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Balancing Discretion and Fairness: The Potential Pitfalls of Allowing Judges Too Much Discretion in Sentencing

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NOTE

Balancing Discretion and Fairness: The Potential Pitfalls of Allowing Judges Too Much Discretion in Sentencing

Concepcion v. United States, 142 S. Ct. 2389 (2022).

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I. INTRODUCTION

Nearly eighty percent of individuals in federal prison for drug offenses are Black or Latino.[1] The War on Drugs, a global campaign started by President Nixon, had an objectively moral goal: reducing the illegal drug trade in the United States. However, in reality, the results of the campaign sparked inequalities in sentencing regimes, which has led to a disproportionate incarceration of minority groups.[2] Most notably, there was a 100-to-1 sentencing disparity between crimes involving crack cocaine (crack) and crimes involving powder cocaine. While this distinction historically claimed to address the theory that powder cocaine has more dangerous health effects; it was instead a notorious façade for incarcerating Black Americans and other minority groups at higher rates

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[1] *Drug Offenders in Federal Prisons: Estimates of Characteristics Based on Linked Data*, BUREAU OF JUST. STATS. (Oct. 27, 2015), https://bjs.ojp.gov/press-release/drug-offenders-federal-prisons-estimates-characteristics-based-linked-data [https://perma.cc/Z7S3-K3YA]. A 2015 report noted that 54% of drug offenders were serving time for crack and powder cocaine. *Id.*

[2] *Race and the Drug War: Hundreds to Gather at Columbia University in New York City for Historic Strategy Session on the Eve of the UN Special Assembly on Drugs*, DRUG POL'Y ALL. (Apr. 12, 2016), https://drugpolicy.org/issues/race-and-drug-war [https://perma.cc/4FWX-55FQ]; *see also* Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/5DRF-CCAZ].

than non-minority groups.[3] Although legislative efforts sought to address this disparity after studies disproved the original justifications for the differences in sentences, the racial divide remains.

In June 2022, the Supreme Court of the United States had the opportunity to back legislative efforts by applying the same legislative intent to the courtroom: decreasing racial bias that exists when judges issue sentences for drug crimes.[4] In *Concepcion v. United States*, the Court addressed a circuit split over considerations during sentencing modification proceedings, looking at sentencing guidelines enacted by Congress under the First Step Act of 2018 and holding that district courts may consider both changes in law and fact.[5] The issues before the Court stemmed from a long history of racial discrimination with respect to drug crimes.[6] While the modifications have chipped away at the extreme racial bias in sentencing regimes—for instance, the crack-to-powder cocaine disparity has shrunk from 100-to-1 to 18-to-1—the *Concepcion* opinion failed to provide sufficient guidance to judges to ensure that positive sentencing trends continue.

Concern with the Court's *Concepcion* decision does not stem from the new sentencing guidelines themselves or their retroactive application, but rather from allowing a sentencing judge to consider outside changes of both law *and* fact when hearing motions under the First Step Act.[7] The Fair Sentencing Act of 2010 and the First Step Act of 2018, both aimed at addressing the racial bias present in historical sentencing regimes, should be considered as changes of law, divorced from changes of fact. Narrowing the scope of what judges may consider by looking only to the changes in the sentencing guidelines lessens the possibility for further racial bias to seep into the judge's decision. This approach also refocuses the judicial system's intent to continue to address deep-rooted racial bias,

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[3] Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was A "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 393 (2002). Research and statistics have concluded that since crack cocaine is typically cheaper, it was found more within the population of poor Black Americans, and since powder cocaine is more expensive, it is usually equated and found among a population of richer, White Americans. DEBORAH J. VAGINS & JESSELYN MCCURDY, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW, at i (Oct. 2006), https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf [https://perma.cc/UH62-H67Y].

[4] Concepcion v. United States, 142 S. Ct. 2389 (2022). The Fair Sentencing Act of 2010 and the First Step Act of 2018 were the first steps in addressing this racial bias. *Id.*

[5] *Id.* at 2396. The district courts were split on whether both intervening changes in law *and* fact could be considered. *Id.* at 2396 n.2.

[6] Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994).

[7] *Concepcion*, 142 S. Ct. at 2404.

with an end-goal of achieving a 1-to-1 sentence guideline between crack and powder cocaine.[8]

Part II of this Note discusses the facts and holding of *Concepcion v. United States*.[9] Part III provides relevant legal background on judicial discretion in sentencing, the Anti-Drug Abuse Act of 1986, the Fair Sentencing Act of 2010, and the First Step Act of 2018, all of which led to the confusion and circuit split addressed in *Concepcion*. Part IV examines both the majority holding and the dissenting opinion in the case. Finally, Part V predicts that greater judicial discretion resulting from the *Concepcion* decision will likely lead to interpretative ambiguity in district courts when considering motions under the First Step Act and increased instances of racial bias during sentencing hearings.

II. FACTS AND HOLDING

In 2007, petitioner Carlos Concepcion (Concepcion) pled guilty to a violation of 21 U.S.C. § 841(a)(1), a statute prohibiting the distribution of five or more grams of crack cocaine.[10] In 2009, he was sentenced to 228 months in prison.[11] The sentencing range submitted to the judge was a much longer sentence due to Concepcion's classification as a career offender.[12] Without being deemed a career offender, his sentencing range

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[8] Some have argued that "Congress's adoption of the 18:1 ratio was admittedly nothing more than a political compromise between those who favored the complete elimination of all crack/powder disparities, and those who believed, for whatever reason, that crack offenses should be punished more severely than powder offenses." United States v. Williams, 788 F. Supp. 2d 847, 856 (N.D. Iowa 2011). Even the Department of Justice had been pushing for the disparity to be eliminated, meaning 1-to-1, before the passage of the Fair Sentencing Act of 2010. *Id.*

[9] *Concepcion*, 142 S. Ct. at 2389.

[10] *Id.* at 2396. The text of 21 U.S.C. §841(a)(1) is: "(a) Unlawful Acts: Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (2022).

[11] *Concepcion*, 142 S. Ct. at 2396. 228 months is equal to 19 years in prison.

[12] *Id.* Concepcion was a career offender, which the United States Sentencing Commission defines as "someone who commits a crime of violence or a controlled substance offense after two prior felony convictions for those crimes." *Career Offenders*, UNITED STATES SENT'G COMM'N, https://www.ussc.gov/research/quick-facts/career-offenders [https://perma.cc/DZC5-SERK] (last visited Oct. 5, 2023). The Probation Office determined Concepcion was "a career offender based on previous Massachusetts convictions for: *possessing with intent to distribute cocaine*; a Massachusetts conviction for *armed carjacking*; a Massachusetts conviction for *armed robbery*; a Massachusetts conviction for *assault and battery with a dangerous weapon*; and a Massachusetts conviction for *distribution of crack cocaine*." Brief for the United States in Opposition at *4, Concepcion v. United States, No 20-1650, 2021 WL 3810047 (Aug. 25, 2021) (emphasis added). Judges are given sentencing options

would have been 57 to 71 months; however, because Concepcion was classified as such, the district court judge was allowed to consider anywhere from 262 to 327 months.[13]

In 2019, following the enactment of the First Step Act of 2018, Concepcion filed a *pro se* motion for reconsideration of his sentence due to changes in sentencing regimes from the Fair Sentencing Act of 2010.[14] He argued his sentencing range of 262 to 327 months would have been only 188 to 235 months under the new sentencing guidelines.[15] Noting this discrepancy, he secured legal counsel and set forth two arguments to further his position.[16] First, based on the changes in law, he argued that he should no longer be considered a career offender, because one of his convictions was vacated and his remaining convictions were not crimes of violence under the new sentencing guidelines.[17] Second, he believed strong indications of rehabilitation existed that the court should consider when modifying his sentence, including successful completion of drug and vocational programming, a stable re-entry plan, and a letter from a chaplain at the prison who attested to his spiritual growth.[18]

A. Procedural History

The United States District Court for the District of Massachusetts denied Concepcion's motion for a sentence reduction.[19] According to the district court, even if it considered only the relevant changes in the law stemming from the Fair Sentencing Act of 2010, Concepcion's sentence was already within the range of 188 to 235 months.[20] He requested that he be resentenced to 154 months in prison, with this number being 34 months below the revised guideline sentencing range ("GSR") after the Fair Sentencing Act of 2010.[21] This request mirrors the original sentencing judge's 34 month departure from his initial, higher sentencing

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and ranges before sentencing a defendant, including a report which details potentially relevant factors judges may consider in making their decision during the initial sentencing. FED. R. CRIM. P. 32(d).

[13] *Concepcion*, 142 S. Ct. at 2396.

[14] *Id.* at 2397.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* This would be ignoring Concepcion's argument regarding his alleged non-status as a career offender, which is where the court gets the new range, still higher due to status as a career offender at the original time of sentencing. *Id.*

[21] Brief for the United States, Appellee, at *6, United States v. Concepcion, No. 19-2025, 2020 WL 3960665 (1st Cir. July 10, 2020).

range.[22] The district court did not consider Concepcion's argument regarding his status—or alleged non-status—as a career offender, concluding that this relief was not authorized under the First Step Act.[23] The court, instead, relied on a decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Hegwood*, where the court held that a district court must "plac[e] itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the Fair Sentencing Act."[24] The district court similarly did not take up the argument presented by Concepcion regarding his evidence of rehabilitation while incarcerated.[25] The court believed that any intervening changes of law (not including the Fair Sentencing Act) or changes of fact were outside of its permissible discretion.[26] Thus, the court did not consider this evidence when addressing Concepcion's motion.[27]

On appeal, the United States Court of Appeals for the First Circuit affirmed.[28] According to the First Circuit, the First Step Act requires a "two-step inquiry."[29] In step one, the court should ask whether the defendant should be resentenced, reviewing only changes from the Fair Sentencing Act.[30] If the court decides the defendant is eligible for resentencing, step two allows the court the discretion to consider new factual and legal developments in determining an appropriate new sentence.[31] Since Concepcion's sentence of 228 months fell within the revised range of 188 to 235 months under the Fair Sentencing Act, the court did not need to reach the second step of the inquiry. Consequently, Concepcion was not eligible for resentencing.[32]

The First Circuit's decision added to an array of conflicting solutions among courts regarding what may be considered under the First Step Act in examining sentences imposed prior to the statute's enactment. Accordingly, the Supreme Court granted certiorari to address the confusion.[33] The Supreme Court overturned the First Circuit's decision, holding that the First Step Act extended district court judges the discretion

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[22] *Id.*

[23] *Concepcion*, 142 S. Ct. at 2397–98.

[24] *Id.* at 2398 (quoting United States v. Hegwood, 934 F.3d 414, 418 (5th Cir. 2019)).

[25] *Id.*

[26] *Id.* at 2396.

[27] *Id.*

[28] *Id.* at 2398.

[29] *Id.* (quoting United States v. Concepcion, 991 F.3d 279, 289 (1st Cir. 2021)).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 2397–98.

[33] *Id.* at 2398.

to consider intervening changes of both law *and* fact when determining whether a defendant may receive a sentence reduction under the Act.[34]

III. LEGAL BACKGROUND

The Federal Rules of Criminal Procedure detail the process of sentencing a defendant in a criminal case. A presentence investigation must be conducted prior to the judge issuing a sentence,[35] and a report is presented to the court detailing guidelines for sentencing.[36] This report includes: (1) applicable guidelines and policy statements of the Sentencing Commission, (2) the defendant's offense level and criminal history, (3) sentencing options and sentence ranges, (4) reasons to sentence outside of the sentence range, and (5) additional information, including the defendant's history and characteristics.[37] For cases involving drugs, both the type and quantity of the drug impact the offense level of the defendant.[38]

This Part will explore how judges have historically used this report with discretionary sentencing from early English courts to the recent circuit split. The next portion will examine the War on Drugs declared by President Nixon, which ultimately led to the Anti-Drug Abuse Act of 1986. Finally, this Part will examine the Fair Sentencing Act of 2010 and the plain language of the First Step Act of 2018, which applied the Fair Sentencing Act retroactively.

A. History of Judicial Discretion in Sentencing

Dating back to the English courts, the law has given judges a wide range of discretion to determine proper sentencing for defendants.[39] Early state courts, such as the Supreme Court of North Carolina in 1887, extended this discretion by allowing trial judges to consider "such evidence as [they] might deem necessary and proper to aid [their] judgment and discretion" when crafting an appropriate sentence for the crime(s) charged.[40] This discretion also extended to federal judges, and commentators remarked that judges "have always considered a wide variety of aggravating and mitigating factors relating to the circumstances

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[34] *Id.* at 2404.

[35] FED. R. CRIM. P. 32(c).

[36] *Id.* at 32(d).

[37] *Id.* This is not a comprehensive or mutually exclusive list. *Id.*

[38] U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (2011).

[39] *See, e.g.*, Rex v. Bunts, 2 T.R. 683, 100 Eng. Rep. 368 (K.B. 1788) ("'[W]hen any defendant shall be brought up for sentence on any indictment' the court shall hear evidence from the prosecution and the defense in determining the appropriate sentence").

[40] State v. Summers, 4 S.E. 120, 121 (1887).

of both the offense and the offender."[41] Judges commonly hear evidence following a conviction that may be irrelevant to guilt but yet still plays a role in the judge's decision making. This evidence can relate to the defendant's reputation or even the insignificant events surrounding the offense.[42] For example, in the 1869 case of *United States v. Randall*, the court considered a defendant's "former good reputation."[43] Similarly, in the 1798 opinion from *Lyon's Case*, though the court gave a very small sentence to a defendant convicted of libel, it explained the sentence was mitigated by the reduced condition of the defendant's estate.[44]

In more recent decisions, such as *United States v. Tucker* in 1972, the Supreme Court confirmed the broad discretion granted to judges, permitting judges to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come" before deciding the sentence to be imposed.[45] The Court furthered this principle in *Koon v. United States*, holding that this discretion is consistent with federal judicial tradition.[46] The sentencing judge should view defendants as individuals with unique backgrounds, according to the Court, and these characteristics and factors may mitigate or magnify the crime and the punishment he or she receives.[47]

B. The War on Drugs

In 1971, President Richard Nixon declared the War on Drugs, stating that drug abuse is "public enemy number one."[48] This declaration led to an increase in funding for drug agencies and the creation of the Drug Enforcement Administration, a federal law enforcement agency tasked with combating illicit drug trafficking and distribution.[49] In 1981, President Ronald Reagan expanded the War on Drugs, extending a stronger focus to criminal punishment for drug crimes.[50] From 1980 to 1997, the number of incarcerations for nonviolent drug crimes increased

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[41] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 14 (1998).

[42] *Id.* at 15.

[43] 27 F. Cas. 696, 708 (D.C. Ore. 1869) (No. 16,118).

[44] 15 F. Cas. 1183, 1185 (CC Vt. 1798) (No. 8,646).

[45] 404 U.S. 443, 446 (1972).

[46] 518 U.S. 81, 113 (1996).

[47] *Id.* Justice Sotomayor uses this language in the *Concepcion* majority opinion when discussing the judicial sentencing discretion. Concepcion v. United States, 142 S. Ct. 2389, 2399 (2022).

[48] *War on Drugs*, BRITANNICA (Aug. 22, 2023), https://www.britannica.com/topic/war-on-drugs [https://perma.cc/HNP3-4F38].

[49] *Id.*

[50] *Id.*

by approximately 350,000 imprisonments.[51] Further, the Anti-Drug Abuse Act of 1986 created minimum sentences for possession of cocaine in certain amounts, including a *mandatory* minimum five year sentence for any defendant convicted of possession of five grams of crack cocaine.[52] For powder cocaine, the mandatory minimum only attached when the defendant was convicted of possession of 500 grams.[53] This Act expressly created a 100-to-1 ratio of sentencing between powder and crack cocaine, meaning the courts treated one gram of crack cocaine the same as 100 grams of powder cocaine for sentencing purposes.[54] The legislative intent behind the Act was founded on the belief that crack was linked more closely to criminal behavior, the perception that crack was more dangerous than other drugs, and the concern that crack would lead to "crack babies."[55] However, later published studies have demonstrated that the effects of cocaine are the same regardless of whether the drug is in crack or powder form.[56]

This sentencing disparity between crack and powder cocaine resulted in a considerable sentencing disparity amongst cocaine users on the basis of race, given that White cocaine users are more likely to use powder, whereas Black and Latino cocaine users usually possess crack cocaine.[57] Consequently, Black and Latino defendants receive harsher crack cocaine sentences and spend more time in jail pursuant to the legislation.[58] Racial bias in law enforcement further contributes to the racial divide in federal

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[51] *Id.*

[52] Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 508 (2012).

[53] *ALCU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing*, ACLU (Oct. 26, 2006, 12:00 AM), https://www.aclu.org/press-releases/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity [https://perma.cc/QGB3-FDPN].

[54] *Id.* In an alternative phrasing, the person must have 100 times more powder cocaine than crack cocaine to trigger the same sentence. *Id.* This Act was also passed following the death of Len Bias, a basketball player for the University of Maryland and second overall pick in the 1986 NBA Draft. Jonathan Gelber, *How Len Bias's Death Helped Launch the US's Unjust War on Drugs*, THE GUARDIAN (June 29, 2021, 4:00 PM), https://www.theguardian.com/sport/2021/jun/29/len-bias-death-basketball-war-on-drugs [https://perma.cc/FU7B-CC4Y]. Bias overdosed on cocaine in the summer of 1986, and many refer to the legislation as the "Len Bias Laws." *Id.*

[55] *Id.* Many believed that crack cocaine had a more negative effect on babies than powder cocaine. *Id.*

[56] D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?*, 276(19) J. AM. MED. ASS'N. 1580 (1996).

[57] Lowney, *supra* note 6, at 123.

[58] *Id.*

prisons.[59] Blacks are not only more likely to be in possession of crack cocaine,[60] they are also more likely to be targeted by police officers than Whites.[61]

C. The Fair Sentencing Act of 2010

The sentencing disparity was not officially addressed until the passage of the Fair Sentencing Act of 2010, signed by President Barack Obama in August 2010.[62] The Fair Sentencing Act reduced the 100-to-1 ratio of crack to powder cocaine to an 18-to-1 ratio.[63] Additionally, the Act eliminated the five-year mandatory prison term for first time offenders of crack cocaine possession.[64] While this Act helped lessen some systemic sentencing bias, it was not applied retroactively and, thus, critics remained unsatisfied.[65] According to these critics, the Act failed to "make good" on

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[59] *The Powder vs. Crack Cocaine Disparity Still Exists, and it's Still Unfair*, THE WASH. POST (Sept. 15, 2022, 2:03 PM), https://www.washingtonpost.com/opinions/2022/09/15/equal-act-crack-powder-cocaine-disparity/ [https://perma.cc/M5YV-YDM8].

[60] Even today, statistics show this racial divide exists: In 2019, only 5.3% of individuals convicted on crack trafficking charges were White compared to 81% Black individuals convicted. *Id.*

[61] Lisa Deaderick, *Creating Different Punishments for Crack and Powder Cocaine Never Made Sense, Unscientific*, THE SAN DIEGO UNION-TRIBUNE (Dec. 25, 2022, 6:00 AM), https://www.sandiegouniontribune.com/columnists/story/2022-12-25/sunday-social-justice-updated-federal-guidance-on-ending-drug-sentencing-disparities [https://perma.cc/5JC6-Q6H8]. In the following years, many plaintiffs brought equal protection claims before courts, but because the judges must give strong deference to legislation surrounding criminal laws, the statute could be struck down only if the claimants could demonstrate that Congress passed the Anti-Drug Abuse Act with the underlying purpose of racial discrimination, and claimants could not meet this bar. Lowney, *supra* note 6, at 124; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272–73 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."). Courts have applied the rational basis test when evaluating the law, and a D.C. Circuit court found rational basis in that "[c]rack is far more addictive than cocaine. It is far more accessible due to its relatively low cost. And it has experienced an explosion of popularity." United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (citing United States v. Pineda, 847 F.2d 64, 65 (2d Cir.1988)).

[62] Hyser, *supra* note 52, at 513.

[63] 156 Cong. Rec. S6866 (2010).

[64] Tyler B. Parks, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1112–13 (2012) ("Before the FSA, committing one of the illegal acts in subsection (a) with five or more grams of crack cocaine triggered the five-year mandatory sentence. Now, twenty-eight grams is required to trigger this sentence.").

[65] *Id.* at 1108.

its promise of fairness.[66] However, this purported failure was due primarily to "the presumption against retroactive legislation" which courts have held "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[67] Given this history, defendants sentenced prior to the passage of the Fair Sentencing Act were still subject to the 100-to-1 ratio.[68]

D. The First Step Act of 2018

The next step in addressing the sentencing disparity came with the passage of the First Step Act, signed into law by President Donald Trump in December 2018.[69] Specifically, § 404(b) of the Act applied the legislation retroactively, meaning that defendants convicted of crack cocaine offenses prior to August 2010 may now petition for resentencing.[70] Section 404(b) states:

> 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 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.[71]

Just one year after the First Step Act's implementation, the United States Sentencing Committee found that courts had reduced 2,387 sentences.[72] At the same time, however, a circuit split developed regarding appropriate criteria for judicial consideration during resentencing hearings.[73] The Third, Fourth, Tenth, and D.C. Circuits determined that judges may consider some additional outside laws and facts when resentencing a defendant.[74] In contrast, the Second, Fifth, Sixth, Seventh,

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[66] *Id.* Parks argues that the Act should be called the "Slightly Fairer Sentencing Act of 2010." *Id.* at 1107.

[67] Landgraf v. USI Film Prod., 511 U.S. 244, 265–66 (1994).

[68] Parks, *supra* note 64, at 1108.

[69] First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

[70] *Id.* at 5222.

[71] *Id.* (emphasis added)

[72] *The First Step Act of 2018: One Year of Implementation*, UNITED STATES SENT'G COMM'N (Aug. 31, 2020), https://www.ussc.gov/research/research-reports/first-step-act-2018-one-year-implementation [https://perma.cc/8VW4-D44L].

[73] Mark Osler, *Justices' Resentencing Ruling Boosts Judicial Discretion*, LAW 360 (July 8, 2022, 5:07 PM), https://www.law360.com/articles/1509537/justices-resentencing-ruling-boosts-judicial-discretion [https://perma.cc/LVB3-DR9L].

[74] *Id.*

Eighth, Ninth, and Eleventh Circuits utilized a narrower lens, considering only changes in the sentencing guidelines enumerated in the Fair Sentencing Act of 2010—retroactively applied by the First Step Act.[75] Accordingly, The Supreme Court addressed this circuit split in *Concepcion v. United States.*[76]

IV. INSTANT DECISION

This Part examines the majority's holding that district courts may consider a broad range of factors when hearing motions under the First Step Act, including changes of both law and fact. It also discusses the dissent's argument that the majority stretched the language of the Act too far, resulting in an overextension of judicial discretion.

A. Majority Opinion

In a 5-4 opinion, the Supreme Court held that when a district court hears a motion under the First Step Act, the court may consider changes in law, including updated sentencing guidelines, *and* changes of fact, such as behavior while incarcerated.[77] Justice Sotomayor, writing for the majority, began with the notion that federal courts have historically had a wide range of discretion regarding the evidence and sources relied upon when determining an appropriate sentence for a defendant.[78] The Court noted that a judge's discretion is explicitly narrowed by Congress or the Constitution only in certain situations, and the plain text and understanding of the First Step Act does not contain any applicable limitations that would prevent the district court from considering these additional factors.[79] Even at the initial sentencing hearing, the Court reasoned that the sentencing judge looks at a defendant not as the person he was on the day the offenses were committed but, instead, as the person he is on the day he appears in court.[80] Another important distinction the majority pointed out is that if a court vacates a sentence on appeal, upon re-sentencing, the court may take new factors into consideration.[81] These factors include individual characteristics of the defendant and/or changes in the sentencing guidelines.[82]

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[75] *Id.*
[76] 142 S. Ct. 2389 (2022).
[77] *Id.* at 2396.
[78] *Id.* at 2395.
[79] *Id.* at 2396.
[80] *Id.* (citing Pepper v. United States, 562 U.S. 476, 492 (2011)).
[81] *Id.* at 2399–2400 (2022).
[82] *Id.* at 2400.

The Court next turned to evaluating the plain language of the First Step Act.[83] Although there is a presumption against retroactive application,[84] the Court explained that Congress *explicitly* provided for such application in the First Step Act through the presence of the "as if" clause: "The Act allows a district court to impose a reduced sentence 'as if' the revised penalties for crack cocaine enacted in the Fair Sentencing Act of 2010 were in effect at the time the offense was committed."[85] Justice Sotomayor emphasized that when Congress has intended for limits to be placed on district courts in considering certain factors, these limitations have historically been expressly laid out.[86] Section 404 of the First Step Act included no limitations for district courts; rather, it required only that courts must apply the legal sentence guideline changes created through the Act.[87]

Because Congress did not expressly or implicitly limit the district court's discretion within the applicable language of the First Step Act, the majority determined Congress did not intend to limit the traditional amount of discretion utilized by district court judges at all.[88] Congress stated that there should be no limit on the information the judge may consider at initial sentencing for other crimes regarding the defendants "background, character, and conduct."[89] The opinion identified examples of when Congress did limit discretion, such as foreclosing consideration of the need for retribution.[90] With no such limiting language, the majority decided this absence was a clear indication that Congress intended to allow a wide range of discretion in the First Step Act—permitting judges to consider changes of both law *and* fact.[91]

Lastly, the majority opinion stated that, in line with sentencing jurisprudence, district courts are obliged to explain their decisions and consider all parties' pertinent arguments.[92] While it is uncontested judges must provide an explanation for their decisions, the detail of that explanation is up to the "judge's own professional judgment."[93] The district court does not have to be persuaded by any of the arguments, but

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[83] *Id.* at 2396.

[84] Landgraf v. USI Film Prod., 511 U.S. 244, 265 (1994).

[85] *Concepcion*, 142 S. Ct. at 2402.

[86] *Id.* at 2400. Justice Sotomayor emphasizes this point: "Congress is not shy about placing such limits where it deems appropriate." *Id.*

[87] *Id.* at 2402.

[88] *Id.* at 2401.

[89] *Id.* at 2400 (citing 18 U.S.C. § 3661).

[90] *Id.* (citing 18 U.S.C. § 3583(c)).

[91] *Id.* at 2401–02. For example, in § 404(c), the majority explains how there are two express limitations provided within the language of the section. *Id.* at 2401.

[92] *Id.* at 2404.

[93] *Id.* (quoting Rita v. United States, 551 U.S. 338, 356 (2007)).

it must give the arguments necessary consideration.[94] Thus, the Court concluded that it is within the district court's discretion to consider intervening changes of law or fact when hearing an argument for a sentence reduction under the First Step Act, and judges are able to apply their professional judgment when giving each argument and factor its relevant weight.[95]

B. The Dissent

Justice Kavanaugh wrote the dissent, joined by Chief Justice Roberts, Justice Alito, and Justice Barrett.[96] Under the dissent's textual interpretation of the First Step Act, a district court should consider changes only in the crack cocaine sentencing ranges but not take into account outside changes in a defendant's behavior or other unrelated changes of fact.[97] In simple terms, Justice Kavanaugh argued that a court need only consider one question when faced with a motion under the First Step Act: "What would the offender's sentence have been if the lower crack-cocaine sentencing ranges had been in effect back at the time of the original sentencing?"[98]

The dissent stressed that the majority's decision would undermine the "finality of criminal judgments," which the dissent emphasized is vital to the functionality of the American criminal justice system.[99] Further, the dissent argued that there is a difference between an original sentencing proceeding and a sentencing modification proceeding.[100] For support, Justice Kavanaugh cited 18 U.S.C. § 3582(c)(1)(B), which provides that the courts may reduce a sentence only as "expressly permitted by statute."[101] Once a sentence is final, it may be altered by the court "in very limited circumstances."[102] The dissent stressed that such wide-spread discretion would lead to even greater sentencing disparities among district courts, as judges are essentially given free range to consider anything they see fit.[103]

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[94] *Id.* They may dismiss these arguments without a detailed explanation. *Id.*
[95] *Id.*
[96] *Id.* at 2405 (Kavanaugh, J., dissenting).
[97] *Id.*
[98] *Id.* at 2405–06.
[99] *Id.* at 2406.
[100] *Id.* (citing Dillon v. United States, 560 U.S. 817, 830 (2010)).
[101] *Id.* (quoting 18 U.S.C. § 3582(c)(1)(B) (2018)).
[102] *Id.* (citing Pepper v. United States, 562 U.S. 476, 501 n.14 (2011)).
[103] *Id.* at 2407.

V. COMMENT

While the Supreme Court's holding in *Concepcion* likely intended to remedy lingering sentencing disparities between minority and non-minority defendants, the Court's decision did little to further that intention and may have instead exacerbated the disparities. On its face, the decision permits courts to consider many mitigating circumstances in a defendant's motion for sentencing reconsideration—a consideration that would hopefully protect individuals from overly harsh or unfair sentences. Despite its intentions, however, the Court's decision ultimately opens the door to allow even more racial bias in sentencing and contravenes the purpose of legislation passed to address the racial bias that has persisted in cocaine sentencing since President Nixon declared the War on Drugs. Not only does this decision conflict with the plain language of the First Step Act, but it also threatens the legitimacy of the criminal justice system by casting doubt on the finality of criminal sentences. Nevertheless, allowing judges unguided discretion to consider outside changes in fact seems to lessen the possibility that this racial divide and facial discrimination can ever be completely extinguished. The *Concepcion* decision increases the likelihood that similarly situated defendants will be given different sentence modifications, especially without any explicit guidance from the Court. Ultimately, the overwhelming racial bias in sentencing cannot be eliminated until the ratio between crack and powder cocaine sentencing is 1-to-1—a solution that lies with the legislature.

A. Dangers of Unbridled Discretion

The decision in *Concepcion v. United States*, while likely intended to provide greater sentencing fairness, instead creates the likelihood of greater inconsistencies and variability, while additionally allowing racial bias to persist.[104] Since district courts may now consider changes in both fact and law when dealing with petitions under the First Step Act, it is more likely that racial bias will creep into sentence modification proceedings.[105] Many of the new programs that judges may now consider

[104] *Id.* at 2404–05. The Federal Bureau of Prisons stated that the First Step Act of 2018 "was the culmination of a bi-partisan effort to improve criminal justice outcomes, as well as to reduce the size of the federal prison population while also creating mechanisms to maintain public safety." *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=On%20December%2021%2C%202018%2C%20President,mechanisms%20to%20maintain%20public%20safety [https://perma.cc/GA9X-WXKX] (last visited Oct. 5, 2023).

[105] *Vote "No" on The FIRST STEP Act*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. (May 8, 2018), https://civilrights.org/resource/vote-no-first-step-act/ [https://perma.cc/UDT8-J587].

during these sentence modification proceedings, such as risk assessments, have been shown to "produce results that are heavily biased against Black defendants and have a disparate negative impact on African Americans."[106]

There is additional concern that unguided discretion at sentence modification hearings will lead to "unduly disparate sentences for similar crimes by similar offenders."[107] This proposition directly contradicts the purpose of trying to close the sentencing gap between crack and powder cocaine sentences.[108] While judges have historically been able to consider all factors at initial sentencing hearings, and even at re-sentencing hearings, the dissent correctly concluded that the proceedings at issue are sentence modification proceedings, rather than "re-sentencings."[109] The initial sentence has already been imposed on the defendant, and this change threatens to undermine the importance of finality in criminal sentencing by allowing judges to consider recent changes in fact not yet in existence at the initial sentencing of the defendant.[110] The holding in *Concepcion* places district courts in uncharted waters, and it leaves defendants to rely on the luck of the draw.

Finally, despite the majority's alleged textualist approach, its decision ultimately overlooked the clear text of the First Step Act itself.[111] The First Step Act states that courts should now make sentencing calculations under the new sentencing guidelines "as if" these changes "were in effect at the time the covered offense was committed."[112] This language appears to allow district courts to consider changes in *law*—namely, changes in the sentencing guidelines—and determine how these changes would have been considered at the initial sentencing. Contrary to

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[106] *Id.* (citing Jennifer Skeem & Christopher Lowenkamp, *Risk, Race & Recidivism: Predictive Bias and Disparate Impact*, (June 14, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339 [https://perma.cc/K3N2-Q2QQ] ("Risk assessments rely on static factors, including criminal history and time of the offense, and dynamic factors, including work history and education achievement. Both static and dynamic factors tend to correlate with socioeconomic class and race, and studies show that African Americans are more likely to be misclassified as high risk than White or Hispanic offenders.").

[107] STITH & CABRANES, *supra* note 41, at 17.

[108] *Id.*

[109] Concepcion, 142 S. Ct. at 2406 (Kavanaugh, J., dissenting).

[110] Calderon v. Thompson, 523 U.S. 538, 556 (1998) ("Only with an assurance of real finality can the State execute its moral judgment in a case . . . . To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty . . . .'") (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993)).

[111] *Concepcion*, 142 S. Ct. at 2398. The majority used language such as "[s]uch discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence." *Id.*

[112] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

the holding in *Concepcion*, the text of the Act does not appear to allow the sentencing court to address outside changes and evidence of the defendant's rehabilitative progress while incarcerated.[113]

B. The Importance of Uniformity and Finality in Criminal Sentencing

It is important to note two essential goals of federal sentencing policy: uniformity and finality.[114] While the judge may initially consider a wide range of factors when determining the sentence for a defendant, the goal of uniformity is undermined when judges are allowed to arbitrarily consider similar factors during petitions under the First Step Act.[115] One of the many purposes of the Fair Sentencing Act was to address the racial disparity that resulted from the 100-to-1 sentencing ratio.[116] Allowing this change to apply retroactively with the passage of the First Step Act was progress in the right direction.[117] However, now that judges are allowed to consider a wide range of factors in sentence modification proceedings, there is concern that they will place a greater emphasis on changes in *fact*—a concern that could bring some of their potential biases to the forefront of their decision.

The majority of defendants petitioning the court under the First Step Act will be from minority groups. Senator Cory Booker stated that the application of the Act will "address[] some of the racial disparities in our system because 90 percent of the people who will benefit from [the First Step Act] are African Americans; 96 percent are Black and Latino."[118] Consequently, many defendants within these minority groups will likely suffer when a judge exercises his or her discretion, and such discretion may lead to less favorable sentence modifications in comparison to non-

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[113] Brief for the United States at 10, United States v. Concepcion, No. 19-2025 (5th Cir. July 10, 2020).

[114] Evan R. Kreiner, *Whose Applicable Guideline Range Is It Anyway? Examining Whether Nominal Career Offenders Can Receive Sentence Modifications Based on Retroactive Reductions in the Crack Cocaine Guidelines*, 112 COLUM. L. REV. 870, 870 (2012) (citing S. Rep. No. 98-225, at 52 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.").

[115] Matthew U. Smith, *Let the Punishment Fit the Criminal: The Use of Societal Value Arguments in Criminal Sentencing*, 21 GEO. J. LEGAL ETHICS 1063, 1073 (2008) ("The presence of sentencing guidelines is an indication that our society, or at least its elected representatives, value consistency and uniformity in criminal sentencing.").

[116] Brief of the District of Columbia and the States and Territories of Colorado et al. as Amici Curiae in Support of Petitioner, Concepcion v. United States, 142 S. Ct. 2389 (2022), WL 5507308 at *20 (2021) (No. 20-1650).

[117] *Id.*

[118] *Id.* (citing 164th Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker)).

minority defendants.[119] Thus, sentence modifications for same or similarly situated defendants will hinge on race.[120]

At first glance, it may appear that this wide range of discretion would benefit the criminal defendants petitioning the court for a sentence modification. However, the reality is that it now comes down to luck of the draw with respect to the judge before which a defendant appears. One critic argues that while the change will benefit defendants who are in front of judges inclined to limit their sentence based on changes of law or evidence of rehabilitation, not all will be so lucky: "[I]f they are in front of a judge who cares mostly about the original facts and finality, the ruling probably won't be good for those defendants."[121]

While luck of the draw can likely be a criticism of the judiciary system in general, the more pressing concern centers around giving judges individual opportunities to undermine the goals of uniformity and finality in sentencing. In turn, concerns surrounding uniformity and finality also threaten the very legitimacy of the criminal justice system.[122] Justice Harlan once stated, "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[123] This lack of finality and unbridled discretion leaves criminal defendants unsure about the application of factors—or lack thereof—that may influence their sentence modification. Was the decision due to only a small change in the sentencing guidelines for this particular situation? Or was it due to implicit bias by the judge regarding the defendant's race? Or a variety of other factors that lead to much ambiguity? Once again, this uncertainty and lack of clarity broadens the existing sentencing disparity and takes a step in the wrong direction from addressing the problem at hand.

C. Racial Biases are Still Present

The Anti-Drug Abuse Act created a wide sentencing disparity between crimes related to crack and powder cocaine, which led to extreme

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[119] Sonja B. Starr & Rehavi M. Marit, *Racial Disparity in Federal Criminal Sentences*, 144 J. POL. ECON. 1320, 1320 (2014)

[120] *Id.* ("Across the distribution, [B]lacks receive sentences that are almost 10 percent longer than those of comparable [W]hites arrested for the same crimes.").

[121] Osler, *supra* note 73.

[122] Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 187 (2014).

[123] Williams v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

racial bias in sentences for decades.[124] Following the declaration of the War on Drugs, prison populations tripled in size and drug offenders made up fifty-seven percent of the incarcerated population by 2000.[125] Additionally, between 1979 and 1989, there was a 300% increase in Blacks arrested for drug crimes.[126] This increase was not only due to an uptick in enforcement generally, but an emphasized increase in enforcement against Blacks.[127] For example, in Columbus, Ohio in 1991, Blacks made up only 11% of the population; however they made up over 90% of the drug arrests in the city.[128] This disparity was similarly present in other cities across the nation.[129] This trend continued as the 100-to-1 sentencing ratio between crack and powder cocaine was utilized in federal courts, producing race-based sentencing results with little positive shift until the Fair Sentencing Act.[130] Unfortunately, this racial divide in sentencing for crack and powder cocaine crimes still exists today, and the *Concepcion* decision threatens any progress that may have been made in narrowing the gap.

The 18-to-1 ratio employed by the courts today still does not solve the racial disparity, as there will likely continue to be a larger amount of minority defendants given disproportionate sentences for crack cocaine, while similarly situated White defendants will be sentenced to much shorter terms for virtually the same offense.[131] The so-called "Fair" Sentencing Act remains far short of fair. Although the Anti-Drug Abuse Act may not have been discriminatory on its face, it has been over thirty-five years since its passage, and the initial justifications for the wide difference in sentences between crack and powder cocaine have since been disproven.[132] This Note is not intended to completely discount the Court's

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[124] *Fair Sentencing Act*, ACLU, https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act [https://perma.cc/B5AN-HQVY] (last visited Oct. 11, 2023) [hereinafter *Fair Sentencing Act*].

[125] Nunn, *supra* note 3, at 393 (citing BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS 1980–2000).

[126] *Id.* at 394 (citing MICHAEL TONRY, MALIGN NEGLECT–RACE, CRIME, AND PUNISHMENT IN AMERICA 109 (1995)).

[127] *Id.* at 396 (citing TONRY, *supra* note 126, at 105–06)).

[128] JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 82 (1996). African Americans "were being arrested at 18 times the rate of [W]hites." *Id.*

[129] *Id.* ("In Jacksonville, FL, 87% of those arrested on drug charges were African-American males, even though they compromised only 12% of that county's population.").

[130] Parks, *supra* note 64, at 1115.

[131] *Fair Sentencing Act*, *supra* note 124.

[132] Jules Netherland & Sheila P. Vakharia, *What is Cocaine and What are the Effects of Cocaine on the Body?*, DRUG POL'Y ALL. (May 2, 2023), https://drugpolicy.org/drug-fact/cocaine/?fact=1 [https://perma.cc/9ACE-TDNA] ("Although [the chemical structure of powder cocaine and crack cocaine is] nearly

efforts to reduce the sentencing disparity,[133] but achieving a 1-to-1 ratio through legislative action is likely the only practical way to address this bias and completely eliminate the sentencing gap between Black and White defendants.[134] The Court fell short in addressing this bias and, instead, left the door open for more racial bias by allowing judges to consider virtually anything about a defendant, especially information that is immaterial to the charges at hand, when hearing petitions under the First Step Act.

VI. CONCLUSION

The holding in *Concepcion* both misses the mark on addressing racial disparity and stalls the progress of reducing racial discrimination when courts hear petitions for sentence modifications under the First Step Act. While some defendants will ultimately benefit from the holding, the unguided judicial discretion opens the door to a higher possibility of racial bias and strays from many of the goals of federal sentencing, including uniformity and finality. In retroactively applying the Fair Sentencing Act, courts would be better suited to consider only changes in the sentencing guidelines. Ultimately, however, the next important step would be legislatively reducing the ratio of crack to powder cocaine sentencing from 18-to-1 to 1-to-1, with the hope of eliminating these discriminatory laws from the books.

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identical, the punishment for crack possession or sales is far greater than for powder cocaine. Until 2010, there was a 100 to 1 sentencing disparity between powder cocaine and crack cocaine. This meant that 5 grams of crack carried a 5-year mandatory minimum sentence, but it took 500 grams of powder cocaine to trigger the same sentence."). While the law was changed in 2010, there continues to be a disparity of 18-to-1.

[133] VAGINS & MCCURDY, *supra* note 3, at 5. The Fair Sentencing Act of 2010 and the First Step Act of 2018 were in many ways responding to these reports of bias. After new scientific studies that there was no basis for the sentencing disparity, the United States Sentencing Commission recommended the revision of the crack quantity thresholds, and Congress responded with lessoning the disparity through those acts.

[134] Jordan Rubin, *Senate Failure to Bury a Reagan-era Drug Law Would be an Epic Embarrassment*, MSNBC (Dec. 13, 2022, 11:36 AM), https://www.msnbc.com/opinion/msnbc-opinion/%20eagan-crack-cocaine-disparity-senate-rcna61293 [https://perma.cc/L9F9-6CT7]. The ACLU emphasized "the 18-to-1 ratio was a compromise and it still reflects outdated and discredited assumptions about crack cocaine." *Fair Sentencing Act*, *supra* note 124.