

The First Step Act

OVERVIEW AND PRACTICE ADVISORY

Overview

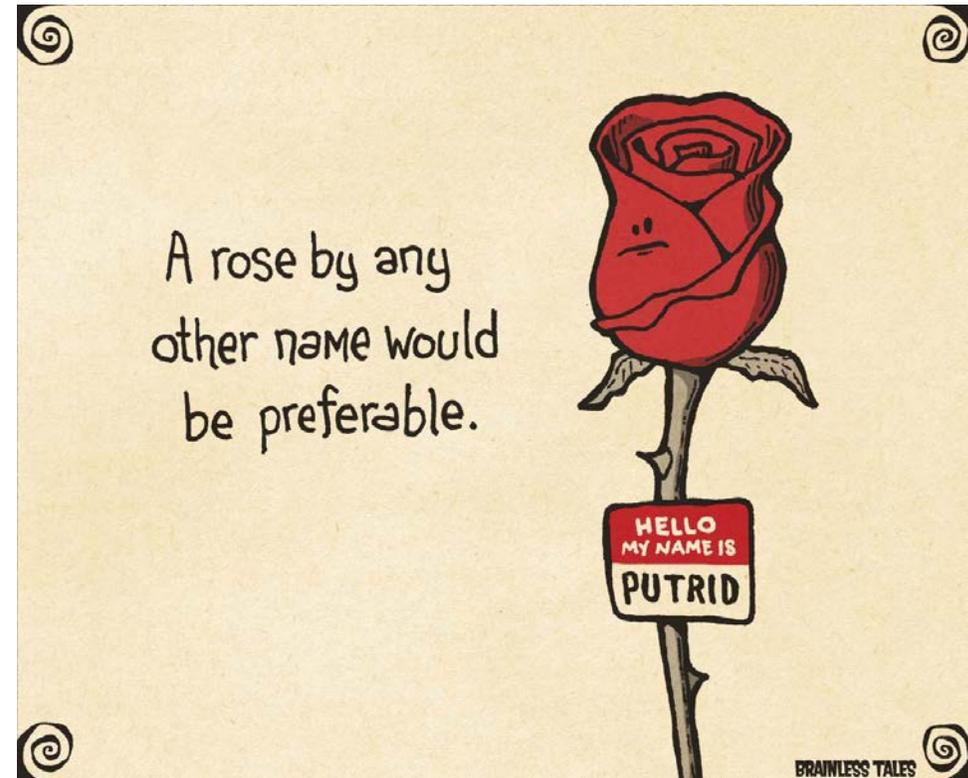
- ▶ Enacted December 21, 2018
- ▶ Reduces 3 Mandatory Minimums Enhanced with Prior Convictions
- ▶ Narrows *and* Expands Enhancing Prior Convictions
- ▶ Broadens Safety Value
- ▶ Clarifies 924(c)(1)(C) applies only if final prior conviction
- ▶ Makes Fair Sentencing Act Retroactive
- ▶ Increases Good Time Credit to 54 days (as always intended)
- ▶ New “Earned” Time Credits for some
- ▶ Compassionate Release

Changes to Drug Mandatory Minimums (Section 401)

- ▶ Mandatory minimum under 841(b)(1)(A) with one 851, reduced from 20 years to 15 years
- ▶ Mandatory minimum under 841(b)(1)(A) with two 851s, reduced from life to 25 years.
- ▶ Also reduces man min under 960(b)(1) (importation) from 20 to 15 years.

Changes to 851

- Old: "felony drug offense"
- New: "serious drug felony"



Changes to 851

Old "felony drug offense"

- ▶ ANY felony drug offense, including simple possession
- ▶ Regardless of sentence imposed
- ▶ Regardless of age of conviction

New "serious drug felony"

- ▶ Offense described in 18 U.S.C. § 924(e)(2) [ACCA]
- ▶ Served term of imprisonment more than 12 months
- ▶ Released from that term within 15 years of commencement of instant offense.

What does this mean?

“Serious drug felony”

To qualify as a drug 851

- ▶ Has to be a federal offense under the CSA (21 USC 801) for which the max term of imprisonment is at least 10 years or a state offense for manufacturing, distributing, or possessing with intent for which a max term of imprisonment of 10 years or more is prescribed.
 - ▶ No simple possession
 - ▶ Most California drug offenses don't have a max of 10 years
 - ▶ Other states may be off the table too because they don't qualify as ACCA predicates. See, e.g., *U.S. v. Franklin*, 904 F.3d 793 (9th Cir. 2018) (Washington).
- ▶ Plus more than 12 months in custody
- ▶ Plus within 15 years



But added “Serious Violent Felony” as new basis for 851

- ▶ Federal three strikes law, 18 U.S.C. § 3559(c)(2)
- ▶ Federal felony assault definitions, 18 U.S.C. § 113
- ▶ For both: “for which the offender served a term of imprisonment of more than 12 months”
- ▶ No staleness limit
- ▶ Categorical approach applies: Does the particular state prior satisfy the generic federal definition, or is it broader?

Would be a “felony violation” of 18 USC § 113 if committed in federal jurisdiction

- ▶ Defines six “felony violations.” See 18 U.S.C. § 113(a)(1)-(3), (6)-(8).
- ▶ Omits simple assault, § 113(a)(5); and assault by striking, beating, or wounding, § 113(a)(4).
- ▶ Includes:
 - ▶ Assaults with intent to commit any felony, § 113(a)(1)-(2)
 - ▶ “Assault with a dangerous weapon, with intent to do bodily harm,” § 113(a)(3)
 - ▶ “Assault resulting in serious bodily injury,” § 113(a)(6)
 - ▶ Two types of domestic violence assaults, § 113(a)(7)-(8)

Section 3559(c): Enumerated Offenses

3559(c)(2)(F)(i): Any of the following state or federal offenses (by whatever name):

- ▶ **Murder** (as described in § 1111)
- ▶ **Voluntary manslaughter** (as described in § 1112; involuntary manslaughter excluded)
- ▶ **Aggravated sexual abuse and sexual abuse** (as described in §§ 2241 and 2242)
- ▶ **Abusive sexual contact** (as described in § 2244(a)(1) and (a)(2))
- ▶ **Kidnapping** (defined in § 3559)
- ▶ **Aircraft piracy** (as described in 49 U.S.C. § 46502)
- ▶ **Robbery*** (as described in §§ 2111, 2113, 2118)
- ▶ **Carjacking** (as described in § 2119)
- ▶ **Extortion** (defined in § 3559)
- ▶ **Arson*** (defined in § 3559)
- ▶ **Firearms use or possession** (as described in § 924(c))
- ▶ Includes “attempt, conspiracy, or solicitation to commit any of the above offenses”

Exceptions for robbery and arson under § 3559(c)(3)

- ▶ Robbery or arson offenses are “nonqualifying offenses” if the defendant proves the following by clear and convincing evidence under 3559(c)(3):
- ▶ **Robbery:** Does not qualify if:
 - ▶ (1) No use or threatened use of a **firearm or dangerous weapon**, and
 - ▶ (2) No **death or serious bodily injury** results
- ▶ **Arson:** Does not qualify if:
 - ▶ (1) Offense posed no **threat to human life**, and
 - ▶ (2) Defendant **reasonably believed** offense posed no threat to human life.

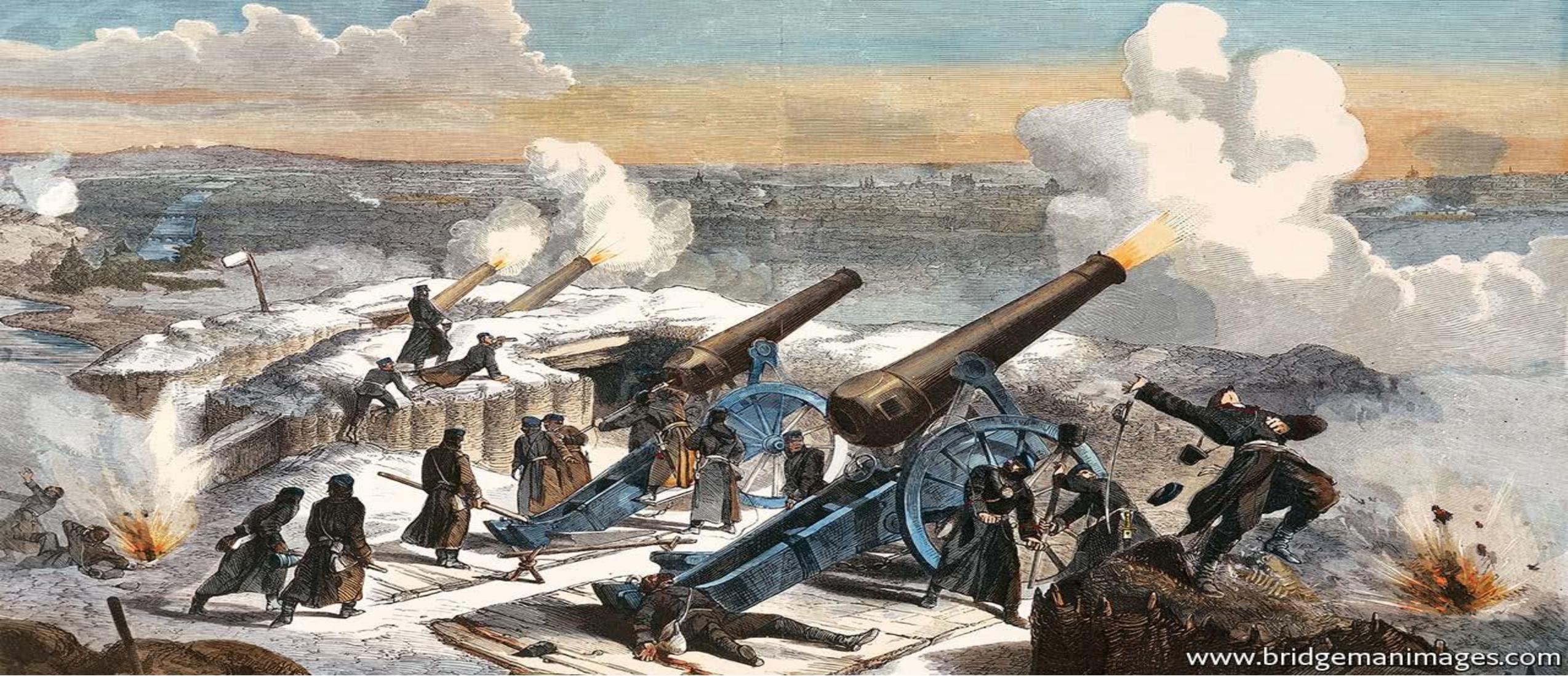
Some circuits say the categorical approach does *not* apply to circumstances D must prove under 3559(c)(3). *US v. Mackovich*, 209 F.3d 1227, 1240 (10th Cir. 2000); *Gray v. US*, 622 Fed. Appx. 788, 793 (11th Cir. 2015) (unpub.).

Section 3559(c): Force clause

- ▶ § 3559(c)(2)(F)(ii): “the term ‘serious violent felony’ also “means”
- ▶ any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another ~~or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.~~
- ▶ Residual clause of § 3559(c)(2)(F)(ii) is void for vagueness. See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).
- ▶ Must be “punishable” by 10 years or more, but applies only to this definition, not enumerated offenses.

Categorical approach applies

- ▶ The “categorical” approach—where the court considers only the crime as defined by its elements, not the particular facts—is used to determine whether the offense of which the defendant was convicted necessarily:
 - ▶ is no broader than the generic offense enumerated in (F)(i), or
 - ▶ has an element of force against the person of another under (F)(ii).
- ▶ See, e.g., *US v. Leaverton*, 895 F.3d 1251 (10th Cir. 2018); *US v. Hardin*, 108 Fed. Appx. 74, 78 (4th Cir. 2004) (unpublished); *US v. Fulford*, 267 F.3d 1241, 1251 (11th Cir. 2001); *US v. Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998).



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serious violent felony = the new battleground

When does Section 401 take effect?

8 *(c) APPLICABILITY TO PENDING CASES.—This section,*
9 *and the amendments made by this section, shall apply to*
10 *any offense that was committed before the date of enactment*
11 *of this Act, if a sentence for the offense has not been imposed*
12 *as of such date of enactment.*

- ▶ The reduced mandatory minimums and narrowed definition of drug priors apply in any case in which sentence has not yet been imposed.
- ▶ What if the case is on appeal? Contact FPD.



- Would violate the *Ex Post Facto* Clause to rely on a “serious violent felony” to set the statutory range for an instant offense that was committed before 12/21/18. See, e.g., *Calder v. Bull*, 3 Dall. 386, 390 (1798); *Peugh v. U.S.*, 569 U.S. 530, 532–33 (2013).
- And the government must, “before trial, or before entry of a plea of guilty,” and not later, “file[] an information with the court (and serve[] a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.” 21 U.S.C. § 851(a)(1).

“New” Safety Valve, Section 402

"Old" Safety Valve, 18 USC § 3553(f)

- ▶ Applied only to offenses under 21 USC §§ 841, 844, 846, 960, 963
- ▶ Defendant:
 - 1) does not have more than 1 criminal history point
 - 2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense
 - 3) offense did not result in death or serious bodily injury
 - 4) was not a supervisor, manager, leader or organizer, and was not engaged in a CCE as defined by 21 USC 848
 - 5) not later than sentencing hearing, truthfully provided all information regarding offense(s) part of same course of conduct; that D has no relevant or useful info or govt is already aware of the info "shall not" preclude court finding D complied with this requirement.

"New" Safety Valve, as amended by Sec. 402

- ▶ **New:** Also applies to offenses under title 46 §§ 70503 or 70506
- ▶ **New (f)(1):** Defendant "does not have –
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines."

“New” Safety Valve

- ▶ “As used in this section, the term ‘**violent offense**’ means a crime of violence, as defined in section 16, that is punishable by imprisonment.” 18 U.S.C. § 3553(g) (new).
 - ▶ § 16(b) is void for vagueness, see *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), so a “violent offense” is “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” 18 U.S.C. § 16(a), that is punishable by imprisonment.
 - ▶ **Categorical approach** applies!
- ▶ **Also new:** “Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.” 18 U.S.C. § 3553(f) (new).

Applying new 3553(f)(1) – a few things

- ▶ **Career offenders** who do not have a disqualifying number or kind of criminal history points qualify for the safety valve. They are automatically placed in CHC VI, regardless of points. USSG § 4B1.1-4B1.2.
- ▶ **2 points for committing the instant offense while under a criminal justice sentence:**
- ▶ **If for a 1-point offense**, do **not** count (“excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines...”)
- ▶ **Not clear if for a 2-point offense:**
 - ▶ No: The revised statute speaks of 1, 2, and 3-point offenses, not status points, and the only 2-point offense that is disqualifying is a “2-point violent offense.”
 - ▶ Yes: 3553(f)(1)(A) refers to 4 points “as determined under the sentencing guidelines.”

When does Section 402 take effect?

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

New" Safety Valve -- Applicability

If client pled guilty or was found guilty by a jury before December 21, 2018, but has not yet been sentenced, find out govt's position and file a motion if necessary :

- ▶ Date "conviction entered" is date final, written judgment is entered.
- ▶ If necessary: For client who pled guilty, court may vacate acceptance of plea and reaccept it (new colloquy required), or allow D to withdraw his plea for a "fair and just reason." Fed. R. Crim. P. 11(d)(2)(B).
 - ▶ Best for open pleas; may be problematic if plea agreement
- ▶ Contact the FPD office for sample motions.

Two-level decrease in base offense level?

- ▶ USSG § 2D1.1(b)(18) provides for a two-level decrease if the defendant meets the “old” safety valve criteria set out in USSG § 5C1.2.
- ▶ Commission will likely fix next amendment cycle (if it has a quorum of 4 voting members, or 7 voting members as required by statute, see 28 USC 991(a)).
- ▶ Meanwhile, the court may grant a variance under 3553(a).

Sec. 403, "Clarification of Section 924(c)"
Limits but does not eliminate stacking



924(c)(1)(C) as amended

~~“In the case of a second or subsequent conviction under this subsection~~ **violation of this subsection that occurs after a prior conviction under this subsection has become final**, the person shall--

- (i) be sentenced to a term of imprisonment of not less than 25 years; and
- (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.”

Supreme Court interpreted the struck language to require stacking of the 25-year or life minimum for offenses charged in the same case with no intervening conviction. *Deal v. United States*, 508 U.S. 129 (1993).

Congress has now “clarifi[ed]” that it always intended § 924(c)(1)(C) to be a true recidivist provision: the 25-year or life minimum may be imposed only for a violation that occurred after a prior conviction under § 924(c) has become final.

But 924(c)(1)(D) remains

“Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”

Then and Now

Then:

If defendant charged and convicted of three § 924(c)s in the same case (and the firearm was not described in (c)(1)(C)(ii), a minimum of 5 years [or 7 or 10 years for brandish or discharge] + 50 years was required.

Life required if the firearm in any “second or subsequent” count was described in (ii).

Now:

5, 7 or 10 years required for each count and still consecutively stacked. E.g.:

- ▶ 15 years (5+5+5)
- ▶ 30 years if all three firearms discharged (10+10+10)

Neither 25-year MM nor mandatory life are available unless violation occurred after a prior 924(c) violation became final.

When does Section 403 take effect?

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Sec. 404, "Application of Fair Sentencing Act"

- ▶ FSA Sec. 2 reduced statutory ranges and minimum SR terms by increasing quantities of crack necessary under 841(b)(1)(A)-(B), and 960(b)(1)(C), (2)(B).
- ▶ FSA Sec. 3 eliminated 5-year MM for simple possession.
- ▶ Enacted Aug. 3, 2010, not retroactive.
- ▶ Applied to all sentenced after Aug. 3, 2010 including those who committed the offense before that date. *See Dorsey v. United States*, 132 S. Ct. 2321 (2012).

Sec. 404, First Step Act

- ▶ Any person convicted of a “violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010,” is eligible. Sec. 404(a). **Broad freestanding remedy not subject to 3582(c)(2) or USSC’s 1B1.10 restrictions.**
- ▶ Only two circumstances in which the court “shall [not] entertain” an eligible person’s motion:
 - ▶ sentence was “previously imposed or reduced [fully] in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010” (**denial or partial reduction under 3582(c)(2)/1B1.10 doesn’t count**) or
 - ▶ 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.” Sec. 404(c). **One chance under Section 404.**

Sec. 404, Discretionary Relief

- ▶ Upon motion of the defendant, BOP, the government, or the court, the 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.” Sec. 404(b).
- ▶ Court has discretion to deny the motion: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Sec. 404(c).

What to do?

- ▶ Jan. 25, 2019 General Order appointing the FPD
- ▶ FPD will represent unless conflict
- ▶ FPD has reliable up-to-date litigation guidance. Do not proceed without it. Do not rely on summaries or advice from other sources (including Sentencing Commission)
- ▶ If client calls, advise not to file *pro se*.
- ▶ If you see a motion filed *pro se* for a former client (or co-defendant!), advise FPD.

Good time credit, Sec. 102(b)(1)

Good news:

- ▶ 54 days per year means 54 days per year. Sec. 102(b)(1)(A).
- ▶ Retroactive: “shall apply with respect to offenses committed before, on, or after the date of enactment of this Act, except . . . shall not apply with respect to offenses committed before November 1, 1987.” Sec. 102(b)(3).

Bad news:

- ▶ BOP/DOJ position: good time reform subject to the same effective date as the risk assessment/earned time credit provisions: the date AG “completes and releases the risk and needs assessment system . . . under section 101(a),” *i.e.*, 210 days after enactment.
- ▶ If correct, was inadvertent, serves no purpose, contrary to congressional intent. Congressional record: 54 days was our intent all along; BOP and the Supreme Court misinterpreted the statute.

Pat Nolan, *When bureaucrats undermine our laws*, The Hill, <https://thehill.com/blogs/congress-blog/politics/426164-when-bureaucrats-undermine-our-laws>

Congressional fix? Uncertain

FSA Title I: Risk Assessments, Programming, Earned Time Credits

- ▶ AG shall “develop and release” **risk assessment system** within 210 days, including tool to classify prisoners as minimum, low, medium, or high risk
 - ▶ Risk assessment tools: validated tools assign at least half the points based on criminal history which cannot change; that + other factors (e.g., employment record, married or single) = racial and economic disparity
 - ▶ Says will include “indicators of progress and of regression, that are dynamic and that can reasonably be expected to change while in prison” (remains to be seen)
- ▶ AG/BOP required to provide **recidivism reduction programs** (priority to high and medium risk, but not prison work programs) or **productive activities** (priority to low and minimum risk).
 - ▶ Sessions severely cut programming and re-entry services. Provides *some* independent oversight. Insufficient guaranteed funding. Prioritizes law enforcement over programming for any savings.
- ▶ **Prison work programs**, shown to be especially effective in reducing recidivism of young minorities at the greatest risk, to be **expanded to ensure that 75% of minimum and low risk prisoners can work 20 hours a week.**

For Some, Earned Time Credits → Prerelease Custody

- ▶ **Some** inmates can receive **10 days** earned time credits per 30 days of programming; **low or minimum risk** get an **extra 5 days**
- ▶ **Transfer to prerelease custody** (RRC, home confinement, supervised release) if credits equal to remainder of term of imprisonment, prisoner is determined minimum or low according to last 2 risk assessments, or warden grants petition (for subjective reasons).
 - ▶ Can't transfer to supervised release unless classified as minimum or low, and not to exceed 12 months.

Important Litigation/Client Relations Issue

- ▶ 70 categories of people are *not* eligible to “receive” earned time credits (even though they earn them by participating in programming) based on instant offense
- ▶ Rough estimate: 43% ineligible
- ▶ Look at 18 U.S.C. § 3632(d)(4)(D) list of offenses excluded from earned time credit before entering into a plea bargain or considering your sentencing strategy. Client may be able to plead to something else.
- ▶ Certain drug offenses are excluded only if there is a role enhancement.
- ▶ Try to stop the judge from making a finding that even though the conviction is for trafficking in some other drug, it involved a detectable amount of fentanyl.
- ▶ Earned time credit not available for programs completed prior to enactment of First Step Act, or during pretrial detention.

Exclusions – *Partial* List

Drug offenses

- ▶ any drug offense resulting in death or serious bodily injury
- ▶ any offense under 841(b)(1)(A)(i) or (B)(i) – heroin – if the court finds at sentencing D was an organizer, leader, manager or supervisor
- ▶ any offense under 841(b)(1)(A)(viii) or (B)(viii) – meth – if the court finds at sentencing D was an organizer, leader, manager or supervisor
- ▶ all offenses under 841(b)(1)(A)(vi) or (B)(vi) – fentanyl
- ▶ anyone sentenced under 841(b)(1)(A) or (B) for *any* drug “if the sentencing court finds that” the offense involved a detectable amount of fentanyl, and that the defendant was an organizer, leader, manager or supervisor.

Partial List of Exclusions, cont'd

Immigration

- ▶ 8 USC 1326(b)(1) or (2), 8 USC 1327, 8 USC 1328
- ▶ A prisoner is “ineligible to apply time credits” if the prisoner “is the subject of a final order of removal under any provision of the immigration laws.” AG and Secty of Homeland Security “shall ensure that any alien described in” 8 U.S.C. 1182 or 1227 “who seeks to earn time credits are subject to proceedings described in” 8 U.S.C. 1228(a) “at a date as early as practicable during the prisoner’s incarceration.”

Some others

- ▶ **fraud** and related activity in connection with **computers**, 18 USC 1030(a)
- ▶ All **924(c)**; all **Kidnapping** offenses in chapter 55; **Bank robbery resulting in death**, 18 USC 2113(e); **Robberies and burglaries involving controlled substances**, 18 USC 2118(c); all **Carjacking** under 2119(1), (2) or (3)
- ▶ Loads of **sex and child porn** crimes, including **failure to register**
- ▶ An offense described in **3559(c)(2)(F)** (serious violent felony) **if D “was sentenced”** to a term of imprisonment of **more than 1 year, and if** has a prior federal or state conviction for **listed violent offenses** and for which “was sentenced” to a term of imprisonment of **more than 1 year**

“Increasing the Use and Transparency of Compassionate Release,” Section 603(b)



Compassionate Release

- ▶ Court may reduce term of imprisonment--and may impose probation or supervised release with or w/o conditions not to exceed unserved portion of original term of imprisonment--after considering 3553(a) factors, if the court finds “**extraordinary and compelling reasons.**” 18 USC 3582(c)(1)(A)(i).
- ▶ Until now, only BOP could file the motion.
- ▶ BOP refused to file motions in the vast majority of deserving cases for 3 decades.

Do you have a client or former client who may qualify?

USSG 1B1.13 defines what should be “extraordinary and compelling reasons” pursuant to authority delegated by Congress under 28 USC 994(t):

- ▶ Terminal illness, or
- ▶ Serious physical or medical condition, serious functional or cognitive impairment, or deteriorating physical or mental health due to aging process, that substantially diminishes ability to provide self-care in prison and not expected to recover, or
- ▶ At least 65 + deteriorating physical or mental health due to aging process + has served the lesser of 10 years or 75 percent of term of imprisonment, or
- ▶ Family circumstances: death or incapacitation of minor child’s caregiver, or D would be the only available caregiver for incapacitated spouse or registered partner, or
- ▶ Any reason deemed extraordinary and compelling by BOP other than or in combination with above.
 - ▶ BOP has added: (1) inmate sentenced after 11/1/87, 70 or older, has served 30 years or more; (2) at least 65 + deteriorating physical or mental health due to aging process + has served 50 percent of term of imprisonment, and (3) at least 65 + served greater of 10 years or 75 percent. BOP Prog. Stmt. 5050.50, sec. 4.

FSA improvements

- ▶ The **defendant** (and sometimes others on behalf of defendant) can also file the motion
- ▶ Must file after fully exhausting administrative remedies or 30 days from receipt of request by warden, whichever is earlier.

FSA improvements

- ▶ **Defines “terminally ill”** as “a disease or condition with an end-of-life trajectory.” 18 U.S.C. § 3582(d)(1).
- ▶ BOP shall, “not later than **72 hours after the diagnosis**” of terminal illness “**notify** the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request for a sentence reduction pursuant to [18 USC 3582(c)(1)(A)]”
- ▶ If D is physically or mentally unable to submit request, BOP shall inform D’s attorney, partner, and family that they may prepare and submit request; BOP must accept and process that request
- ▶ BOP shall provide family and extended family **opportunity for visitation within 7 days** of diagnosis.
- ▶ Upon request of D, his attorney, partner or family, **BOP employees must assist** in preparing and submitting request to BOP.
- ▶ **BOP shall process the request not later than 14 days** of receipt of request.
- ▶ **Visibly post new procedures** at all BOP facilities.

Practical considerations

- ▶ Requires cooperation between:
- ▶ Lawyer in district of confinement for client contact, work with BOP, establish solid record of relevant facts, exhaustion of administrative remedies
- ▶ Lawyer in district of conviction to file and litigate motion
- ▶ Several limits in BOP program statement not in USSC policy statement; only USSC was given authority by Congress

What to Do?

- ▶ First stop: Contact FPD in your district for sample motions (upcoming)
- ▶ If the court declines appointment, contact FAMM
- ▶ For further information, see *Compassionate Release Basics for Federal Defenders*, http://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_2019-01-02.pdf

Questions on Sections Other than Compassionate Release?

If questions after reading the statute, contact FPD