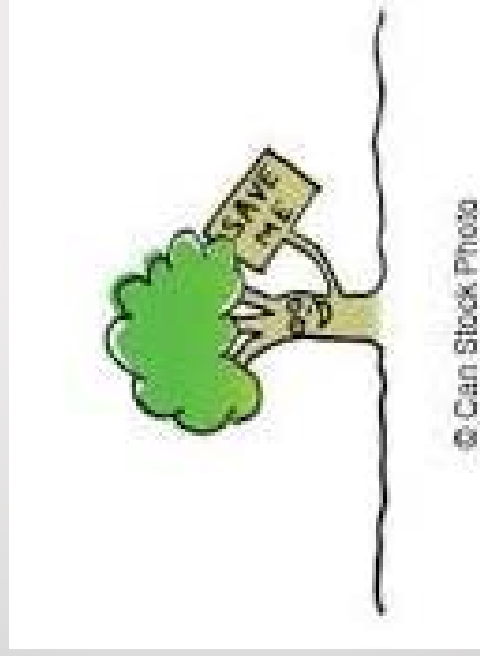




The First Step Act of 2018

Laura S. Wasco, Research & Writing Attorney
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What? No materials?



- Don't worry! This PowerPoint will be posted to our website after the seminar.
- Consider downloading it in lieu of printing.

(Somewhat) Helpful overview

To locate it, go to USSC website and in the Search box at the top, type in:

“Insider Express First Step Act”

Keep in mind – it gives basic information. Don’t rely on it for in-depth analysis or terribly defense-friendly analysis.

United States Sentencing Commission | Office of Education & Sentencing Practice

ESP**INSIDER****EXPRESS**

SPECIAL EDITION

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First Step Act

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40, 1001 402-4400
444
the firststepact.gov
the firststepact.gov

Featured:

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OFFICIAL ACT
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Provision.....Pg. 3

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First Step Act
Signed into Law on December 21st, 2018

The First Step Act (P.L. 115-391) was signed into law by the President on December 21, 2018. The Act deals mostly with reentry of the incarcerated, directing the Federal Bureau of Prisons to take specific actions regarding programming, treatment, and reentry. The Act also contains provisions that will be implemented by the Commission. The Act does not contain any directives to the Commission.

Related to its sentencing reform provisions (Title IV), the Act makes important changes to mandatory minimum penalties and to the safety valve provision (a provision that allows courts to sentence a defendant without regard to the mandatory minimum). Specifically, in relation to Title IV, the Act:

- reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);
- reduces the safety valve ceiling from 18 U.S.C. § 3553(f), increasing the ceiling to 30 years for certain mandatory minimum offenses (Section 402);
- reduces the severity of the “stockpile” of multiple § 924(c) offenses (Section 403); and
- applies retroactively the (or sentencing Act of 2018) which reduced mandatory minimum penalties for crack cocaine offenses (Section 404).

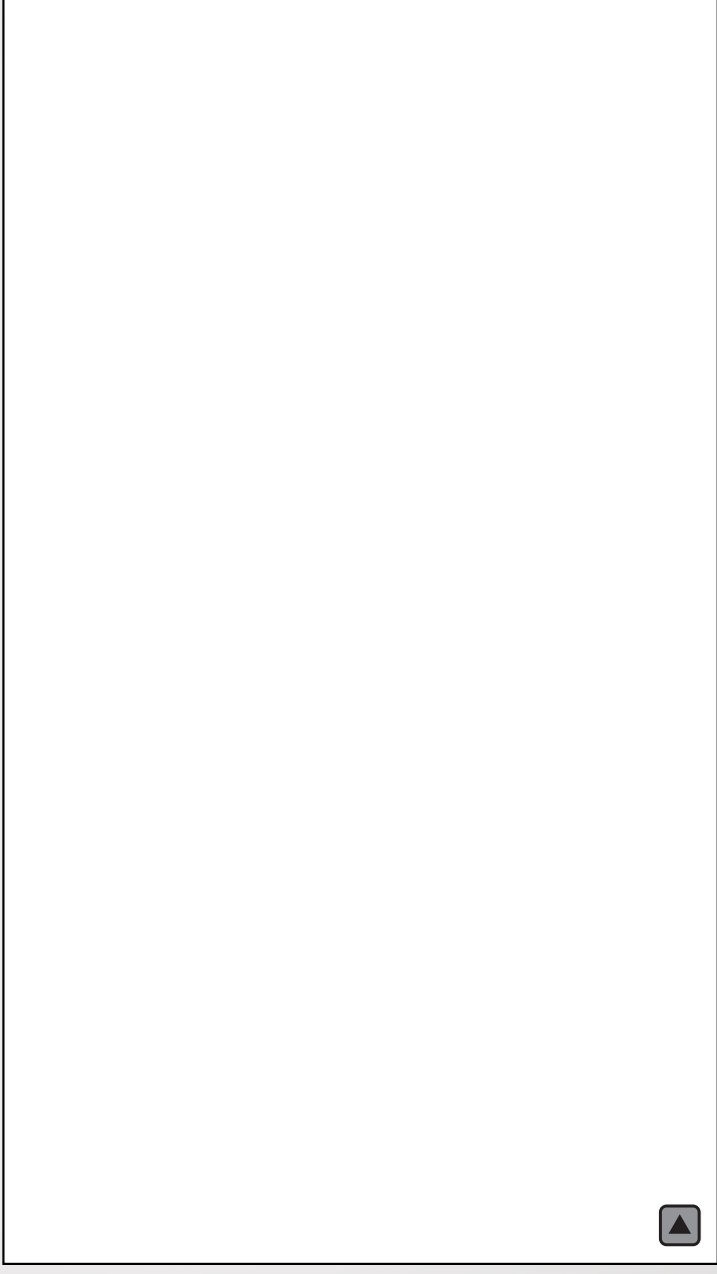
First Step Act Provisions	
Title I	Recidivism Reduction
Title II	Lapse of Offense/Alibi/Alibi/Correctional Officer Self-Protection Act of 2018
Title III	Restraints on Pre-arrest Prisoners Prohibited
Title IV	Sentencing Reform
Title V	Second Chance Act of 2007 Reauthorized
Title VI	Prison Conditions, Treatment for opioid and heroin abuse, and more)



Page 1

What is the First Step Act?

- To try to understand the most popular and retroactive part of the 1SA, let's take a walk down memory lane....



Anti-Drug Abuse Act (1986)

- After the appearance of crack cocaine in the United States,
- The death of Len Bias on June 19, 1986 from cocaine the morning after he signed with the Boston Celtics,
- And the death of Don Rogers from cocaine (safety with Cleveland Browns) on June 27, 1986 at his bachelor party, eight days before his wedding,



- U.S. Rep. Thomas (Tip) P. O'Neill mobilized House Leaders to create an omnibus anti-drug bill that became The Anti-Drug Abuse Act.



Anti-Drug Abuse Act (1986)

- This was the law created to fight the War on Drugs passed by the U.S. Congress.
- It changed federal supervised release from one aimed at rehabilitation into a punitive system.
- It reflected 100-to-1 disparity between amounts of crack cocaine and powder cocaine needed to trigger mandatory minimums.
- For example, with respect to mandatory minimums, a 5-year mandatory minimum was triggered by a conviction for PWID 5 grams of CB (but 500 grams of cocaine powder) and the 10-year mandatory minimum was triggered by a conviction for PWID 50 grams of cocaine base (but 5,000 grams of cocaine powder).

We saw...

- Crack considered “worse” than powder cocaine, despite being the same drug. It was considered instantly addictive and to cause violent behavior.
- Racial disparities in federal sentencing.
- Harsher sentences for African-Americans. Prior to mandatory minimums, federal drug sentences for African-Americans were 11% higher than for Caucasians. Four years post-ADAA, federal drug sentences for African-Americans were 49% higher because lower-level offenders often received the same or more harsh sentence as major drug dealers.

* From ACLU's report, “Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law,” available at: <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law?redirect=cpreirect/27181>.

To combat the crack disparity problem:

- The U.S. Sentencing Commission took some action by implementing Guideline Amendments to lower Base Offense Levels in the Drug Quantity Tables for some amounts of Crack Cocaine Levels:
 - o 2008 - Amendment 705 and 706 – Crack Retro I
 - Took 100-to-1 ratio down to 20-to-1

Fair Sentencing Act (2010)

- On 8/3/2010, the FSA reduced the disparity between amounts of crack cocaine and powder cocaine needed to trigger mandatory minimums down to 18-to-1.
- For example, the FSA lowered the mandatory minimums applicable to many crack cocaine offenders by increasing the amount of crack cocaine needed to trigger the 5-year mandatory minimum from 5 to 28 grams and the 10-year mandatory minimum from 50 grams to 280 grams.
- The change was NOT made retroactive.

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

- United States Supreme Court took up the *Dorsey* case (a pipeline case-Dorsey was sentenced after the Act on 8/3/2010, but committed his offense before the Act came into effect) and it held on 6/21/2012 that the Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. *Dorsey* helped the so-called “pipeline” cases get the benefit of the new mandatory minimums, but everyone else found themselves out of luck.
- In other words, no one pre-Act could receive any benefit of the new mandatory minimums.

To continue to combat the crack disparity problem:

- U.S. Sentencing Commission took more action implementing Guideline Amendments to lower Base Offense Levels in the Drug Quantity Tables for some amounts of Crack Cocaine Levels AND eventually, for ALL DRUGS, including Crack:
 - o 2014 – Amendment 750 – Crack Retro II
 - Took 20-to-1 ratio down to 18-to-1 (but mandatory minimums not retroactive per Amendment 759)
 - o 2016 – Amendment 782 – Drugs Minus 2
 - Took all drugs down two levels

What does the First Step Act stand for?

FIRST STEP Act =

Formerly Incarcerated Reenter
Society Transformed
Safely Transitioning Every Person
Act

•

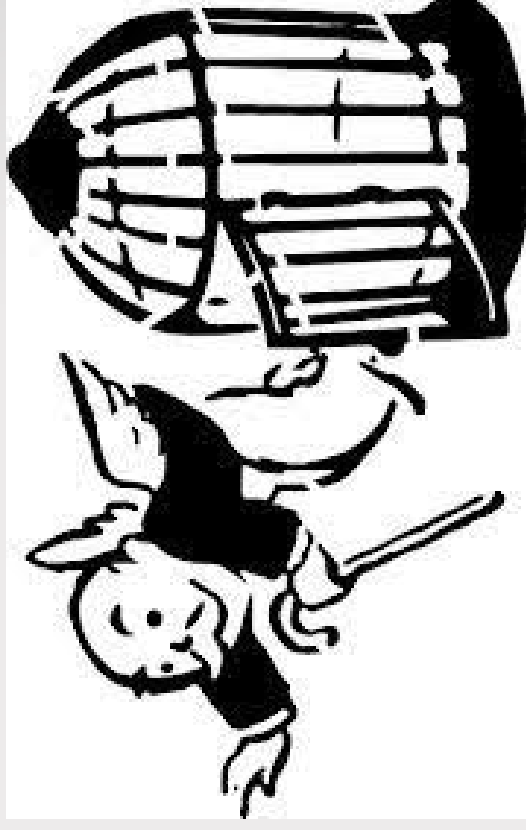
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What is the First Step Act ?

The 1SA is a bill that attempts to remedy injustice by making the Fair Sentencing Act's changes to statutory ranges for crack cocaine defendants retroactive.

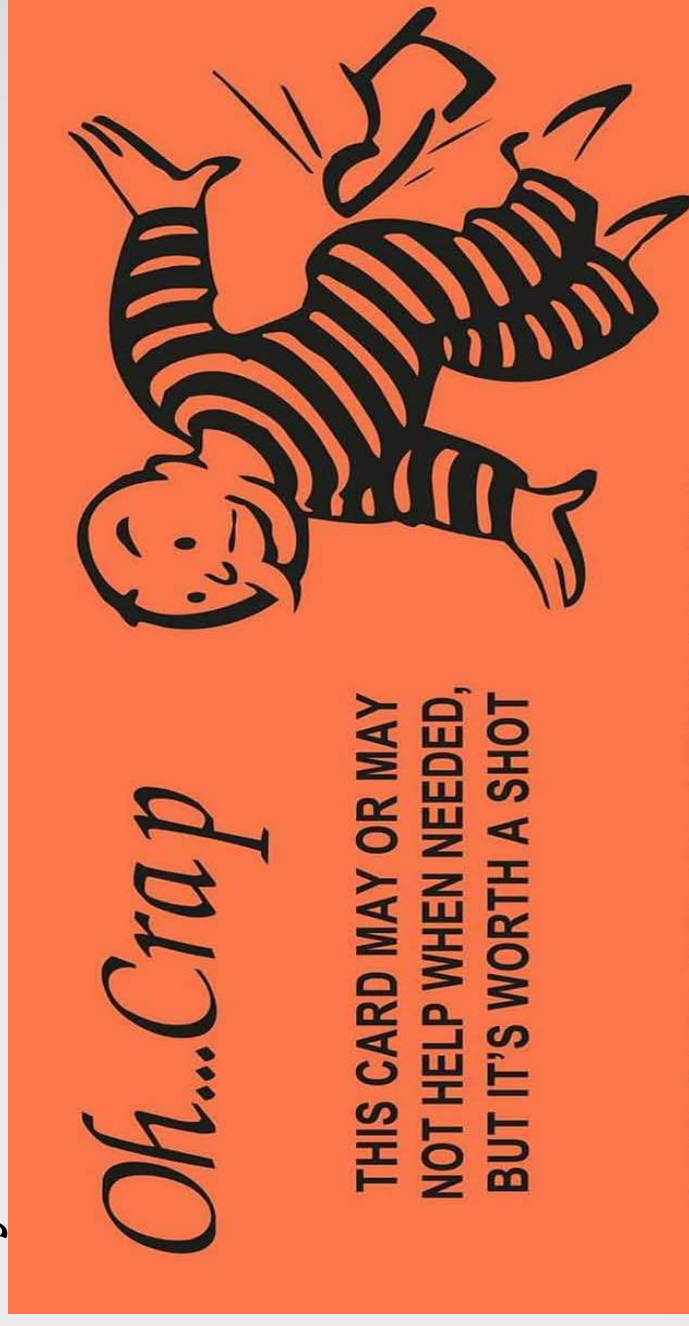
What can you do with the First Step Act?

- Retroactive Section 404 – Motion for Reduction of Sentence!
- What is your client's first thought?
 - o Get out of prison free card!



What's the catch?

- It's discretionary!



First Step Act Sentencing Provisions

- Section 401 – Reduces certain enhanced mandatory minimum penalties for some drug offenders; changes to § 851 enhancement for repeat offenders
- Section 402 – Broadens the safety valve at 18 U.S.C. § 3553(f)
- Section 403 – Clarifies stacking at 18 U.S.C. § 924(c)
- Section 404 – Retroactively Applies the Fair Sentencing Act
- Section 603 – Compassionate Release

Section 401 – Changes to Drug Mandatory Minimums and § 851 Enhancements

- Two Main Points:
 - Mandatory minimums are reduced
 - There are new criteria for enhanced penalties
 - Predicate offenses have changed
 - There is a new time-served requirement



Section 401 – Changes to Drug Mandatory Minimums

STATUTORY PROVISION	ANTI-DRUG ABUSE ACT 100-to-1	FAIR SENTENCING ACT OF 2010 18-to-1	FIRST STEP ACT OF 2018 18-to-1
21 U.S.C. § 841(b)(1)(A)	50 grams or more 10-L	280 grams or more 10-L	280 grams or more 10-L
21 U.S.C. § 841(b)(1)(B)	5 grams or more but less than 50 grams 5-40	28 grams or more but less than 280 grams 5-40	28 grams or more but less than 280 grams 5-40
21 U.S.C. § 960(b)(1) Import/Export	50 grams or more 10-L	280 grams or more 10-L	280 grams or more 10-L
21 U.S.C. § 960(b)(2)	5 grams or more but less than 50 grams 5-40	28 grams or more but less than 280 grams 5-40	28 grams or more but less than 280 grams 5-40

Section 401 – Changes to § 851 Enhancements

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

Section 401 – narrows definition of prior drug conviction (§ 851)

*From ABE

“felony drug offense,” 21 U.S.C. § 802(44)

- ANY offense “relating to” narcotic drugs, marihuana, anabolic steroids, depressant or stimulant substances
- “punishable by imprisonment for more than one year”
- Includes simple possession, misdemeanors in some states
- Regardless of sentence imposed or served
- Regardless of age of conviction

“serious drug felony,” 21 U.S.C. § 802(57)

- Only an offense described in 18 U.S.C. § 924(e)(2) [ACCA]
 - federal offense under 21 U.S.C. § 801 et seq., 21 U.S.C. § 951 et seq., or 46 ch. 705, or
 - state offense for manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance as defined in 21 U.S.C. § 802
 - + maximum term of imprisonment of 10 years or more prescribed by law
- Plus served term of imprisonment more than 12 months
- Plus released from that term within 15 years of commencement of instant offense

"Serious Drug Felony" – keep in mind

*From ABE

- Many state drug offenses, and a few federal, have a statutory maximum of less than 10 years.
- If lower, argue maximum term of imprisonment is the one in effect at the time of the prior conviction. *United States v. Elder*, 840 F.3d 455, 461 (7th Cir. 2016). But see *McNeill v. United States* 563 U.S. 816, 817-18 (2011) (defendant's prior convictions were serious drug offenses under ACCA because even though presently punishable by only 30 and 38 months, they were punishable by 10 years when committed).
- The maximum term of imprisonment is the maximum *this* defendant could have received under a jurisdiction's binding or presumptive sentencing rules, not the statutory maximum a hypothetical defendant could have received. *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), *Carachur-Rosendo v. Holder*, 560 U.S. 563 (2010).
- Not all drug offenses satisfy these definitions.
 - o See, e.g., *United States v. Madkins*, 866 F.3d 1136, 1145 (10th Cir. 2017) ("Kansas law defines 'sale' to include an 'offer to sell,'" which "is broader than distribution."); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) (Texas statute is overbroad because its prohibition of "delivery" includes "offers to sell").
 - o See, e.g., *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018) (New York statute overbroad because it lists HCG, not a controlled substance under the CSA); *United States v. Barrow*, 230 F. Supp. 3d 116, 124 (E.D.N.Y. 2017) (same); *United States v. Epps*, 2018 WL 2958442 (D. Conn. June 13, 2018) (offense under Conn. Gen. Stat. § 21a-277(a) is overbroad because it criminalizes offer to sell, and lists two drugs that are not controlled substances under the CSA).

Section 401 – Added “Serious Violent Felony” as a new basis for § 851

*From ABE

- “an offense described in section 3559(c)(2),” or
- “any offense that would be a felony violation of [18 U.S.C. § 113] if [it] were committed in the special maritime and territorial jurisdiction of the United States”
- For both: “for which the offender served a term of imprisonment of more than 12 months”
- No staleness limit
- Definition for SVF is found at 21 U.S.C. § 802(58)

"Serious Violent Felony" – 18 U.S.C. § 3559(c)(2)(F) *From ABE

- Chapter 18 of the United States Code, Section 3559(c)(2)(F) describes "serious violent felony" as enumerated offenses such as murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses, among others, or an offense "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" and is punishable by a maximum term of imprisonment of ten years or more.
- What kinds of offenses are SVFs?
 - **Murder, manslaughter** other than involuntary manslaughter, **assault with intent to commit murder, assault with intent to commit rape, aggravated sexual abuse, abusive sexual contact, kidnapping, aircraft piracy, robbery carjacking, extortion, arson, firearms use, firearms possession, or attempt, conspiracy, or solicitation to commit any of the above offenses;**
 - an offense "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 is physical force against the person of another may be used in the course of committing the offense" and is punishable by a maximum imprisonment term of 10 years or more.

Notes about "Serious Violent Felony"

- SVF does not include burglary or breaking and entering.
- 18 U.S.C. § 3559(c)(2)(F) references other Code Sections; make sure to compare your client's conviction to the offense(s) listed in § 3559(c)(2)(F). Do the elements criminalize more conduct than the generic offense? Or is there a categorical match? If there is none, argue the prior conviction is not a SVF.
- 18 U.S.C. § 3559(c)(2) has a force clause, but it is limited to force against a person, and it requires a maximum punishment of at least 10 years imprisonment. Make sure your client's exposure was at least 10 years, that his or her priors are not excluded under *United States v. Simmons* or other similar state case law, and that there is not any extended exposure under North Carolina's Structured Sentencing laws (or other similar laws).
- 18 U.S.C. § 3559(c)(2) has a residual clause. If the AUSA or USPO attempts to categorize the client's prior conviction as a SVF under this clause, object under *Johnson, Dimaya, and Davis*.

"Serious Violent Felony" – 18 U.S.C. § 113

*From ABE

- There are six "felony violations." See 18 U.S.C. § 113(a)(1)-(3), (6)-(8) (variations of assaults).
- It does not include "assault by striking, beating or wounding," § 113(a)(4), or "simple assault," (a)(5) – punishable by not more than one year.
- Apply the categorical approach to determine whether the offense as defined by its elements reaches more conduct than the generic offense enumerated in 18 U.S.C. § 3553(c)(2)(f)(i) or § 113. If so, it does not count.
- Also determine if it necessarily has as an element force against the person of another under 18 U.S.C. § 3553(c)(2)(f)(ii). If not, it does not count.
- Need to remember *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); and *Shepard v. United States*, 544 U.S. 13 (2005).

Non-qualifying felonies under 18 U.S.C. § 3559(c)(3) *From ABE

- Robbery, arson, and any offense that would qualify under § 3559(c)(2)(F)(ii) do not qualify if the defendant proves the following by clear and convincing evidence:

(A) Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--

- (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense;
- (ii) and the offense did not result in death or serious bodily injury (as defined in § 1365) to any person.

(B) **Arson in certain cases.**--Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--

- (i) the offense posed no threat to human life; and
- (ii) the defendant reasonably believed the offense posed no threat to human life.”

§ 851 and Ex Post Facto Considerations

*From ABE

- It 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 12/21/2018. See, e.g., *Calder v. Bull*, 3 Dall. 386, 390 (1798); *Peugh v. United States*, 569 U.S. 530, 532–33 (2013).
- 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).



§ 851 and Ex Post Facto Considerations

*From ABE

Client has not yet pled guilty or trial has not yet begun

- Gov't can still file § 851. *See* 21 USC 851(a)(1).
- But not for a “serious violent felony” if instant offense committed before Dec. 21, 2018. *Ex Post Facto* Clause.

Gov't did not file any § 851 before trial or before entry of a guilty plea

- Gov't cannot now file § 851 notice on any basis. *See* 21 U.S.C. § 851(a)(1).

Gov't filed § 851 for “felony drug offense” before trial or before entry of a guilty plea

- Gov't cannot now file § 851 based on a *different drug* conviction, e.g., where the prior was not SDF but a different one is. Too late. *See* § 851(a)(1).
- Gov't cannot now file § 851 based on a “serious violent felony.”
 - o Too late. *See* § 851(a)(1).
 - o + Ex post facto if instant offense committed before 12/21/2018.

Section 402 – Safety Valve

18 U.S.C. § 3553(f)

§2D1.1

(18) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

I want my two
points!



Section 402 – Safety Valve

18 U.S.C. § 3553(f)

Prior Limitation

1. Applied only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, 963

2. The defendant:

- o Does not have more than 1 criminal history point, as determined under the USSG before application of §4A1.3(b) (Departures Based on Inadequacy of Criminal History)*
- o Did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense
- o Offense did not result in death or serious bodily injury
- o Was not a supervisor, manager, leader or organizer, and was not engaged in a CCE as defined by 21 § U.S.C. 848
- o 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 gov't is already aware of the info "shall not" preclude court finding D complied with this requirement.

* This still exists in §5C1.2.

*From ABE

Current Limitation

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 USSG;
- (B) A prior 3-point offense, as determined under the USSG; and
- (C) A prior 2-point violent offense[*]; as determined under the USSG."

***Violent Offense: "As used in this section, the term 'violent offense' means a crime of violence, as defined in [18 U.S.C. §] 16 that is punishable by imprisonment." 18 U.S.C. § 3553(g)**

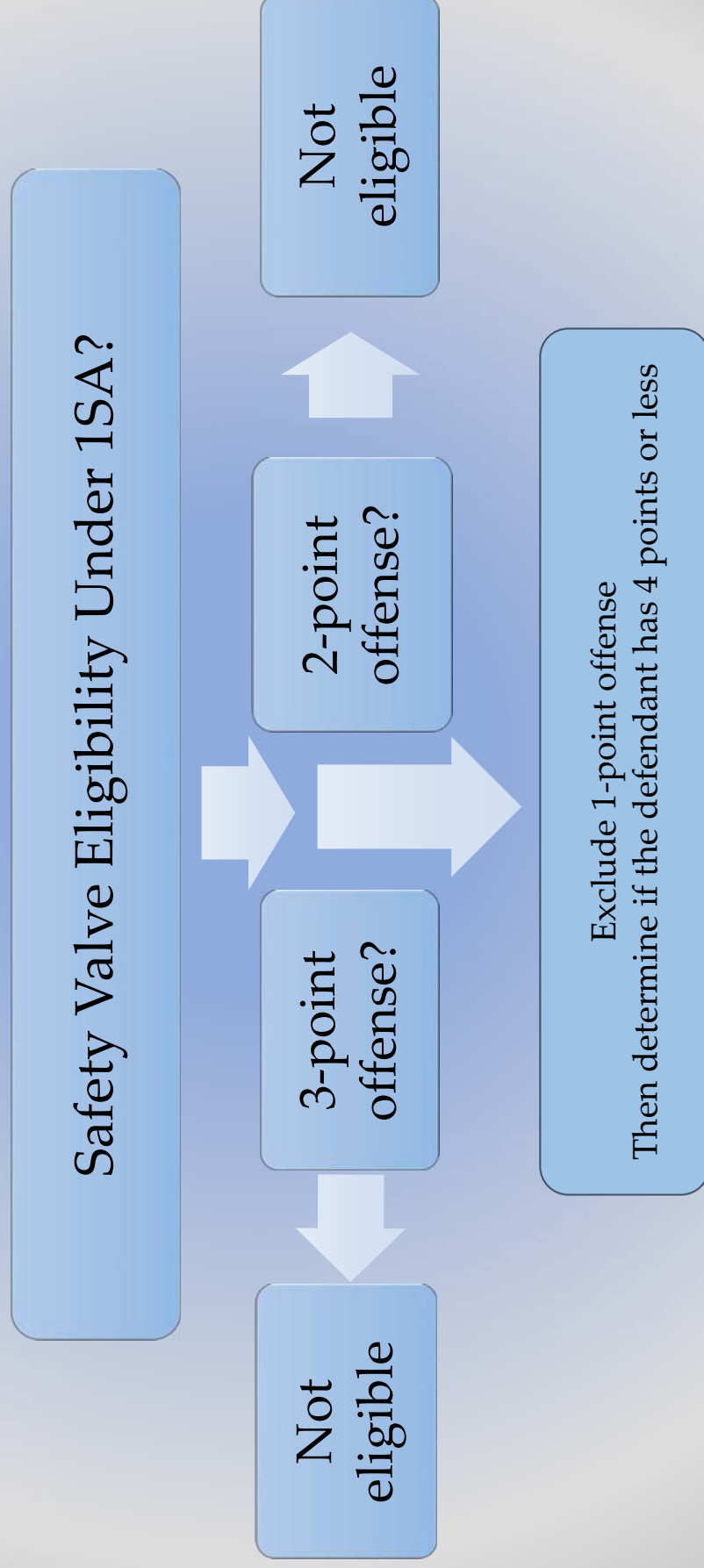
- o § 16(b) is void for vagueness, see *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), so a "violent offense" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. § 16(a), that is punishable by imprisonment.
- o Contrary to USSC's suggestion, this holding applies to criminal cases. See *id.* at 1212-13; *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019).

Section 402 – Safety Valve

18 U.S.C. § 3553(f)

- Provision applies to maritime drug trafficking statutes (crimes under Title 46).
- “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.” (f)(5)
 - o Precludes the judge from relying on such information to impose a higher sentence based on such information.
 - o As always, (f)(5) is not “substantial assistance,” requires no government motion, and is up to the judge.
- **Applies to “convictions entered” on or after date of enactment, 12/21/2018, including when a jury verdict was returned or a guilty plea was entered before that date.**

How does this work?



Section 402 – Safety Valve

18 U.S.C. § 3553(f)(1) - application

*From ABE

- 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.
- Any 2 points for committing the instant offense while under a criminal justice sentence under § 4A1.1(d) that “result[] from a 1-point offense” do not count under § 3553(f)(1)(A).
- If 2 points are added because the defendant was under a criminal justice sentence for a 1-point offense, the offense is still a 1-point offense, not a 3-point offense under § 3553(f)(1)(B).

Section 402 – Safety Valve

18 U.S.C. § 3553(f)(1) - application

*From ABE

- **Do status points count toward the 4 disqualifying points (defendant was under a criminal justice sentence for a 2-point offense count under § 3553(f)(1)(A))?**
 - o USSC “newsletter”: A defendant who “has two prior 2-point convictions (for nonviolent offenses) and ... also received two criminal history points for ‘status’ under §4A1.1(d) ... has more than four criminal history points (excluding any criminal history points resulting from a 1-point offense), and is therefore not eligible for the statutory safety valve.”
 - o No proponents argue - Congress used “1-point,” “2-point,” and “3-point” offenses as a measure of seriousness, no mention of “status” points within the revised statute, and the only 2-point offense that is disqualifying is a “2-point violent offense.”
 - o Yes proponents argue that 18 U.S.C. § 3553(f)(1)(A) refers to 4 points “as determined under the sentencing guidelines,” that this is not correct according to legislative history, and it’s not reflected in DOJ guidance.
 - o Ultimately, USSC has no authority to tell courts that a defendant is ineligible for the *statutory* safety valve.
-

Section 403 – Stacking Provision

18 U.S.C. § 924(c)

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Section 403 – Stacking Provision

18 U.S.C. § 924(c)

- Previously, in *Deal v. United States*, the United States Supreme Court interpreted the now stricken § 924(c)(1)(C) language to require stacking of the 25 year or life minimum for offenses charged in the same case with no intervening conviction. 508 U.S. 129 (1993).
- Congress has now “clarified]” that it always intended § 924(c)(1)(C) to be a true recidivist provision in that 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.
- “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.”

Section 403 – Stacking Provision

18 U.S.C. § 924(c)

- Keep in mind that § 924(c)(1)(D) remains the same:
“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.”
- “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 yet been imposed.*” § 403(b)(emphasis added).

Section 403 – Stacking Provision

18 U.S.C. § 924(c)

§ 924(c) Possession Counts	Before First Step Act	After First Step Act
1 Count	MM 5 years	MM 5 years
2 Counts in Same Indictment	MM of 5 + 25 = 30 years	MM of 5 + 5 = 10 years
3 Counts in Same Indictment	MM of 5 + 25 + 25 = 55 years	MM of 5 + 5 + 5 = 15 years

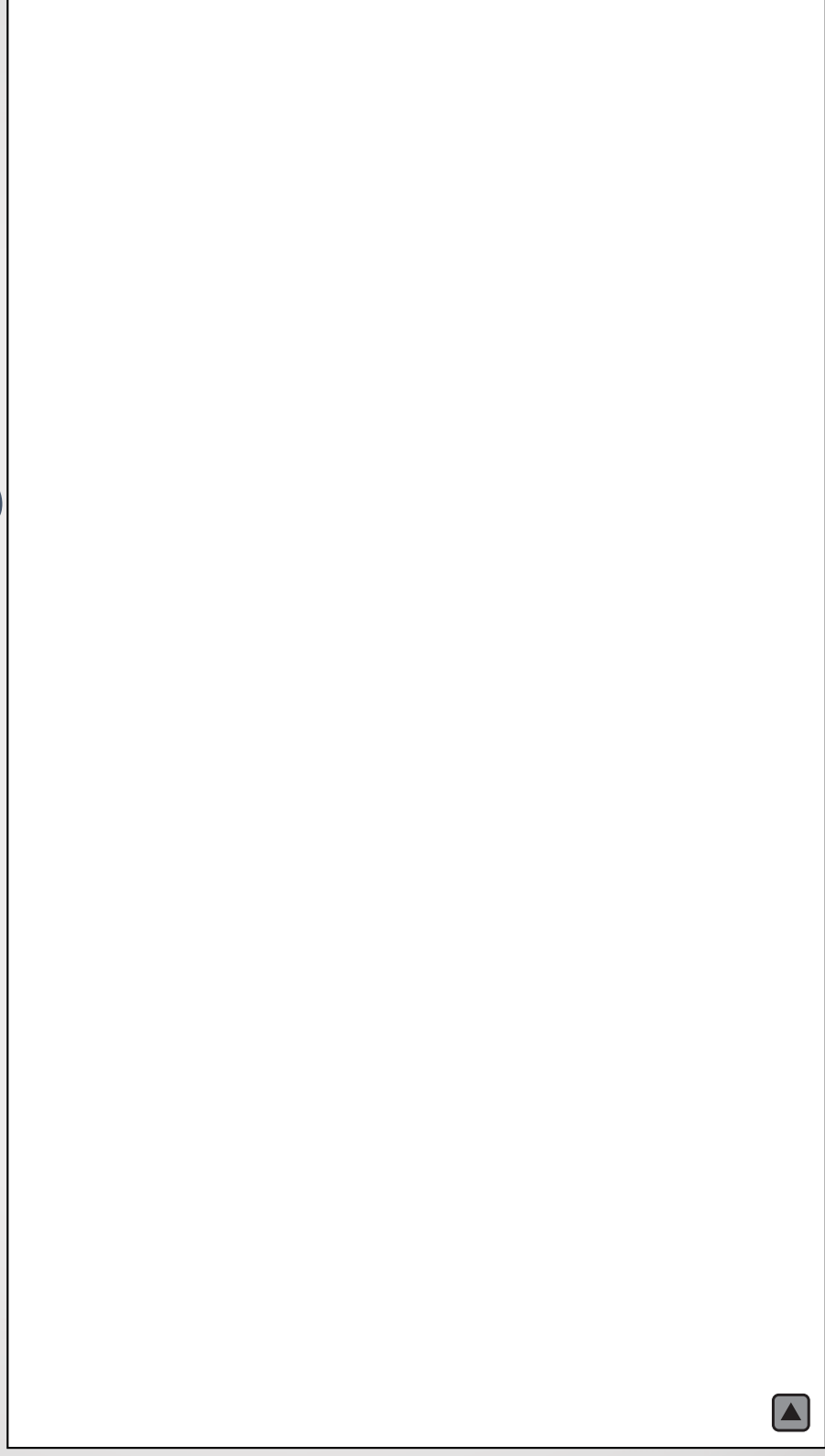
*Neither the 25-year MM nor mandatory life are available unless the violation occurred after a prior § 924(c) violation became final.

Section 404 – Retroactivity of the Fair Sentencing Act

- Matthew Charles
- Sold 216 grams of crack to an informant and illegally possessed a gun
- Sentenced to 35 years in custody
- Described by his sentencing judge as “a danger to society who should simply be off the streets.”
- In BOP, he had zero infractions; studied the bible; was a regular at the law library helping illiterate inmates draft pleadings and read their court paperwork.
- He received a crack retro reduction in 2016, and was released.
- But, after a year and a half, the decision was reversed, and he was sent back to prison.



Section 404 – Retroactivity of the Fair Sentencing Act



Section 404 – Retroactivity of the Fair Sentencing 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. § 404(a).
- Only two circumstances in which the court “shall [not] entertain” an eligible person’s motion:
 - o 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
 - o 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.” §404(c). (One chance under § 404.)
- 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.” § 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.” § 404(c).

Eligibility & Issues

Eligibility

- Only applies to individuals who are charged with crack cocaine offenses.
- Individuals sentenced post-*Dorsey* (after 6/21/2012) have already had the benefit of the Fair Sentencing Act's new mandatory minimums.

Issues

Government has objected in about 90% of these 1SA cases:

- Drug weight (indictment vs. found at sentencing)
- Post-sentencing conduct
- Full vs. partial resentencing
- Request for variance due to changes in the law
- Multiple drugs and complications with MM remaining the same and/or GLR not changing

EDNC Statistics

Judge	Motions Filed	Granted	Denied
Sr. U.S. District Judge Britt	19	15	1
Chief U.S. District Judge Boyle	144	75	2
U.S. District Judge Dever	61	6	7
U.S. District Judge Flanagan	53	17	1
Sr. U.S. District Judge Howard	36	18	1

First Step Act Cases at the Fourth Circuit Court of Appeals

- *Douglas Washington* 19-7042 (E.D. Va.) (and *Brian Antwanie Johnson* 19-7028, consolidated for appeal):
 - o Pursuant to an agreement with the Government, Washington pleaded guilty of conspiring to distribute at least 50 grams of crack cocaine. In the agreement, Washington admitted he was responsible for distributing, or reasonably foresaw that his co-conspirators distributed, between 50 grams and 1.5 kilograms of crack. Because Washington admitted to at least 50 grams, he was subjected to a ten-year mandatory minimum. Washington later moved for a sentence reduction pursuant to the First Step Act. Despite his actual conduct, the district court granted that motion. The government appealed.
 - o **The issue on appeal is whether “Section 404 of the First Step Act ... directs a [district] court to consider solely the drug quantity alleged in the indictment in determining eligibility for a sentence reduction [or] instead requires [the] court to consider a defendant’s conduct.”**

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



Section 603(b) – “Increasing the Use and Transparency of Compassionate Release” *From ABE

- Until now, only BOP could file Compassionate Release Motions; it was not doing so in deserving cases.
- Court may reduce term of imprisonment-and may impose probation or supervised release with or without 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 U.S.C. § 3582(c)(1)(A)(i)

What is the criteria to qualify for CR?

*From ABE

- USSG § 1B1.13 defines what should be “extraordinary and compelling reasons” pursuant to authority delegated by Congress under 28 U.S.C. § 994(t):
 - o Terminal illness, or
 - o 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
 - o 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
 - o Family circumstances: death or incapacitation of minor child’s caregiver, or defendant would be the only available caregiver for incapacitated spouse or registered partner, or
 - o 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, § 4.

Improvements to CR by 1SA

^{*From ABE}

- The defendant can file the motion after fully exhausting administrative remedies or 30 days from receipt of request by warden, whichever is earlier.
- 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 U.S.C. § 3582(c)(1)(A)].”
- BOP shall provide family and extended family opportunity for visitation within 7 days of diagnosis.
- BOP shall upon request of the defendant, his attorney, partner or family ensure BOP employees assist him/her in preparing and submitting request to BOP.
- BOP shall process the request not later than 14 days of receipt of request.
- If the defendant is physically or mentally unable to submit a request to BOP, BOP shall:
 - Inform defendant’s attorney, partner, and family that they may prepare and submit request to BOP, accept and process that request, or
 - Upon defendant’s request, his attorney, partner or family, ensure BOP employees assist defendant in preparing and submitting request to BOP
- Visibly post new procedures at all BOP facilities.

Some practical considerations

*From ABE

- 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
- If you need assistance with a CR case, we have several attorneys in the FPD office who work on these cases.

Contact Information

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THANK YOU!