

# THE FIRST STEP ACT

Materials from the  
United States Sentencing Commission and  
from the Federal and Community Defenders

# PRIMARILY DIRECTED TO REENTRY

- Affects application of the safety valve
- Makes important changes to mandatory minimum sentences
- Affects release to a half way house and release to supervised release
- Provides programs for certain inmates that provide an opportunity for obtaining Earned Time Credit, reentry skills, and other benefits in prison
- Prohibits restraints on pregnant prisoners

# December 21, 2018

- "The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act."
- "Conviction entered" is not defined in the Act or the Guidelines
- No changes to the Sentencing Guidelines have yet occurred
- No Commission Action right now

- The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply

# Changes to Drug Mandatory Minimum Penalties

## Section 401

| Statutory Provision      | Statutory Penalty         | Enhanced Penalty BEFORE First Step Act   | Enhanced Penalty AFTER First Step Act   |
|--------------------------|---------------------------|--|---|
| 21 U.S.C. § 841(b)(1)(A) | 10-year Mandatory Minimum | <p><b>20-year</b> Mandatory Minimum (after one prior conviction for a felony drug offense)</p> <p><b>Life</b> (after two or more prior convictions for a <b>felony drug offense</b>)</p> | <p><b>15-year</b> Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)</p> <p><b>25-year</b> Mandatory Minimum (after two or more prior convictions for a <b>serious drug felony or serious violent felony</b>)</p> |
| 21 U.S.C. § 841(b)(1)(B) | 5-year Mandatory Minimum  | <b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>felony drug offense</b> )  | <b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )   |
| 21 U.S.C. § 960(b)(1)    | 10-year Mandatory Minimum | <b>20-year</b> Mandatory Minimum (after one prior conviction for a <b>felony drug offense</b> )  | <b>15-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )   |
| 21 U.S.C. § 960(b)(2)    | 5-year Mandatory Minimum  | <b>10-year Mandatory Minimum</b> (after one prior conviction for a <b>felony drug offense</b> )  | <b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )   |

Note that §§841(b)(1)(C) and (D) were NOT amended.

# 21 USC § 851

## Serious drug felony

- Prosecution must file notice to impose the enhanced mandatory minimum
- Serious drug felony
  - Prior drug conviction must have been punished by a sentence of 12 months or more time served
  - Accused must have been released from the prior sentence within 15 years
  - And the offense must have carried a possible penalty of 10 years or more
- Note that time “served” is not the same as the guidelines’ definition of “sentence imposed,” the term used in the criminal history provisions.

# Serious Violent Felony

- An offense for which one serves **imprisonment of more than 12 months** that is either a violation of 18 U.S.C. § 3559(c)(2) (defining serious violent felony for sentencing purposes) or 18 U.S.C. § 113 (assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States.
- A person with less than 60 day sentence served for a violent offense will not be excluded from the new safety valve provision because such convictions are only assessed 1 point under the guidelines.



- **F)** the term “[serious violent felony](#)” means—**(i)** a Federal or [State](#) offense, by whatever designation and wherever committed, consisting of murder (as described in [section 1111](#)); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 1113(a)); [assault with intent to commit rape](#); aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); [kidnapping](#); aircraft piracy (as described in [section 46502 of Title 49](#)); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); [extortion; arson; firearms use](#); firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
- **(ii)** 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;

- **Murder;**
- **manslaughter other than involuntary manslaughter;**
- **assault with intent to commit murder;**
- **assault with intent to commit rape;**
- **aggravated sexual abuse and sexual abuse**
- **abusive sexual contact**
- **kidnapping;**
- **aircraft piracy**
- **Robbery**
- **Carjacking**
- **extortion;**
- **arson;**
- **firearms use;**
- **firearms possession**
- **any other offense punishable by a maximum term of imprisonment of **10 years** with an element that is use of physical force**

# SO CHECK THE AGE OF PRIORS

Evaluate whether they meet the definition of Serious  
Drug Felony or Serious Violent Felony

# Changes to Application of Safety Valve

## **Old Limitation**

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- (1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History category);

...

Note that this limitation still exists in §5C1.2.

## New Limitation

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- (1) The defendant does not have:
  - (A) more than four 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;

Definition of Violent Offense: As used in this section, the term “violent offense” means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

# 18 USC § 16

- The term “crime of violence” means—**(a)**an offense that has as **an element** the use, attempted use, or threatened **use of physical force** against the person or property of another, or
- **(b)**any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
- Blue text was held to be Unconstitutionally Vagur

- *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)[residual clause of 18 USC § 16 is unconstitutionally vague].

- Supreme Court precedent directs the use of the **categorical approach** to make the determination if an offense is a crime of violence.



## §5C1.2 Has not changed so....

The Court has authority under 18 U.S.C. § 3553(a) to grant a **2-level** reduction to the newly eligible safety valve offenders not meeting the guideline criteria.

If the Court should do so, it will be considered a variance from the guidelines.

# What is a 3 point offense in Chapter 4 of the Sentencing Guidelines?

- 4A1.2 provides: The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
- (a) Add **3** points for each prior **sentence of imprisonment exceeding one year** and one month.

# What is a 2 point offense under the Sentencing Guidelines?

- (b) Add **2** points for each prior sentence of **imprisonment of at least sixty days** not counted in (a).

# With respect to 2 point offenses

- A person cannot have a 2 point **violent** offense

# Offenses must be within 15 years of the current offense

- Because these points are determined under the Sentencing Guidelines, the person must have been released for the prior offense counted for criminal history category within 15 years of the commission of the current offense.
- For sentences of less than 13 months the prior sentence must have been completed within 10 years of the current offense.

## New Limitation

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- (1) The defendant does not have:
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  - (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;

Definition of Violent Offense: As used in this section, the term “violent offense” means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

# Decreased mandatory minimum sentences

- Use or possession of firearm in furtherance of a drug trafficking or violent offense
- Retroactive application of the 2010 Fair Sentencing Act (Crack vs. Cocaine sentencing)

## 924 (c) Convictions and Punishments changes Use or possession of firearm in furtherance...

- Before the Act, a second or subsequent count of conviction under section 924(c) triggered a higher mandatory minimum penalty, as well as mandatory “stacking” of these sentences for each count of conviction. This was so because, in *Deal v. United States*, 508 U.S. 129 (1993), the Supreme Court held that, even when **multiple counts** under section 924(c) were in the **same indictment**, the conviction on the **first count did not have to be final** before the mandatory increases and stacking provisions



# Prior firearms offense must be final to enhance punishment

- The First Step Act revised section 924(c)(1)(C) by providing that the higher penalty for a “second or subsequent count of conviction” under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final.

| <b>924(c) Counts of Conviction<br/>in the Same Indictment</b> | <b>BEFORE the<br/>First Step Act</b>             | <b>AFTER the<br/>First Step Act</b>            |
|---|--|--|
| 1 Count   | Mandatory minimum of 5 years                     | Mandatory minimum of 5 years                   |
| 2 Counts  | Mandatory minimum of<br>$5 + 25 = 30$ years      | Mandatory minimum of<br>$5 + 5 = 10$ years     |
| 3 Counts  | Mandatory minimum of<br>$5 + 25 + 25 = 55$ years | Mandatory minimum of<br>$5 + 5 + 5 = 15$ years |

# Keep in mind other enhancements in the Guidelines

- Higher mandatory minimums apply depending on other factors such as whether the firearm was brandished (**seven years**) and whether the firearm was a machine gun (**30 years**) among others.

# Retroactive Application of the Fair Sentencing Act

- Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties.
- Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine.
- The First Step Act authorizes the defendant, the Director of the Bureau of Prisons, the attorney for the government, or the Court to make the motion

# Changes from the Fair Sentencing Act are now Retroactive

| <b>BEFORE</b> | <b>The Fair Sentencing Act</b>   | <b>AFTER</b>  |
|---------------|--|---------------|
| 5 g<br>50 g   | <b>21 U.S.C. § 841</b><br>5-yr min - 40-yr max<br>10-yr min - life max | 28 g<br>280 g |
| 5 g<br>50 g   | <b>21 U.S.C. § 960</b><br>5-yr min - 40-yr max<br>10-yr min - life max | 28 g<br>280 g |

# Recidivism reduction and Earned Time Credits

## Important Dates

- **January 2020:** BOP to post full list of approved programs on [www.bop.gov](http://www.bop.gov)
- **January 15, 2020:** BOP to complete initial risk and needs assessment for each prisoner and “begin” to assign programming
- **January 15, 2022:** BOP must provide evidence-based recidivism reduction programs or productive activities for all inmates.

*See 18 U.S.C. § 3621(h); Dep't of Just, The First Step Act of 2018: Risk and Needs Assessment System, at 71.*



# Risk Assessment program PATTERN as modified

- <https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf>

# Earned Time Credits

## Acquiring “Earned Time Credits” (ETCs)

All eligible persons: earn 10 days of ETCs for “every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities”

Persons in min/low risk categories who, “over 2 consecutive assessments”\* have not increased their risk category shall earn “an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities”

\*Persons who “successfully participate” in programming shall receive reassessments “not less often than annually.” Persons in medium/high risk categories who are less than 5 years from release shall receive “more frequent” reassessments.

See 18 U.S.C. § 3632(d)(4), (5)

## Incentives

- 1) Phone & visitation privileges
- 2) Transfer closer to home
- 3) Additional rewards developed by BOP (commissary, email, preferred housing units, etc.)
- 4) Earned Time Credits (ETCs)

*See* 18 U.S.C. § 3632(d)(1) – (4)

### Acquiring “Earned Time Credits” (ETCs)

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See 18 U.S.C. § 3632(d)(4), (5)

## Ineligible for ETCs

If “serving a sentence for a conviction” under any of the following:

- 18 U.S.C. § 32
- 18 U.S.C. § 33
- 18 U.S.C. § 36
- 18 U.S.C. § 81
- 18 U.S.C. § 111(b)
- 18 U.S.C. § 113(a)(1), (7), (8)
- 18 U.S.C. § 115, except threats
- 18 U.S.C. § 116
- 18 U.S.C. § 117
- Ch. 10 (biological weapons)
- Ch. 11B (chemical weapons)
- 18 U.S.C. § 351
- 18 U.S.C. § 521
- 18 U.S.C. § 751
- 18 U.S.C. § 793
- 18 U.S.C. § 794
- Ch. 39 (explosives), except § 836
- 18 U.S.C. § 842(p) if weapon of mass destruction
- 18 U.S.C. § 2118(c)
- 18 U.S.C. § 2119
- Ch. 105 (sabotage) except § 2152
- Ch. 109A (sex abuse)
- 18 U.S.C. § 2250
- 18 U.S.C. § 2251
- 18 U.S.C. § 2251A
- 18 U.S.C. § 2252
- 18 U.S.C. § 2252A
- 18 U.S.C. § 2260
- 18 U.S.C. § 2283
- 18 U.S.C. § 2284
- 18 U.S.C. § 2291 if sub. risk of death/SBI
- Ch. 113B (terrorism)
- 18 U.S.C. § 2340A
- 18 U.S.C. § 2381
- 18 U.S.C. § 2442
- 18 U.S.C. § 3559(c)(2)(F) if +1 year imprisonment and if certain prior convictions

- 18 U.S.C. § 844(f)(3), (h), (i)
- 18 U.S.C. § 871
- 18 U.S.C. § 879
- 18 U.S.C. § 924(c)
- 18 U.S.C. § 1030(a)(1)
- 18 U.S.C. § 1091
- Ch. 51 (homicide) except §§ 1112, 1113 (att. manslt.), 1115, 1122
- Ch. 55 (kidnapping)
- Ch. 77 (slavery/peonage) except §§ 1593 – 1596
- 18 U.S.C. § 1751
- 18 U.S.C. § 1791
- 18 U.S.C. § 1792
- 18 U.S.C. § 1841(a)(2)(C)
- 18 U.S.C. § 1992
- 18 U.S.C. § 2113(c)
- 42 U.S.C. § 2077(b)
- 42 U.S.C. § 2122
- 42 U.S.C. § 2131
- 42 U.S.C. § 2274
- 42 U.S.C. § 2275
- 42 U.S.C. § 2284
- 49 U.S.C. § 60123(b) if sub. risk of death/SBI
- 21 U.S.C. § 841(b)(1)(A-C) if death/SBI resulted
- 8 U.S.C. § 1326(b)(1), (2)
- 8 U.S.C. § 1327
- 8 U.S.C. § 1328
- 50 U.S.C. § 4611 et seq.
- 50 U.S.C. § 1705
- 50 U.S.C. § 3121
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if for fentanyl/analogue

**Court-found ineligibilities:**

- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if heroin and court finds role enhancement
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if meth and court finds role enhancement
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) for any drug if court finds offense involved fentanyl/analogue and role enhancement

**Deportable persons:** ineligible to apply time credits if subject to a final order of removal under any provision of the INA

*See* 18 U.S.C. § 3632(d)(4)(D)-(E)

### Acquiring "Earned Time Credits" (ETCs)

All eligible persons: earn 10 days of ETCs for "every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities"

Persons in min/low risk categories who, "over 2 consecutive assessments"\* have not increased their risk category shall earn "an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities"

\*Persons who "successfully participate" in programming shall receive reassessments "not less often than annually." Persons in medium/high risk categories who are less than 5 years from release shall receive "more frequent" reassessments.

See 18 U.S.C. § 3632(d)(4), (5)



## Using "Earned Time Credits" (ETCs)

**ETCs can be used when accumulated credits are equal to remainder of prison term.**

**For prerelease custody (home confinement or RRC):**

- (1) Min/Low risk for last 2 reassessments; or
- (2) Warden approval after determining (a) no danger to society; (b) good-faith effort to lower recidivism risk through programming; and (c) unlikely to recidivate

**For supervised released (not to exceed 12 months):**

- (1) Min/Low risk for last reassessment; or
- (2) Warden approval after determining (a) no danger to society; (b) good-faith effort to lower recidivism risk through programming; and (c) unlikely to recidivate

*See* 18 U.S.C. § 3624(g)

# Any Questions?

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