactive, allowing courts to reduce the sentence of crack cocaine offenders sentenced under the old 100:1 scheme by instead applying the less harsh 18:1 ratio.[26] This ratio reflects the proportional drug weights of powder cocaine and crack cocaine to trigger the same mandatory minimum.[27] Thus, under the 100:1 scheme it took only five grams of crack cocaine to trigger the same five-year mandatory minimum as 500 grams of powder cocaine.[28] This is an egregious and discriminatory scheme, completely disproportional to the harm caused by what is essentially the same drug.[29] In 2010, Congress diminished this injustice by reducing the ratio to 18:1.[30] Leaving the triggering powder cocaine

23. Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941, 952–54 (2019).

24. First Step Act of 2018, Pub. L. No. 115-391, §§ 401–404, 132 Stat. 5194, 5220–22 (codified at 21 U.S.C. § 841). In its other titles, First Step's primary focus is reentry of people who are incarcerated into society, "directing the Federal Bureau of Prisons to take specific actions regarding programming, good-time credit, and compassionate release, among other issues." INSIDER EXPRESS, *supra* note 21, at 1.

25. First Step Act of 2018 §§ 401–403; *see* INSIDER EXPRESS, *supra* note 21, at 1.

26. First Step Act of 2018 § 404.

27. *See supra* note 3.

28. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 1302(a)(2), § 1010(b)(1)–(2), 100 Stat. 3207, 3207-15 to -17 (current version at 21 U.S.C. § 841(b)). Additionally, fifty grams of crack cocaine and 5000 grams of powder cocaine triggered the same ten-year mandatory minimum. *Id.*

29. Exum, *supra* note 23, at 948 (citing CARL L. HART, JOANNE CSETE & DON HABIBI, OPEN SOC'Y FOUND., METHAMPHETAMINE: FACT VS. FICTION AND LESSONS FROM THE CRACK HYSTERIA 2 (2014), https://www.opensocietyfoundations.org/sites/default/files/methamphetamine-dangers-exaggerated-20140218.pdf [https://perma.cc/79W6-JBN7]).

30. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841).

weights unaltered, the law raised the crack cocaine weights to twenty-eight grams and 280 grams.[31]

This new ratio is made retroactively available to prisoners in section 404(b) of the First Step Act:

> A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.[32]

A "covered offense" is one with penalties "modified by section 2 or 3 of the Fair Sentencing Act of 2010" that was committed before the Act was passed.[33] The law gives prisoners only one opportunity to move for relief under section 404, and courts retain discretion to deny resentencing motions.[34]

At the time the First Step Act was passed in December 2018, 2660 offenders were eligible for relief under section 404.[35] This is a small percentage of the overall number of offenders impacted by the First Step Act.[36] However, this small segment is an especially important segment because of who it represents: those offenders sentenced under an unduly harsh scheme, the overwhelming majority of whom are Black, and the particular injustice of serving a sentence that society has come to decry as unjust and racist.[37] Of

31. *Id.*

32. First Step Act of 2018 § 404(b), 21 U.S.C. § 841 note (Application of Fair Sentencing Act).

33. *Id.* § 404(a). This includes sentencing for crack cocaine offenses under the 100:1 ratio, or mandatory minimum imposed for simple possession of crack cocaine. *See* Fair Sentencing Act of 2010 § 3.

34. First Step Act of 2018 § 404(c) ("No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

35. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY (2019) [hereinafter IMPACT SUMMARY], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf [https://perma.cc/7BFE-HL59].

36. For example, the First Step Act's highest impact section is 102(b), pertaining to good-time credit and prerelease custody, which affects 142,448 offenders. *Id.*

37. *See, e.g.*, Mark J. Perry & Gary J. Schmitt, *From 100-1 to 18-1: Improved Disparity for Double-Standard, Racist, Minimum Drug Sentencing?*, AEIDEAS: CARPE DIEM (Mar. 21, 2010), https://www.aei.org/carpe-diem/from-100-1-to-18-1-improved-disparity-for-double-standard-racist-minimum-drug-sentencing/ [https://perma.cc/84CV-SDCB].

those 2660 prisoners, 89.1% are Black and 6.2% are Hispanic; only 4% are white.[38]

2. Congressional Intent

As embodied in the substance of the law, Congress's intent in passing the First Step Act was to decrease the prison population, shorten sentences for drug crimes, and reduce the disparity between crack cocaine and powder cocaine sentencing.[39] The law works to decrease the prison population by expanding the compassionate release program, increasing the number of safety valve applications for reduced sentences, making the Fair Sentencing Act retroactive, and by implementing programs to reduce recidivism.[40] The law shortens sentences for drug crimes by further reducing mandatory minimums and changing the conditions under which they apply.[41] It does this by modifying the definitions for a mandatory minimum-triggering "serious drug felony" and "serious violent felony."[42] Finally, the law expands efforts to reduce the disparity between crack cocaine and powder cocaine sentencing by making the Fair Sentencing Act retroactive.[43]

Additionally, the First Step Act was shaped by the goals of the United States Sentencing Commission ("Sentencing Commission"): uniformity, proportionality, and reducing unjustified race-based differences in sentencing.[44] The Sentencing Commission worked over the last twenty-five years to mobilize Congress to reform drug sentencing by enacting policies of its own, making recommendations to Congress, and directly shaping legislation.[45] The Sentencing Commission's goal of uniformity in sentencing means treating like offenders alike.[46] Replacing the 100:1 ratio with the 18:1 ratio serves uniformity by better reflecting the relative harm between crack cocaine and powder cocaine offenses. Proportionality in sentencing means treating different offenders differently based on the

38. IMPACT SUMMARY, *supra* note 35. For additional reference, 98.8% of those impacted are male, and 97% are U.S. citizens. *Id.*

39. United States v. Simons, 375 F. Supp. 3d 379, 382 (E.D.N.Y. 2019).

40. INSIDER EXPRESS, *supra* note 21, at 1.

41. *Id.* at 2.

42. *Id.*

43. *Id.* at 4.

44. Dorsey v. United States, 567 U.S. 260, 268 (2012).

45. *See infra* note 59.

46. *Dorsey*, 567 U.S. at 268.

severity of their conduct.[47] This is achieved by the First Step Act in diminishing the reach of mandatory minimums, which restores judicial discretion within the guidelines such that low-level drug dealers can be sentenced less severely than major drug traffickers.[48] Finally, applying the 18:1 ratio reduces unjustified race-based differences, because the overwhelming majority of people affected by the previous 100:1 scheme are Black.[49]

Taken together, Congress's intent and the Sentencing Commission's goals aspire to fundamental fairness in sentencing. Fundamental fairness is required of the federal government by the Due Process Clause of the Fifth Amendment and it is measured "by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct."[50] The implementation of section 404 must be measured against fundamental fairness by assessing the factors of (1) the extent of sentence reduction, and (2) the degree to which it evaluates the petitioning prisoner as an individual. The sentence reduction factor captures Congress's intent to reduce the prison population and shorten sentences for drug crimes, the Sentencing Commission's goal of uniformity, and the shared goal of reducing racial disparity in sentencing. The individuality factor captures Congress's goal of reducing the prison population by assessing for likelihood of recidivism, the Sentencing Commission's goal of proportionality, and the shared goal of reducing racial discrimination in sentencing.

B. *The First Step Act in Context*

1. The War on Drugs

The First Step Act is the necessary culmination of the misguided criminal justice policies implemented as part of the War on Drugs. In a 1971 press conference, President Richard Nixon targeted drug abuse as "public enemy number one" and declared war.[51] Nixon's

47. *Id.*

48. *See id.*

49. *See supra* note 38 and accompanying text.

50. Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

51. Remarks About an Intensified Program for Drug Abuse Prevention and Control, 1971 PUB. PAPERS 738, 738 (June 17, 1971) ("America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.").

war "cast drug abuse and the drug offender as dangerous adversaries of the law-abiding public, requiring military-like tactics to defeat."[52] Two years later in an address to Congress, President Nixon created an agency dedicated to waging his war, the Drug Enforcement Administration, and celebrated that funding for drug enforcement had increased sevenfold in the previous five years.[53]

Under President Reagan, Congress passed the Anti-Drug Abuse Act of 1986, making criminal sentencing a primary weapon for cracking down on drug abuse.[54] The Act reinstated a sentencing regime which established highly punitive mandatory minimum sentences based on drug weights.[55] Amid a national panic about the dangers of crack cocaine, Congress hastily passed the Anti-Drug Abuse Act without a single committee hearing or congressional report.[56] The national fear also prompted Congress to include the wildly disproportionate sentencing scheme which triggered crack cocaine mandatory minimum sentences for drug weights 100 times less than powder cocaine.[57] This 100:1 ratio disproportionately impacted Black communities, and ushered in the era of mass incarceration.[58]

52. Exum, *supra* note 23, at 941.

53. Message to the Congress Transmitting Reorganization Plan 2 of 1973 Establishing the Drug Enforcement Administration, 1973 PUB. PAPERS 228, 228–29 (Mar. 28, 1973).

54. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (current version at 21 U.S.C. § 841(b)).

55. *Id*. The first mandatory minimum sentencing laws for drug offenses were passed in 1951, but had grown unpopular by the 1960s. *See* Act of Nov. 2, 1951, Pub. L. No. 82-255, § 1, 65 Stat. 767, 767–68 (amending the Narcotic Drugs Import and Export Act); Exum, *supra* note 23, at 943. Ironically, Congress had repealed most of the mandatory minimums with the Comprehensive Drug Abuse Prevention and Control Act in 1970, just one year before President Nixon initiated the War on Drugs. Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1291–92 (1970).

56. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5–6 (2002) [hereinafter 2002 REPORT], https://www.ussc.gov/research/congressional-reports/2002-report-congress-federal-cocaine-sentencing-policy [http://perma.cc/6BPP-ECZ5].

57. *Id.* at 4–5 ("As a result of the 1986 Act, 21 U.S.C. § 841(b)(1) requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine."). The public hysteria has proven to be misplaced as studies have shown that "[t]here are no pharmacological differences between crack [cocaine] and powder cocaine to justify their differential treatment under the law." HART ET AL., *supra* note 29, at 2.

58. 2002 REPORT, *supra* note 56, at 102–03. While the scope of this Comment is limited to drug sentencing law, general crime bills like the Violent Crime Control and Law Enforcement Act of 1994 also exacerbated the disparity by increasing the number of officers enforcing drug laws and by implementing three-strikes provisions. *See* Pub. L. No. 103-322, 108

For fifteen years, the Sentencing Commission decried the 100:1 ratio.[59] In 1995, the Sentencing Commission began to report on the ratio's disparate impact, expressing concern that the law targeted minority communities: "[m]ost strikingly, crack cocaine offenders are 88.3 percent Black."[60] The Sentencing Commission warned that the average sentence for a crack cocaine offense was twice as long as the average sentence for a powder cocaine offense, and suggested that modification of the 100:1 ratio would "not only evaporate but would slightly reverse" the Black-white racial disparity in sentencing.[61]

2. The Fair Sentencing Act of 2010

At last, in 2010, Congress acted upon the Sentencing Commission's recommendation and reduced the 100:1 ratio. Under the Fair Sentencing Act of 2010, Congress reduced the sentencing disparity between crack cocaine and powder cocaine to 18:1.[62] The law increased the quantity of crack cocaine required to trigger a five-year mandatory minimum sentence from five grams to twenty-eight grams, and the quantity required to trigger a ten-year mandatory minimum from fifty to 280 grams.[63] Despite these important reforms, the Supreme Court later held that the act would only apply to those sentences issued after 2010, leaving in place all sentences previously imposed under the unfair guidelines.[64] In that case, *Dorsey v. United States*, the Supreme Court recognized Congress wrote the Fair Sentencing Act in response to "unjustified race-

Stat. 1796 (codified at 34 U.S.C. § 12601); *see* ALEXANDER, *supra* note 2, at 56.

59. The Commission recommended modification of the 100:1 ratio in 1995, 1997, 2002, 2004, and 2007. Exum, *supra* note 23, at 950–51.

60. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 152–53 (1995) [hereinafter 1995 REPORT], https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/CHAP5-8.pdf [http://perma.cc/B4MR-ABXA]. Although crack cocaine offenders are overwhelmingly Black, studies also show that people who are white use crack cocaine at similar or higher rates as people who are Black. Exum, *supra* note 23, at 954 (citing a study surveying crack users that found fifty-two percent were white and thirty-eight percent were Black).

61. 1995 REPORT, *supra* note 60, at 152–54 (citing DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1–2 (1993)).

62. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)(1)). The Act also eliminated the mandatory minimum sentence for simple possession of crack cocaine. *Id.* § 3.

63. *Id.* § 2.

64. Dorsey v. United States, 567 U.S. 260, 279–81 (2012).

based differences," yet found that Congress only intended those sentenced after August 3, 2010 to benefit from the less-prejudicial sentencing scheme.[65] The injustice of this temporal arbitrariness was one of the issues the First Step Act of 2018 was designed to remedy.

3. Relevant Changes in Law Since 2010

Since the Fair Sentencing Act took effect in 2010, sentencing law has continued to change. Two of the changes most relevant to sentencing under the First Step Act are what crimes qualify for career offender status, and the constitutionality of triggering a mandatory minimum based on conduct found by a judge instead of a jury. The significance of these changes is best understood in the larger context of how a court calculates a sentence.

Since 1987, when the Sentencing Commission promulgated the Federal Sentencing Guidelines, courts have applied a uniform sentencing method.[66] The process includes three steps: (1) calculation of the applicable offense level and criminal history score under the Guidelines, (2) consideration of the policy statements and commentary to determine whether a departure is warranted, and (3) consideration of all applicable factors under 18 U.S.C. § 3553(a).[67] In application, at the first step, the court uses a table in the Guidelines to calculate a defendant's sentencing range, accounting for the offense level of the conviction, specific offense characteristics that aggravate or mitigate that level, and the defendant's criminal history.[68] The court then considers possible grounds for sentencing outside of the Guideline range, including departures specific to the

65. *Id.* at 268, 279–81.

66. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 1–3 (2015) [hereinafter FEDERAL SENTENCING], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/PV3U-KR45]. The Sentencing Commission was established as a part of the Sentencing Reform Act of 1984, which responded to criticism over sentencing disparities and widespread parole. *See id.* at 1; Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991-998). Although the Sentencing Commission is an independent body within the judicial branch, its power is more akin to legislative power. *See* United States v. Booker, 543 U.S. 220, 243 (2005) ("[T]he Commission is an independent agency that exercises policymaking authority delegated to it by Congress.").

67. FEDERAL SENTENCING, *supra* note 66, at 12. This is known as the *Booker* three-step process. *Id.*

68. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (U.S. SENTENCING COMM'N 2018).

defendant's actual conduct in committing the offense, cooperation with the government, and policy statements of the Sentencing Commission.[69] Finally, the court considers all seven factors of § 3553(a), including (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the need for the sentence to reflect retribution, deterrence, incapacitation, and rehabilitation; (3) the kinds of sentences available; (4) the sentencing range calculated through the Guidelines; (5) policy statements promulgated by the Commission; (6) uniformity, "the need to avoid unwarranted sentencing disparities" among offenders with similar records and offenses; and (7) "the need to provide restitution to any victims."[70]

Although the offense of conviction determines the statutory minimum and maximum punishments, the defendant's broader conduct is considered at steps one and three of calculating the sentence.[71] This "real offense conduct" philosophy is the cornerstone of the Guidelines system and requires that a defendant's sentence reflect the defendant's actual conduct, and not just the conduct for which the defendant was convicted.[72] As applied to drug sentencing, convictions embrace categories of conduct, such as possession with intent to distribute five or more grams of crack cocaine, while real conduct would include the actual drug weight possessed by the defendant. The conviction imposes a mandatory minimum and a statutory maximum punishment, but the drug quantity attributed to the defendant is one of the specific offense characteristics that aggravates the offense level in calculating the sentencing guidelines.

The first relevant changing area of law is at the intersection of the Guidelines' real offense conduct philosophy and the Sixth Amendment right to a jury trial. In 2013, in *Alleyne v. United States*, the Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury," and it must be included in the indictment.[73] Because conduct

69. *Id.* § 1B1.1(b)–(c).

70. 18 U.S.C. § 3553(a)(1)–(7). The Supreme Court has recognized the redundancy of some of the steps of the process, but has taken it to emphasize "the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." Gall v. United States, 552 U.S. 38, 50 n.6 (2007).

71. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2018).

72. FEDERAL SENTENCING, *supra* note 66, at 12–13.

73. 570 U.S. 99, 103 (2013). "The essential point is that the aggravating fact produced a higher range which, in turn, conclusively indicates that the fact is an element of a distinct

that increases a mandatory minimum also increases a statutory maximum, this holding naturally followed from *Apprendi v. New Jersey*.[74] For example, in the drug context, statutory minimums and maximums operate in brackets attached to the conviction: zero to twenty years as a base that can be enhanced to five to forty years or ten years to life depending on the quantity.[75] Thus, an *Alleyne* violation occurs where a judge imposes a mandatory minimum sentence based off of the real conduct of a quantity possessed that was not found beyond a reasonable doubt by a jury.[76] This is a substantial development of law, which occurred after all prisoners who were eligible for the First Step Act were originally sentenced. Because of the nature of drug offenses and real conduct sentencing, many of these prisoners have significant discrepancies between the drug quantity of convictions and the drug quantity attributed at sentencing, which may raise *Alleyne* issues on resentencing.

A second relevant changing area of law is career offender status. This factor aggravates the offense level and merits a near-maximum sentence. Under the Guidelines, a career offender is an adult who commits a "crime of violence" or a controlled substance felony after two prior felony convictions for those crimes.[77] The Guidelines assign all career offenders to the maximum criminal history category and to sentence ranges at or near the statutory maximum penalty.[78] However, an offender previously sentenced as a career offender would likely receive a shorter sentence if sentenced today for various reasons: the career offender guideline range is lower; courts are now permitted to impose a sentence below the career offender guideline range; and, many offenders would no longer be classified as career offenders, either because the predicate offenses

and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id*. at 115–16.

74. 530 U.S. 466, 476 (2000) (holding that any fact that raises a statutory maximum must be charged in an indictment and proved to a jury beyond a reasonable doubt).

75. *See* 21 U.S.C. § 841(b)(1)(C).

76. *Would the Supreme Court's Decision in* Alleyne v. United States*, 133 S. Ct. 2151 (2013), Lead to a Lower Sentence Today?*, DEFENDER SERVS. OFF. TRAINING DIVISION [hereinafter *Federal Defender Training*], https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/clemency-would-alleyne-lead-to-lower-sentence-today.pdf [https://perma.cc/Z3M9-V2FS].

77. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2018).

78. U.S. SENTENCING COMM'N, QUICK FACTS—CAREER OFFENDERS 1 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf [https://perma.cc/SF4V-HKLD]; *see also* 28 U.S.C. § 994(h).

previously counted separately are now considered a single sentence, or the offense is no longer a crime of violence under the Supreme Court's narrowing interpretation.[79]

The Court began restricting the definition of "crime of violence" in 2004, but for years courts found several nonviolent offenses qualified: "tampering with a motor vehicle, burglary of a nondwelling, fleeing and eluding, operating a motor vehicle without the owner's consent, possession of a short-barreled shotgun, carrying a concealed weapon, oral threatening, car theft, and failing to return to a halfway house."[80] In narrowing its interpretation, the Court has heightened the actus reus to require "violent force,"[81] and the mens rea to require "purposeful, violent, and aggressive conduct," more than mere recklessness.[82] Fifty-seven percent of those eligible for resentencing under the First Step Act were originally sentenced as career offenders.[83] In this dynamic area of law where courts are frequently reclassifying crimes under the Supreme Court's narrower interpretation of crimes of violence, most will want to argue that they no longer qualify as career offenders nor deserve the near-maximum punishment for the offense.

C. *Problems in Implementing Section 404*

While the First Step Act provided new statutory authority for courts to apply the Fair Sentencing Act retroactively, it offered little guidance in how to do so.[84] Courts are arbitrarily implementing section 404 because it is written ambiguously. The provision's language leaves two open questions for courts to decide: (1) whether the court has the authority to impose a new sentence or only to

79. *See How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today*, DEFENDER SERVS. OFF. TRAINING DIVISION [hereinafter *Career Offender Training*], https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/clemency-how-a-person-sentenced-as-a-career-offender-would-receive-a-lower-sentence-today4-14.pdf [https://perma.cc/4KQM-RAJ3].

80. *Id.* at 16; *see generally* Leocal v. Ashcroft, 543 U.S. 1 (2004).

81. *See* Johnson v. United States, 559 U.S. 133, 140 (2010) ("[V]iolent force—that is, force capable of causing physical pain or injury to another person."); *Leocal*, 543 U.S. at 9.

82. *See* Chambers v. United States, 555 U.S. 122, 127–28 (2009); Begay v. United States, 553 U.S. 137, 144–46 (2008).

83. U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 8 (2020) [hereinafter RETROACTIVITY REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20200203-First-Step-Act-Retro.pdf [https://perma.cc/JAU4-4FNL].

84. *See*, *e.g.*, United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *6 (E.D. Va. June 19, 2019).

modify the existing sentence, and (2) which updates in sentencing guidelines and caselaw to apply, if any.[85]

In deciding the first issue, whether to impose a new sentence or modify the existing sentence, courts must reconcile the language of the text with existing, familiar procedures for resentencing appeals. Within a month of the First Step Act's passage, the Sentencing Commission identified this question of scope as a preliminary question for the courts to decide.[86] Section 404(b) provides that "[a] court . . . may . . . *impose* a reduced sentence."[87] On the one hand, the word "impose" generally refers to the full plenary sentencing procedure following a defendant's conviction. When imposing a sentence, a court "conduct[s] a full and thorough review of the evidence in the case."[88] This includes reviewing a presentence report prepared by the probation office that details the conduct of the defendant and affords the defendant the opportunity to argue mitigating factors and introduce evidence.[89] Imposing a sentence also requires the court to consider a breadth of factors detailed in 18 U.S.C. § 3553(a), ranging from policy statements from the Commission to the seriousness of the offense.[90]

On the other hand, the fact that the language only allows the court to impose "*a reduced sentence*" suggests limitation on the court's authority.[91] This directive sounds in a more limited sentence modification, which is generally available to prisoners as governed by 18 U.S.C. § 3582(c) independent of the First Step Act. In contrast to the procedure for imposing a sentence, when a court modifies a sentence pursuant to § 3582(c) it conducts a more limited review.[92] A body of caselaw applying this section provides a familiar guide for courts and the path of least resistance in implementing their new resentencing authority under the First Step

85. *See, e.g.*, *id.* at *6–14.

86. *See* INSIDER EXPRESS, *supra* note 21, at 8 ("Courts will have to decide whether a resentencing under the Act is a plenary resentencing proceeding or a more limited resentencing.").

87. First Step Act of 2018 § 404(b), 21 U.S.C. § 841 note (Application of Fair Sentencing Act) (emphasis added).

88. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *8.

89. *Id.*

90. 18 U.S.C. § 3553(a); *see supra* note 70 and accompanying text.

91. First Step Act of 2018 § 404(b) (emphasis added).

92. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *8–9.

Act.[93] Section 3582(c)(2) allows for modification of a sentence subsequent to a change in the Sentencing Guidelines, while § 3582(c)(1)(B) allows the court to "modify an imposed term of imprisonment" pursuant to statutory authority.[94] The Supreme Court interpreted § 3582(c)(2) in *Dillon v. United States*, emphasizing that it "does not authorize a sentencing or resentencing"; rather, the new sentencing court may defer to findings of the original sentencing court.[95] This modification procedure significantly limits the petitioner's rights such that he has no right to a hearing, and, even if he is granted one, he has no right to be present such that he may argue his case or introduce evidence.[96]

In deciding the second issue, whether to resentence under the legal landscape at the time of the original conviction or present day, courts also face an interpretive quandary. Section 404(b) continues, "a court . . . may . . . impose a reduced sentence *as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed*."[97] A court rigidly interpreting that provision will reason that because the law only mentions sections 2 and 3 of the Fair Sentencing Act, those are the only changes in the law which should be applied. That is to say, the court will endeavor to travel back in time to the date of the original conviction and apply the law of that date, modified only by sections 2 and 3, thereby applying sentencing practices that have since been updated by Congress, the Sentencing Commission, and appellate courts. On the other hand, a court taking a broader view of section 404 would read the express authority to apply sections 2 and 3 as directly responding to and overruling *Dorsey*, which decided the Fair Sentencing Act was not retroactive.[98] Interpreting the law in that context, section 404 is not a mandate to apply a time machine

93. *See id.* at *7, *9 ("[M]ost courts have applied the procedures under § 3582(c)(1)(B) to motions for relief under the First Step Act.").

94. *Compare* 18 U.S.C. § 3582(c)(2) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."), *with* § 3582(c)(1)(B) ("[T]he court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute . . . .").

95. 560 U.S. 817, 825, 829 (2010).

96. *Id.*; FED. R. CRIM. P. 43(b)(4); U.S. SENTENCING COMM'N, PRIMER ON RETROACTIVITY 2–5 (2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Retroactivity.pdf [https://perma.cc/GT54-FU97].

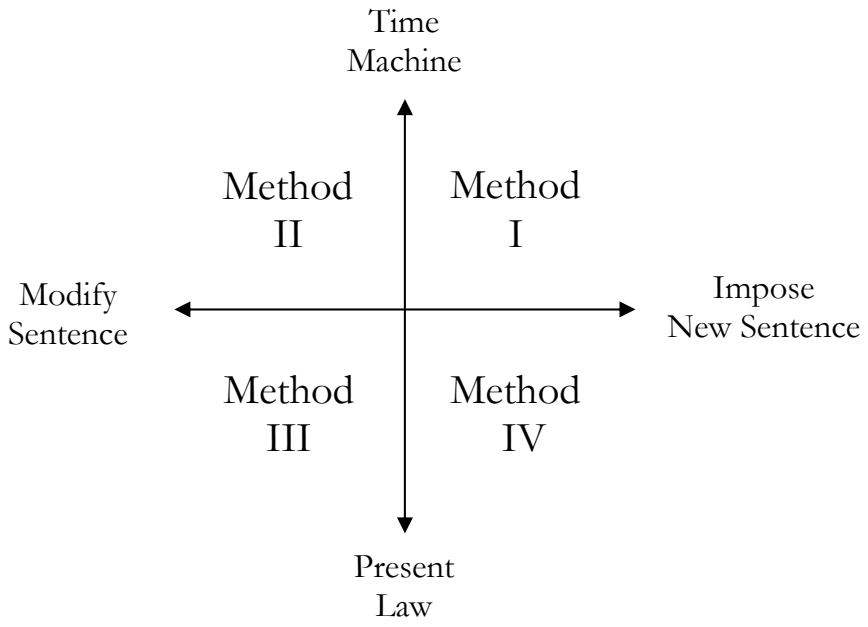
97. First Step Act of 2018 § 404(b), 18 U.S.C. § 841 note (Application of Fair Sentencing Act) (emphasis added).

98. Dorsey v. United States, 567 U.S. 260, 268 (2012).

resentencing—the court requires no express authority from Congress to apply present-day law in sentencing a defendant.

As noted above, the sea change in sentencing law since 2010 bears particular significance for defendants originally sentenced as career offenders, and those whose attributed drug weights varied significantly from the weight of conviction. These two factors mandate mandatory minimums that may prevent the First Step Act from providing any relief and thereby cause courts to deny petitions for resentencing without a hearing.

The open questions of imposing a sentence or modifying it, and applying a time machine or present law, overlap such that a court can implement section 404 in one of four different ways. In analyzing how these issues overlap, it is helpful to visualize them on a grid. The x-axis represents the court's decision whether to modify the existing sentence or impose a new sentence. The y-axis represents the court's decision whether to apply a time machine approach or resentence under present law. The axes intersect to depict four quadrants, each representing one of the four methods presently being used to implement section 404.



In Method I, a court decides to impose a new sentence and apply the time machine approach.[99] In Method II, a court decides not to impose a new sentence but to modify the existing one and to apply the time machine approach.[100] In Method III, the court decides to modify the sentence and apply present law.[101] Lastly, in Method IV, the court decides to impose a new sentence and apply present law. [102] The next Part of this Comment employs cases to illustrate each method in application, evaluates them against fundamental fairness, and argues Method IV is the best approach.

II. ANALYZING THE IMPLEMENTATION OF SECTION 404

A. *Method I: Impose a New Sentence Through Time Machine Resentencing,* Hegwood

United States v. Hegwood represents one of the few United States Circuit Court decisions to interpret section 404.[103] *Hegwood* came to the Fifth Circuit on appeal from the Southern District of Texas.[104] The Fifth Circuit held that section 404 authorizes imposing a new sentence through a time machine approach.[105]

In 2008, Michael Dewayne Hegwood sold eight grams of crack cocaine to a confidential informant, unwittingly recorded on audio and video.[106] Hegwood was charged with conspiracy and possession with intent to distribute five grams or more of crack cocaine.[107] He pled guilty to the possession charge and, in 2010, after serving twenty-seven months on a related state charge, was sentenced to 200 months (sixteen years, eight months) with five years of supervised release.[108] At the time of sentencing, Hegwood qualified as a career offender based on two prior drug offenses, and his sentence

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

100. *See,* e.g., United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592, at *4–5 (D. Neb. Mar. 28, 2019).

101. *See, e.g.*, United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *8–9 (E.D. Va. June 19, 2019).

102. *See, e.g.*, United States v. Payton, No. 07-20498-1, 2019 U.S. Dist. LEXIS 110292, at *10–12 (E.D. Mich. July 2, 2019).

103. 934 F.3d 414 (5th Cir. 2019).

104. *Id.* at 414.

105. *Id.* at 418–19.

106. *Id.* at 415.

107. *Id*.

108. *Id.*

was enhanced accordingly.[109] After having two applications for resentencing denied, Hegwood was granted a resentencing hearing under the First Step Act in 2019, and was resentenced to 153 months (twelve years, nine months).[110] On appeal, Hegwood argued for a full plenary resentencing, which would apply the present law that no longer classified him as a career offender, meriting a sentence range of seventy-seven months (six years, five months) to ninety-six months (eight years).[111] The court did not grant a full plenary resentencing.[112]

The Fifth Circuit agreed with Hegwood that section 404 authorized the imposition of a new sentence rather than the modification of his existing one:

> The district court's action is better understood as imposing, not modifying, a sentence, because the sentencing is being conducted as if all the conditions for the original sentencing were again in place with the one exception. The new sentence conceptually substitutes for the original sentence, as opposed to modifying that sentence.[113]

Although the Fifth Circuit concluded section 404 required imposing a new sentence, the court likened the process to a § 3582(c) modification because of the limitations it found in answering the second issue.[114]

Next, the Fifth Circuit held that section 404 requires a time machine resentencing rather than the application of present law.[115] According to its textual analysis, section 404 requires this approach because the only explicit basis for resentencing is "as if" the Fair Sentencing Act was in effect at the time of the offense.[116] Therefore, the court reasoned, "Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense."[117] The court articulated its role according to the time machine approach, saying "[t]he district court decides on a new sentence by placing itself in the time frame of the original sentenc-

109. *Id.*
110. *Id.* at 415–16.
111. *Id.* at 417.
112. *Id.* at 418.
113. *Id.* at 418–19.
114. *Id.* at 418.
115. *Id.*
116. *Id.*
117. *Id.*

ing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act."[118] With this limitation, the court reasoned that section 404 is more like a § 3582(c)(2) modification than a plenary resentencing because the original sentencing is only adjusted for compliance with sections 2 and 3 of the Fair Sentencing Act.[119]

For Hegwood, imposing a new sentence did not provide full relief because the court applied the time machine approach. Ultimately, Hegwood's guideline sentencing range was reduced under the 18:1 ratio, but his sentence was still enhanced by career offender status.[120] Had the court imposed a new sentence considering present law, Hegwood would not qualify as a career offender, and his sentence would not be enhanced.[121] For Hegwood, the time machine approach meant the difference between serving four more years in prison and being eligible for immediate release.

1. Evaluating Method I

Measured against the First Step Act's purpose of fundamental fairness in sentencing, Method I fails in the extent to which it reduces prisoners' sentences. This factor reflects Congress's goals for the First Step Act to reduce the prison population and shorten sentences for drug crimes. It also accounts for the Sentencing Commission's goal of uniformity in sentencing, and their shared goal in eliminating racial disparity in sentencing. Method I fails to accomplish these goals because the time machine approach turns a blind eye to the progress of case law and the statutory system, thereby resentencing using the overly punitive legal landscape pre-2010.

Method I also fails in the degree to which it evaluates the petitioner as an individual. This factor reflects Congress's goal of reducing the prison population by assessing for likelihood of recidivism, the Sentencing Commission's goal of proportionality, and the shared goal of reducing racial discrimination in sentencing. Although the court interpreted section 404 to require imposing a new sentence, which would normally require a full evaluation of the petitioner's character, context, and rehabilitation, the combination

118. *Id.*
119. *Id.* (citing Dillon v. United States, 560 U.S. 817, 826 (2010)).
120. *Id.* at 418–19.
121. *Id.* at 416.

with the time machine approach did not yield this result. Because of the time machine approach, the court reasoned the resentencing was more like the general petition for sentence modification under § 3582(c) than a full plenary resentencing. Accordingly, Method I defers to the findings of the trial court, denies the petitioner the opportunity to put on new evidence, and to be present at his or her resentencing to advocate for him or herself. Accordingly, Method I fails to achieve fundamental fairness in sentencing; instead, it perpetuates the injustice the First Step Act was enacted to remedy.

As illustrated in *Hegwood*, Method I allows prisoners to be resentenced under an outdated scheme which has been updated precisely because it was found unjust.[122] Although the court reduced Hegwood's sentence, it chose an interpretation of section 404 that did not result in the greatest sentence reduction, clinging to the text of the statute for justification. Hegwood advanced an argument for a full plenary resentencing that was equally based on the text of the statute but also accounted for the larger purpose of the First Step Act—fundamental fairness.[123] We will see a minority of courts are open to this interpretation in Method IV.

Hegwood illustrates one significant problem with the time machine approach: sentencing a person as a career offender though they no longer qualify as one.[124] As fifty-seven percent of prisoners eligible for section 404 resentencing were originally sentenced as career offenders, rejecting the time machine approach is a critical step in fulfilling the purpose of the First Step Act.[125] Career offender status is not the only problem that arises with the time machine approach. A second problem arises when the drug weight of offense varies significantly from the weight attributed in the presentence report.[126] This issue arises in *Haynes*, where the court applied Method II.

122. *See Career Offender Training*, *supra* note 79, at 1.

123. *Hegwood*, 934 F.3d at 417–18.

124. *See Career Offender Training*, *supra* note 79.

125. RETROACTIVITY REPORT, *supra* note 83, at 8.

126. *See, e.g.*, United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *11–14 (E.D. Va. June 19, 2019).

B. *Method II: Modify Existing Sentence Through Time Machine Resentencing*, Haynes

United States v. Haynes was decided by the District Court of Nebraska and illustrates Method II.[127] The *Haynes* court held section 404 authorizes a sentence modification using the time machine method.[128] The facts of *Haynes* give rise to the important issue of whether to resentence the defendant according to the drug weight of conviction or as attributed in the presentence report.[129]

Willie Haynes pled guilty to possession with intent to distribute five or more grams of crack cocaine.[130] Haynes did not object to the weight attributed to him in the presentence report, which held him responsible for 28.35 grams.[131] Under the 100:1 ratio, Haynes's conviction of five or more grams carried a mandatory minimum of five years.[132] This mandatory minimum was increased to ten years because of prior felony drug convictions.[133] Additionally, Haynes's sentencing guideline range was enhanced as a career offender, from 262 months (twenty-one years, ten months) to 327 months (twenty-seven years, three months).[134] For a reason unnoted in the opinion, the sentencing court made a downward variance and sentenced Haynes to 188 months (fifteen years, eight months) with eight years of supervised release.[135] Haynes initially moved pro se for a sentence reduction under the First Step Act, but was denied.[136] Fortunately, the court did not consider that motion to be a review on the merits and allowed Haynes to refile with representation of the Federal Public Defender.[137] Haynes argued the 18:1 ratio would reduce his sentencing range to 188 months (fifteen years, eight months) to 235 months (nineteen years, seven months).[138] Additionally, he requested a downward variance of twenty-eight percent from the lower end of that range, as had been

127. United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592 (D. Neb. Mar. 28, 2019).
128. *Id.* at *4–5.
129. *Id.* at *2.
130. *Id.* at *1–2.
131. *Id.* at *2.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at *2–3.
136. *Id.* at *1.
137. *Id.*
138. *Id.* at *3.

granted in his original sentencing.[139] This would merit a resentencing to 135 months (eleven years, three months).[140]

First, the *Haynes* court held that section 404 requires a sentence modification rather than the imposition of a new sentence.[141] Haynes argued that section 404(b)'s language giving courts the power to "'*impose*' a reduced sentence" distinguished the resentencing process from a mere modification.[142] The court "s[aw] no basis for that distinction," implying that a § 3582(c)(1)(B) modification pursuant to statute was the correct procedural tool.[143] The court noted that the defendant did not have the right to be present at such a proceeding pursuant to Federal Rule of Criminal Procedure 43(b).[144]

Subsequently, the *Haynes* court held that section 404 authorizes the time machine approach to resentencing.[145] As applied to Haynes's circumstances, where the drug weight attributed to him in the presentence report varied significantly from the weight of offense, this meant a complete denial of his petition.[146] The Fair Sentencing Act, under the new 18:1 ratio, increased the weight required to trigger a five-year mandatory minimum from five grams of crack cocaine to twenty-eight grams of crack cocaine.[147] Here, the court decided that Haynes's conviction would be unaltered by the Fair Sentencing Act because he had been attributed with 28.35 grams in the presentence report, an amount requiring the same mandatory minimum as his original sentence.[148] Thus, the court ultimately denied Haynes's motion to reduce sentence.[149]

139. *Id.*

140. *Id.*

141. *Id.* at *5.

142. *Id.* (quoting First Step Act of 2018 § 404(b), 21 U.S.C. § 841 note (Application of Fair Sentencing Act) (emphasis added)).

143. *Id.* at *5.

144. *Id.* at *4–5.

145. *Id.* at *4.

146. *Id.* at *1–2, *5.

147. *See supra* note 3 and accompanying text.

148. *Haynes*, 2019 U.S. Dist. LEXIS 53592, at *4 ("[T]he government charged the offense in Count II of the Indictment in accordance with the wording of the statutes as they existed at the time of the Indictment. If the Fair Sentencing Act had been in effect at the time of the Indictment, the underlying and undisputed facts demonstrate that the government still would have charged Haynes under 21 U.S.C. § 841(b)(1)(B)(iii).").

149. *Id.* at *5.

1. Evaluating Method II

As illustrated in *Haynes*, Method II fails the First Step Act's pursuit of fundamental fairness in sentencing. It first fails in the extent to which it reduces prisoners' sentences. In Haynes's case, and many others where the drug weight attributed in the presentence report is greater than the amount of the conviction by a factor of 5.56 or more, Method II completely denies resentencing.[150] This decision is reached by the application of the time machine method, such that the court may resentence based off of judge-found facts, the real conduct of petitioner's drug quantity, while ignoring *Alleyne* because it had not been decided at the time of conviction. Additionally, the fact that Haynes pled to five grams but failed to object to the judge's finding of 28.35 grams does not obviate his *Alleyne* claim. A petitioner has the right to remain silent during his sentencing and that cannot be taken as an admission.[151] Thus, Method II fails to reduce the prison population, fails to shorten sentences for drug crimes, and fails to reduce unwarranted race-based sentencing disparities.

Additionally, Method II fails to evaluate petitioners as individuals. This is inherent in choosing to modify a sentence rather than impose a new sentence. In modifying a sentence, the court conducts a limited review, defers to the sentencing court's findings, and denies the petitioner the right to attend the resentencing hearing. Without granting the petitioner the basic human dignity of being present to look the judge in the eye and make a case for his or her rehabilitation, the court cannot fully weigh whether the petitioner is likely to reoffend.[152] Further, this modest review is only available for petitioners who make it past Method II's drug weight discrepancy threshold of 5.56. Otherwise, those petitioners receive no review at all. This fails to achieve the underlying goals of the First Step Act of reducing the prison population by assessing for likelihood of recidivism, proportionality, and the reduction of racial discrimination in sentencing.[153] While Method II fails to measure up

150. This factor is the amount the mandatory minimum triggering weights are increased from a 100:1 ratio to an 18:1 ratio.

151. *See* Mitchell v. United States, 526 U.S. 314, 326–30 (1999) (holding that a defendant has the right to remain silent at sentencing and no negative inference may be drawn from that silence in determining the facts).

152. *See* United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4–5 (M.D. Pa. May 31, 2019).

153. *See* discussion *supra* section I.A.2.

to fundamental fairness in outcomes and treatment of petitioners, its time machine approach to the drug weight discrepancy also implicates constitutional concerns.[154] This issue is addressed in the Method III case, *United States v. Jones*.

C. *Method III: Modify Existing Sentence Under Present Law*, Jones

In *United States v. Jones*, the court implemented section 404 through Method III. The *Jones* court held that section 404 authorizes a sentence modification under present law.[155] The facts of *Jones* again raise the issue of a significant drug weight discrepancy between the offense and the presentence report.[156] Because *Jones* rejects the time machine approach, it properly resolves the problem by resentencing according to the offense.[157]

In 2005, Kendall R. Jones was convicted of conspiracy and possession with intent to distribute fifty grams or more of crack cocaine.[158] Under the 100:1 ratio, this offense triggered a ten-year mandatory minimum, which was doubled to twenty years due to a prior drug conviction.[159] However, the presentence report attributed 367.4 grams of crack cocaine on his conspiracy charge, aggravating his sentencing guideline range to 262 months (twenty-one years, ten months) to 327 months (twenty-seven years, three months).[160] The court sentenced Jones to 300 months (twenty-five years) with ten years of supervised release.[161] Pursuant to action by the Sentencing Commission, which reduced the guidelines for Jones's offense, Jones successfully petitioned for his sentence to be reduced to the twenty-year mandatory minimum, which remained unaltered.[162] Jones filed for further resentencing under the First

154. *See supra* notes 73–76 and accompanying text.

155. United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *10, *14 (E.D. Va. June 19, 2019).

156. *Id.* at *4.

157. *Id.* at *14.

158. *Id.* at *4.

159. *Id.*

160. *Id.*

161. *Id.* at *5.

162. *Id.*

Step Act arguing that retroactive application of the Fair Sentencing Act eliminated the twenty-year mandatory minimum.[163] The court agreed.[164]

First, the *Jones* court held that section 404 requires a sentence modification rather than imposing a new sentence.[165] The court reasoned, like the *Haynes* court, that a First Step Act resentencing fell squarely within a § 3582(c)(1)(B) modification, which allows courts to modify a sentence "to the extent . . . expressly permitted by statute."[166] The court also noted that the First Step Act only permits courts to impose "a reduced sentence."[167] Thus, the court reasoned, the scope of resentencing is limited, like a § 3582(c) modification, rather than a plenary resentencing.[168]

Next, the *Jones* court rejected the time machine approach in favor of resentencing under present law.[169] For Jones, this carried special significance because the drug weight attributed to him in the presentence report, 367.4 grams, would still trigger the same twenty-year mandatory minimum. This is because 367.4 grams exceeded the new ten-year mandatory minimum triggering weight, 280 grams, which would then be enhanced by his prior conviction.[170] If the court applied the time machine approach, Jones's unaltered mandatory minimum would disqualify him for relief, as seen in *Haynes*.[171] However, the court rejected the time machine approach, characterizing the government's argument about what it would have charged had the Fair Sentencing Act been in place at the time of conviction as "speculative and hypothetical."[172]

Thus, the court modified Jones's sentence based off of the offense, fifty grams, rather than the quantity attributed in the presentence report.[173] The court supported this decision by noting

163. *Id.*

164. *Id.* at *16.

165. *Id.* at *6–10.

166. *Id.* at *9 (quoting 18 U.S.C. § 3582(c)(1)(B)).

167. *Id.* at *9–10 (quoting First Step Act of 2018 § 404(b), 21 U.S.C. § 841 note (Application of Fair Sentencing Act)).

168. *Id.*

169. *Id.* at *10–14.

170. *See supra* notes 62–63 and accompanying text.

171. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *11; *see* United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592, at *4–5 (D. Neb. Mar. 28, 2019).

172. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *12–13.

173. *Id.* at *13–14; *see, e.g.*, United States v. Outler, No. 1:06-cr-291, 2019 U.S. Dist. LEXIS 215940, at *4 (E.D. Va. Apr. 26, 2019).

that the language of the First Step Act applies to "covered offense[s]," as opposed to conduct.[174] The *Jones* court held, "[t]he covered offense is the charge of conviction—the charge in the indictment."[175]

Resentencing based on the offense rather than the attributed conduct is not only a rejection of the time machine approach on grounds of speculation, but an insistence upon following present Supreme Court precedent in *Alleyne v. United States*.[176] *Alleyne* was decided in 2013, after Jones was convicted.[177] *Alleyne* extended *Apprendi v. New Jersey* to hold that "any fact that increases the mandatory minimum is an 'element' [of the crime] that must be submitted to the jury," and thus proven beyond a reasonable doubt by the government.[178] This requirement flows from the Sixth Amendment right to a trial by jury in conjunction with the Due Process Clause.[179]

As applied to the drug weight controversy, only the weight charged in the language of the offense and conviction is found by a jury beyond a reasonable doubt.[180] The amount attributed to the defendant in the presentence report and factored in at sentencing is found by a judge by a lower standard, a preponderance of the evidence.[181] Thus, under *Alleyne*, it would be unconstitutional to resentence a defendant based off of the amount attributed in a presentence report, because a jury did not find that element beyond a reasonable doubt.[182]

Accordingly, the court resentenced Jones based upon fifty grams of crack cocaine, the amount in the indictment.[183] Although fifty grams still triggered a mandatory minimum under the 18:1 ratio,

174. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *12 (quoting First Step Act of 2018 § 404(a), 21 U.S.C. § 841 note (Application of Fair Sentencing Act)).

175. *Id*.

176. 570 U.S. 99 (2013).

177. *Id.*; *see Jones*, 2019 U.S. Dist. LEXIS 216110, at *4.

178. *Alleyne*, 570 U.S. at 103; Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that any fact that increases the maximum sentence is an element of the crime which must be found by the jury).

179. *Alleyne*, 570 U.S. at 104–05.

180. *See* FEDERAL SENTENCING, *supra* note 66, at 4.

181. *See id.* at 12–13.

182. *See Federal Defender Training*, *supra* note 76, at 5–8.

183. United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *12–13, *16 (E.D. Va. June 19, 2019).

that minimum was only ten years.[184] Ten years was less than his new sentencing range, 168 months (fourteen years) to 210 months (seventeen years, six months), and, more importantly, less time than he had already served.[185] At the time of resentencing, Jones had served 175 months (fourteen years, seven months) of his twenty-year sentence.[186] The court modified Jones's sentence to time served with eight years of supervised release.[187] The court gave the Bureau of Prisons ten days to process Jones's release, and then Jones was freed.[188]

1. Evaluating Method III

Measured against the First Step Act's aspiration of fundamental fairness in sentencing, Method III comes close to passing.[189] As seen here in the case of Kendall Jones, Method III reduces prison sentences to the full legal extent and favors immediate release where appropriate.[190] This advances the underlying goals of reducing the prison population, shortening sentences for drug crimes, and combatting racial disparity in sentencing, thus restoring justice to those punished under an overly punitive scheme.[191] Method III achieves these goals by rejecting the time machine approach, thereby refusing to speculate about whether the petitioner would have been charged and convicted of a greater offense under the new 18:1 ratio.

However, Method III fails fundamental fairness in sentencing by failing to evaluate the petitioner as an individual. Fundamental fairness is not satisfied by mere outcomes, but by a process that attends to the injustice served upon each petitioner. By deciding that section 404 requires a sentence modification pursuant to § 3582(c)(1)(B), the court violates the petitioner's basic dignity in denying him or her the right to be present.[192] This contravenes the spirit of the First Step Act, a reform concerned with remedying

184. *Id.* at *16.
185. *Id*. at *16–17.
186. *Id*. at *5.
187. *Id.* at *17.
188. *Id.*
189. *See* discussion *supra* section I.A.2.
190. *See Jones*, 2019 U.S. Dist. LEXIS 216110, at *17.
191. *See* discussion *supra* section I.A.2.
192. *See* United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4–5 (M.D. Pa. May 31, 2019).

decades of racial injustice.[193] Although the *Jones* court took care to consider Jones's post-sentence conduct, and his rehabilitation appeared to sway the court in resentencing him to time served, there is no guarantee that other courts applying Method II or III modifications would consider those factors.[194] The only way they are guaranteed to be considered is in a full plenary resentencing, where the petitioner can fully allocute before the court. The First Step Act does not direct the court to consider those factors, nor is it required by the general sentence modification statute in § 3582(c)(1)(B).[195] Instead, the language of the First Step Act requires consideration of post-sentence conduct by directing a court to "*impose* a reduced sentence."[196] The word impose, rather than modify, requires the court to consider the § 3553(a) factors, which is the only way to guarantee a court will consider the defendant's rehabilitation, character, and context.[197] By imposing a new sentence under present law, the court favors the greatest reduction in sentence and recidivism.

Method III also illumines a fundamental problem with applying the time machine approach: it resentences the defendant with an unconstitutional method justified on the thin rationale that section 404 requires the court to pretend that the Supreme Court has not decided *Alleyne* yet.[198] This problem exists in Method II, illustrated in *Haynes* above, but would equally taint a Method I application should the pertinent discrepancy between convicted and attributed drug weights be present.[199] Thus, *Jones* introduces us to the constitutional concerns latent in Methods I and II.[200] The time machine approach also raises problems where the defendant was sentenced as a career offender, as illustrated in *Hegwood*'s

193. *See* discussion *supra* section I.A.2.

194. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *14–17.

195. *See* First Step Act of 2018 § 404, 21 U.S.C. § 841 note (Application of Fair Sentencing Act); 18 U.S.C. § 3582(c)(1)(B).

196. First Step Act of 2018 § 404(b) (emphasis added).

197. *See* 18 U.S.C. § 3553(a); *Jones*, 2019 U.S. Dist. LEXIS 216110, at *7–8; *supra* note 70 and accompanying text.

198. *See Jones*, 2019 U.S. Dist. LEXIS 216110, at *13 ("[T]he government's 'argument that a defendant is not eligible because the sentencing court might have elected to calculate his statutory penalties in a way that now is unlawful, and back then would have been illogical, is unpersuasive.'" (quoting United States v. Glore, 371 F. Supp. 3d 524, 532 (E.D. Wis. 2019))).

199. *See* United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592, at *4 (D. Neb. Mar. 28, 2019).

200. *See Jones*, 2019 U.S. Dist. LEXIS 216110, at *13–14.

implementation of Method I.[201] This issue is fully illumined and resolved in *Payton*'s application of Method IV.

D. *Method IV: Impose a New Sentence Under Present Law*, Payton

United States v. Payton implements section 404 through Method IV.[202] The *Payton* court held that section 404 requires the court to impose a new sentence while following present-day caselaw and sentencing guidelines.[203] The combination of these decisions amounts to a full plenary resentencing. The facts of *Payton* illustrate Method IV's resolution of the problems arising from resentencing a career offender.[204]

In 2008, Earl Payton pled guilty to conspiracy to possess with intent to distribute and conspiracy to distribute fifty grams or more of crack cocaine.[205] Because Payton had three prior breaking and entering convictions and one prior felony drug conviction, he was deemed a career offender warranting a twenty-year mandatory minimum.[206] However, his sentencing guideline range was higher: 262 months (twenty-one years, ten months) to 327 months (twenty-seven years, three months).[207] The court imposed a sentence of 300 months (twenty-five years).[208] Eleven years later, Payton moved to be resentenced under the First Step Act.[209]

First, the court held that section 404 requires courts to impose a reduced sentence rather than modify the existing one.[210] In reaching this conclusion, the court conducted a textual analysis, beginning with the plain language of the statute.[211] The court found it

201. *See* United States v. Hegwood, 934 F.3d 414, 418–19 (5th Cir. 2019).
202. United States v. Payton, No. 07-20498-1, 2019 U.S. Dist. LEXIS 110292 (E.D. Mich. July 2, 2019).
203. *Id.* at *10–12.
204. *Id.* at *12.
205. *Id.* at *2.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at *10.
211. *Id.*

significant that section 404(b) uses the word "impose" in instructing it to reduce the defendant's sentence.[212] This distinguishes section 404 from a § 3582(c)(2) modification, which does not "impose a new sentence in the usual sense."[213] The court was persuaded by Payton's argument that "the only way to impose a reduced sentence [was] to consider the § 3553(a) factors and Guidelines, including the defendant's record in prison."[214]

Further, the court emphatically rejected the time machine approach: "The Court will not turn a blind eye to the changes in the law and Guidelines which have gone into effect since 2008."[215] For the *Payton* court, this issue is part and parcel to the decision to impose a new sentence: "[T]he First Step Act vests the Court with broad discretion to resentence defendants considering the § 3553(a) factors, including the case law and Guidelines in effect today."[216] For Payton, application of the Guidelines in effect at his resentencing meant that he was no longer classified as a career offender, reducing his mandatory minimum from twenty years to ten years.[217] His sentencing range thus became 120 months (ten years) to 137 months (eleven years, five months).[218]

1. Evaluating Method IV

Method IV uniquely fulfills the purpose of the First Step Act in seeking fundamental fairness in sentencing.[219] It reduces prisoners' sentences to the greatest appropriate extent by removing career offender barriers where the law has changed. Thus, it satisfies the goal of reducing the prison population, favoring immediate release where appropriate, shortening prison sentences, and reducing racial disparity in sentencing.

212. *Id.*

213. *Id.* (citing United States v. Dodd, 372 F. Supp. 3d 795, 797 (S.D. Iowa Apr. 9, 2019)).

214. *Id.*

215. *Id.* at *11.

216. *Id.* at *9.

217. *Id.* at *12. In 2016, the Sentencing Commission narrowed the definition of a crime of violence and excluded burglary of a dwelling, the offense which had made Payton a career offender in 2008. *Id.* at *12 n.3.

218. *Id.* at *12. At a subsequent plenary sentencing hearing, the court sentenced Payton to 180 months (fifteen years). Amended Judgment at 2, *Payton*, 2019 U.S. Dist. LEXIS 110292 (E.D. Mich. July 11, 2019) (No. 07-20498-1). It is unclear from the record what justified his upward variance from the guidelines range.

219. *See* discussion *supra* section I.A.2.

Additionally, Method IV advances fundamental fairness by the comprehensive approach it takes to evaluating each petitioner as an individual. By imposing a new sentence under present law, the court conducts a full plenary resentencing, which requires a full review of the petitioner's context, character, and conduct along with the § 3553(a) factors. Not only does Method IV reevaluate all of the information before the court, it grants the petitioner the right to present their petition in person, preserving basic human dignity. This will not completely cure the injustice of serving an overly punitive and racist sentence, but it is a necessary first step toward full remedy. This satisfies the goal of reducing the prison population by fully assessing each petitioner for likelihood of recidivism. It advances the eradication of unjustified race-based disparities in drug sentencing and it advances proportionality by allowing courts to exercise discretion to sentence low-level drug offenders less severely than major drug traffickers.[220] The *Payton* court acknowledged Method IV's coherence with the First Step Act:

> This interpretation is in keeping with the purposes of the First Step Act which was enacted, in part, to: provide a remedy for individuals subjected to overly harsh and prejudicial penalties for crack cocaine offenses; decrease the number of people caged in our overcrowded prisons largely because of the War on Drugs; and save taxpayer dollars.[221]

Further, Method IV cures the career offender problem by rejecting the time machine approach.[222] As seen in *Hegwood*'s implementation of Method I, imposing a new sentence with the time machine approach leaves unjust mandatory minimums in place.[223] Instead, with the plenary resentencing of Method IV, the court considers the updated guidelines and reevaluates the factors which aggravate or mitigate the sentence.[224] This is fair and just, and comports with the purpose of the First Step Act. As the *Payton* court put it, "Applying outdated and prejudicial Guidelines would subvert both Congress's intent in passing the Act and the Court's duty to get things right."[225]

220. *See* discussion *supra* section I.A.2.
221. *Payton*, 2019 U.S. Dist. LEXIS 110292, at *11.
222. *See id.*
223. United States v. Hegwood, 934 F.3d 414, 418–19 (5th Cir. 2019).
224. *Payton*, 2019 U.S. Dist. LEXIS 110292, at *11–13.
225. *Id.* at *11.

Additionally, Method IV cures the drug weight problem by rejecting the time machine approach.[226] Similar to the Method III modification, as seen in *Jones*, Method IV requires resentencing based upon the drug quantity of the offense, not the attributed conduct.[227] For example, in *United States v. Dodd*, Anthony Timothy Dodd was held responsible for over fifty grams of crack cocaine in his conviction, but his presentence report attributed him with 1.5 kilograms.[228] Implementing Method IV, the court first chose to impose a new sentence, asserting that the theory that section 404 requires modification "rests on a misplaced equivalency with sentence reductions under 18 U.S.C. § 3582(c)(2), a narrow avenue limited by the U.S. Sentencing Commission."[229] Next the court rejected the time machine approach, refusing to engage in a speculative series of hypotheticals, and obviating the Sixth Amendment violations that would arise in resentencing based off the presentence report.[230] The court resentenced Dodd based off of his conviction of fifty grams, which triggered the 18:1 ratio's five-year mandatory minimum for possessing more than twenty-eight grams, and then calculated his sentencing range factoring in his conduct, including the 1.5 kilograms attributed to him, to merit a new sentence of fifteen years. This case illustrates how a plenary resentencing advances proportionality: an offender who possesses a quantity much greater than the mandatory minimum can be punished more severely than a lesser offender, while still receiving a sentence that is fundamentally fair. Fifteen years was a profound relief from his original pre-Fair Sentencing Act sentence—a mandatory minimum of life in prison.[231]

226. *Id.*

227. *See* United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *11–14 (E.D. Va. June 19, 2019).

228. United States v. Dodd, 372 F. Supp. 3d 795, 796–97 (S.D. Iowa 2019).

229. *Id.* at 797. The court also rejected the modification section relied on by *Jones* in Method III, § 3582(c)(1)(B): "As section 404 of the First Step Act authorizes a reduction in sentence by its own terms, it would be effective even absent the existence of 18 U.S.C. § 3582(c)(1)(B) as complementary authority." *Id.* at 797 n.2.

230. *Id.* at 797–98 ("The First Step Act, however, applies to offenses and not conduct. . . . Both *Apprendi* and *Alleyne* are binding on this Court for sentencings held today. That these procedural rules do not trigger a right to relief retroactively on collateral review, *see Walker v. United States*, 810 F.3d 568, 574–75 (8th Cir. 2016), is distinct from whether they apply to proceedings independently authorized under the First Step Act.").

231. *Id.* at 796, 800. The mandatory life sentence was so offensive, in fact, that ten years after being sentenced, Dodd's sentence was commuted by President Obama to twenty years. *Id.* at 796. The First Step Act shows that a further reduction of five years was still appropriate and fair.

The *Payton* court did not confront the drug weight disparity issue, but its logic in rejecting the time machine approach applies with equal force.[232] *Payton* cited support from *United States v. Stone*, which said, "[t]he First Step Act neither directs nor implies that the Court should perpetuate the application of an unconstitutional practice when determining a new sentence that complies with the Act's directives."[233]

E. *Comparison*

Comparing Methods I–IV reveals that application or rejection of the time machine approach has a greater impact on the fundamental fairness of a section 404 resentencing than whether the court chooses to impose a new sentence rather than modify. This is because the time machine approach has the potential to completely deny a petition based on outdated mandatory minimums triggered by career offender status or a significant discrepancy in drug weights. Thus, Methods III and IV are more fundamentally fair than Methods I and II, precisely because Methods III and IV reject the time machine approach and sentence under present law. However, imposing a new sentence is a more just implementation of section 404 than a sentence modification because only imposing a new sentence requires the court to fully evaluate the petitioner as an individual who is present and allocuting before the court such that it may consider his character, context, and conduct, along with all of the § 3553(a) factors.[234] In this regard, Method IV surpasses Method III. Accordingly, only Method IV fully coheres with the purpose of the First Step Act in achieving fundamental fairness in sentencing.

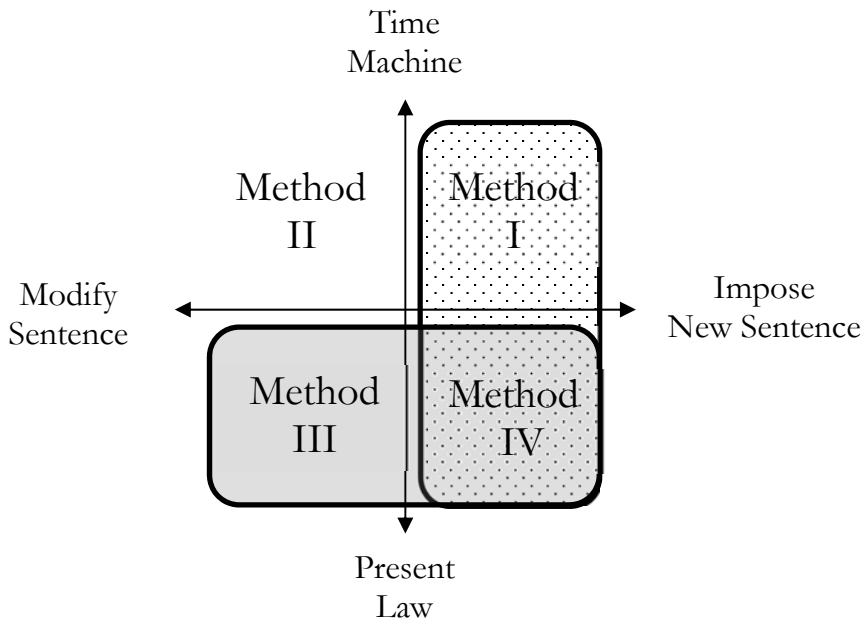
The matrix below illustrates the overlap of the more fundamentally fair approaches, imposing a new sentence under present law, with added weight for the time machine issue. The import of applying present law is portrayed by a heavier gray than the imposition of a new sentence. Graphically, the darker the method, the better approach to implementing section 404 it is. Thus, though

232. United States v. Payton, No. 07-20498-1, 2019 U.S. Dist. LEXIS 110292, at *11 (E.D. Mich. July 2, 2019).

233. *Id.* (citing United States v. Stone, No. 96-cr-403, 2019 U.S. Dist. LEXIS 99457, at *7 (N.D. Ohio June 13, 2019)).

234. *See* United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4–5 (M.D. Pa. May 31, 2019).

Method I and Method III each answer one issue correctly and one issue incorrectly, Method III yields the better outcome because it rejects the time machine approach.[235] Ultimately, Method IV uniquely serves the First Step Act's purpose of fundamental fairness in sentencing, as illustrated by its darkest gray.



The court's decision of which method to apply is not an academic distinction, but is measured in days, months, and years of peoples' lives spent unnecessarily incarcerated. Consider, again, Michael Dewayne Hegwood. At the time he moved to be resentenced under the First Step Act, Hegwood had been in prison for 108 months (nine years) on a crack cocaine offense.[236] Hegwood still had ninety-two months (seven years, eight months) to serve on his 200-month (sixteen years, eight months) sentence, which had been enhanced by "career offender" status.[237] If the court applied Method IV and imposed a new sentence under today's law he would no longer be classified as a career offender and his sentencing guideline range would therefore be seventy-seven months (six years, five months)

235. *See* discussion *supra* section II.C.1.
236. United States v. Hegwood, 934 F.3d 414, 415–16 (5th Cir. 2019).
237. *Id.*

to ninety-six months (eight years).[238] Hegwood would be eligible for immediate release.[239] However, because the court applied Method I and imposed a new sentence using the time machine approach, Hegwood was still classified as a career offender and sentenced to 153 months (twelve years, nine months).[240] While that is almost four years less than his original sentence, it still leaves Hegwood in prison for four more years.[241] This is especially harsh knowing that today's guidelines assert that the nine years he has already served is somewhere between twelve and thirty-one months longer than is merited by his offense.[242]

There are 2660 prisoners eligible for relief under section 404.[243] If Hegwood's case is representative of half of those prisoners, even after Method I resentencing, they will serve over 9400 years more than they would if resentenced under Method IV.[244] At a cost of $36,000 a year to detain a prisoner, American taxpayers would pay an extra $338.4 million to unnecessarily and unjustly incarcerate crack cocaine offenders.[245] Even if Hegwood was representative of only a quarter of those prisoners, 4700 excess prison years would be a gross injustice, worthy of national outcry and congressional remedy. To Michael Hegwood, four more years in custody is a cruel failure of justice, worthy of remedy. Unfortunately for him, the Fifth Circuit upheld his resentencing, and the Supreme Court denied certiorari.[246]

While choosing the wrong implementation method is a discrete injury to an individual prisoner, the existence of four different methods of implementing section 404 is a systemic injustice yielding arbitrary results that undermines the goals of sentencing re-

238. *Id.* at 416.

239. *See id.*

240. *Id.* at 416, 418–19.

241. *Id.* at 415–16.

242. *Id.* at 416.

243. IMPACT SUMMARY, *supra* note 35.

244. This calculation is my own and based off of the total number of prisoners eligible for relief, 2660, with an average sentence of 258 months, receiving a 23.5% sentence reduction like Hegwood under Method I when eligible for a 56.5% sentence reduction under Method IV, like Hegwood. *Cf. Hegwood*, 934 F.3d at 416; IMPACT SUMMARY, *supra* note 35 (total number of eligible offenders); RETROACTIVITY REPORT, *supra* note 83, at 9 (average sentence).

245. Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863, 18,863 (Apr. 30, 2018) ($36,299.25 average in FY 2017).

246. *Hegwood*, 934 F.3d at 419, *cert. denied*, 140 S. Ct. 285 (2019).

form. In advocating for the First Step Act, the Sentencing Commission aspired to three goals: uniformity, treating like offenders alike; proportionality, treating different offenders differently (e.g., major drug traffickers and low-level dealers); and eradicating unjustified race-based differences in sentencing law.[247] None of these can be achieved while courts continue to resentence prisoners arbitrarily under four different methods. The haphazard implementation of section 404 is further contrary to the policy goals of Congress. In the Fair Sentencing Act of 2010 and the First Step Act of 2018, Congress made strong policy statements prioritizing decreasing the prison population, shortening sentences for drug crimes, and reducing the disparity between crack cocaine and powder cocaine sentencing.[248] For the 2387 prisoners who have already been resentenced, and the 273 remaining, their sentence will never be fundamentally fair so long as courts continue to implement four different methods.[249] Therefore, Congress should act to amend section 404.

III. PROPOSED FIRST STEP ACT AMENDMENT

As it is written, section 404 of the First Step Act fails to give courts sufficient guidance to achieve the purposes of the Act. Although the statute directs a resentencing court to "impose" a new sentence, the fact that it must be a "reduced sentence" suggests something more akin to the familiar mechanism of statutory resentencing under § 3582(c) and pulls courts toward modification.[250] Further, the directive to resentence "as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect" tempts some courts to resentence via imaginative exercises in time travel which ignore significant constitutional precedent.[251] Resultantly, section 404's ambiguous language has manifested the four different methods of implementation in use in the district courts.[252] To achieve fundamental fairness in resentencing crack cocaine offenders and fulfill

247. *See* Dorsey v. United States, 567 U.S. 260, 268 (2012).

248. United States v. Simons, 375 F. Supp. 3d 379, 382 (E.D.N.Y. 2019).

249. *Cf.* RETROACTIVITY REPORT, *supra* note 83, at 3–4 (petitioners resentenced through Dec. 31, 2019); IMPACT SUMMARY, *supra* note 35 (total number eligible).

250. *See* United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *9–10 (E.D. Va. June 19, 2019).

251. *See id.* at *13–14; *Hegwood*, 934 F.3d at 418–19.

252. *See* discussion *supra* section I.C.

the purpose of the First Step Act, Congress must amend the language of section 404 such that it requires courts to apply Method IV.

An act of Congress is the best way to resolve the arbitrary implementation of section 404. Congress is the supreme lawmaking body in the United States and any time it can be the authority to implement or correct a law, it should.[253] Article I of the Constitution vests Congress with "all legislative powers."[254] These powers give congressional lawmakers the resources and institutional competence to craft intricate policies.[255] Further, for sentencing reform to carry the most democratic legitimacy, change should be implemented by those officials directly elected by the people.[256] While the Supreme Court could intervene to rule that Method IV is the correct interpretation, that is a less preferable solution and less likely. The Court prefers issues to fully develop below before weighing in, and thus far only the Fifth Circuit has interpreted section 404. Further, the Court denied review on the Fifth Circuit case, *Hegwood*.[257] With a dwindling number of prisoners who qualify for section 404 resentencing, the matter must be resolved urgently.[258] It would take far too long for the Court to resolve this issue.

Section 404(b) should be amended as follows:

> **(b)** Defendants previously sentenced. A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence ~~as if~~ *for covered offenses by applying* sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) ~~were in effect at the time the covered offense was committed~~ *retroactively as a part of a full plenary resentencing, adhering to all sentencing guidelines and case law current at the time of the motion.*

This proposed amendment first resolves the issue of whether to impose or modify a sentence by expressly requiring a full plenary resentencing. The plenary resentencing mandate itself implies the

253. *See* U.S. CONST. art. I, § 1.

254. *Id.*

255. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 788–89 (1997) (Souter, J., concurring) (arguing that the legislature is better positioned than a court to deal with emerging issues).

256. *See* U.S. CONST. art. I, § 2; *id.* amend. XVII.

257. Hegwood v. United States, 140 S. Ct. 285 (2019).

258. *See* RETROACTIVITY REPORT, *supra* note 83, at 4. (2387 offenders have already had resentencing motions granted under the First Step Act).

application of the law present to the motion, resolving the second issue by rejecting the time machine approach.[259] However, the amendment further emphasizes the rejection of the time machine approach by explicitly requiring the court to adhere to all sentencing guidelines and caselaw present at the time of the motion. In addition, the full plenary sentencing encompasses a comprehensive review of the petitioner's character, context, and conduct, such that rehabilitative efforts would be accounted for in the new sentence.

Applying this amended section 404 to the facts of the Method I, II, and III cases above results in a more just outcome, faithful to the fundamental fairness purpose of the First Step Act. In the Method I case, *Hegwood*, the court would still impose a new sentence on Hegwood, but instead of applying the time machine approach, the court would resentence under present law.[260] Hegwood would no longer be classified as a career offender and he would be eligible for immediate release.[261]

Next, in the Method II case, *Haynes*, the court readily dismissed the petition because it conducted a limited review under a sentence modification.[262] Further, the time machine approach allowed the court to assume the government would have charged him with the higher offense under the new drug weights, triggering the same mandatory minimum, even though Haynes was not found to possess that amount beyond a reasonable doubt by a jury.[263] Under a plenary resentencing, the court could not so handily dismiss the case without a full review, including Haynes's conduct in prison and the § 3553(a) factors.[264] Additionally, the court could not resentence Haynes with the drug weight attributed in the presentence report, because under *Alleyne* it would violate Haynes's Sixth Amendment right to a jury trial.[265] Instead, he would be resentenced according to the five grams of crack cocaine he was convicted of possessing. There is no way of knowing what the outcome of Haynes's resentencing would be, but an amended section 404

259. *See* United States v. Jones, No. 3:04-cr-392, 2019 U.S. Dist. LEXIS 216110, at *8 (E.D. Va. June 19, 2019).

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

261. *See id.* at 416.

262. United States v. Haynes, No. 8:08CR441, 2019 U.S. Dist. LEXIS 53592, at *4–5 (D. Neb. Mar. 28, 2019).

263. *See id.* at *3–4.

264. *See Jones*, 2019 U.S. Dist. LEXIS 216110, at *8.

265. *Id.* at *13–14; *see* Alleyne v. United States, 570 U.S. 99, 103.

would at least ensure a full review in congruence with the purpose of the First Step Act.

Finally, in the Method III case, *Jones*, there is less harm to remedy because the court rejected the time machine approach and Jones's sentence was modified to time served.[266] However, an amended section 404 would uphold the basic dignity of petitioners seeking justice under the First Step Act by giving them the right to be present and fully allocute at their resentencing.[267] Further, an amended section 404 would require courts to fully consider the risk of recidivism by a mandated review of the prisoner's postconviction conduct along with the § 3553(a) factors. All of these outcomes are more congruent with the purpose of the First Step Act than the outcomes under Methods I, II, or III. By applying Method IV to *Hegwood*, *Haynes*, and *Jones*, petitioners receive something much closer to fundamental fairness in both the outcome and the process of resentencing.

While the proposed amendment resolves the arbitrary implementation of section 404, the First Step Act has other outstanding issues. One glaring issue is that while the First Step Act makes the Fair Sentencing Act's reforms retroactive in section 404, the First Step Act fails to make its own reforms retroactive.[268] This omission perpetuates the injustice that the First Step Act purports to remedy in making the Fair Sentencing Act retroactive. One remaining issue within section 404 implementation is whether it infringes upon executive privilege to resentence a defendant who has previously had their sentence commuted by the President.[269] These issues merit their own study and responses but lie outside of the scope of this Comment.

CONCLUSION

The First Step Act of 2018 is a significant step toward remedying the injustices of drug sentencing within our criminal justice

266. *Jones*, 2019 U.S. Dist. LEXIS 216110, at *17.

267. *See* United States v. Rhines, No. 4:01-cr-310, 2019 U.S. Dist. LEXIS 115868, at *4–5 (M.D. Pa. May 31, 2019).

268. *See, e.g.*, Jamiles Lartey, *Current Inmates Feel Left Behind by Trump's Criminal Justice Reform Bill*, GUARDIAN (Dec. 22, 2018, 1:00 AM EST), https://www.theguardian.com/us-news/2018/dec/21/trump-first-step-criminal-justice-reform-three-strikes [https://perma.cc/CW2S-E59Z].

269. *See, e.g.*, United States v. Razz, 379 F. Supp. 3d 1309, 1314, 1316–18 (S.D. Fla. 2019).

system. The Act makes broad changes to prison programming, reentry, and good-time credit towards the goal of reducing recidivism. It also introduces sentencing reforms to mandatory minimums to address overly punitive sentencing law. These reforms work together to reduce the overall prison population and the resources required to maintain it. Additionally, in section 404 the First Step Act makes the Fair Sentencing Act of 2010 retroactive. This allows prisoners sentenced under the old 100:1 crack cocaine to powder cocaine sentencing scheme to be resentenced under the less disproportionate 18:1 scheme. Unfortunately, section 404 is written ambiguously such that district courts are implementing the resentencing provision in four different ways. Section 404 leaves open the questions whether to impose a new sentence or modify the existing one, and whether to do so under the law as it existed at the time of the offense, modified only by the Fair Sentencing Act's 18:1 ratio, or the law as it presently exists at the time of the defendant's motion for resentencing.

Only Method IV, imposing a new sentence under present law, as exhibited in *Payton*, fully coheres to the purpose of the First Step Act in achieving fundamental fairness in sentencing. Method IV interprets section 404 to require a full plenary resentencing, which gives the petitioner the right to attend his or her sentencing hearing, fully advocate for him or herself before the court, and requires the court to consider the § 3553(a) factors, including the petitioner's rehabilitation since conviction. This method also ameliorates constitutional concerns raised by a time machine approach, which applies outdated sentencing guidelines and caselaw. This is especially significant when offenders were originally classified as career offenders and when there is a discrepancy in the drug weight of the conviction and drug weight attributed in the presentence report. A full plenary resentencing effectuates the greatest possible sentence reduction and fully evaluates the petitioner as an individual, thereby achieving fundamental fairness in sentencing.

Therefore, Congress should amend section 404 to explicitly require a full plenary resentencing. As long as four different methods are being used to implement section 404, uniformity in sentencing cannot be achieved. This not only perpetuates the injustice of the old sentencing regime where petitioners' motions are denied, but adds a new injustice of arbitrary resentencing under the First Step Act. Congress should capitalize on the present bipartisan appetite

for criminal justice reform to uniformly require full plenary resentencing under section 404. While the number of prisoners eligible to be resentenced under this provision is a small fraction of the prison population, the difference in method amounts to thousands of prison years unjustly served and additional hundreds of millions of dollars spent to perpetuate unjust incarceration. In the words of Judge Weinstein, reflecting upon resentencing a defendant under the First Step Act in the Eastern District of New York, "[a]n extra year, day, or moment of freedom from prison, when warranted, is worth pursuing by a prisoner, and, if justified by the law, should be granted by the court. . . . justice favors freedom over unnecessary incarceration."[270]

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270. United States v. Simons, 375 F. Supp. 3d 379, 382 (E.D.N.Y. 2019).

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