STEPPING UP IMPLEMENTATION OF THE FIRST STEP ACT

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"Prison Brake: Rethinking the Sentencing Status Quo"

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The First Step Act ("FSA") is a bipartisan federal criminal justice reform bill that was signed into law in December 2018. Pub. L. 115-391, 132 Stat. 5194 (2018). The law is expansive, touching on many aspects of federal sentencing. For this panel, we are focusing on sections of the FSA that may be particularly relevant for criminal defense practitioners today. We will first focus on the sentencing reform provisions of the FSA, section 401, which altered mandatory minimums for federal drug cases, and section 404, which made the Fair Sentencing Act retroactive. Other sentencing reform provisions of the FSA, which may also be discussed, include the change in the federal safety valve statute to increase eligibility for relief below mandatory minimum drug penalties (section 402) and the modification of the severe "stacking penalties" under 18 U.S.C. § 924(c) (section 403). This panel also will discuss section 603(b) of the FSA, which amended the compassionate release statute, 18 U.S.C. § 3582(c)(1)(a), to allow a defendant to file a motion for a sentence reduction directly with his or her sentencing court, where previously only the BOP could file such a motion.

Sentencing Reform Provisions of the FSA:

Drug Recidivism Penalties, section 401:

The FSA reduces mandatory minimum penalties for federal drug offenses under 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(b) and 21 U.S.C. §§ 960(b)(1) and (b)(2). The FSA also changes the definitions for prior convictions under 21 U.S.C. § 851 that enhance statutory drug penalties. The defendant's prior convictions must now meet the new definitions of "serious drug felony" or "serious violent felony." *See* **First Step Act, Sections 401-404, *Summary of Changes* ("Summary")**, at 1-3; *see also* **SRC *First Step Act Overview PowerPoint* ("SRC Powerpoint"),** slides 3-23.

Safety Valve, section 402:

The FSA expands the criteria for the federal drug safety valve under 18 U.S.C. § 3553(f), increasing eligibility for relief below mandatory minimum penalties for drug cases. Specifically, the FSA now applies not only to federal drug offenses but also to drug cases under the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70503, 70506. The FSA also extended safety valve eligibility to defendants who have up to four criminal history points, excluding any criminal history points resulting from a 1-point offense. Defendants who have a 3-point or 2-point violent offense are excluded from eligibility, regardless of their criminal history score. *But see United States v. Diaz*, 18CR1550

(S.D. Cal.) (finding safety valve statute in the conjunctive rather than disjunctive; on government appeal*); see also United States v. Garcon*, 9:19CR80081 (S.D. Fla.); *United States v. Lopez*, 19CR261 (S.D. Cal.) (same). A "violent offense" is a "crime of violence, as defined by 18 U.S.C. § 16, that is punishable by imprisonment." *See* **Summary**, at 5-6; **SRC PowerPoint**, slides 24-31.

Notably, the FSA did not change the safety valve guideline under § 5C1.2 of the United States Sentencing Guidelines Manual, which previously mirrored the statutory language of section § 3553(f). If the defendant met the criteria in § 5C1.2, then §§ 2D1.1(b)(18) (Drug Trafficking) and 2D1.11(b)(6)(Listed Chemicals) provided for a two-level reduction in the guideline offense level. Because the FSA made no changes to this guideline, the two-level reduction can only apply if the defendant meets the old statutory safety valve criteria still listed at § 5C1.2. A defendant who meets only the post-FSA expanded safety valve criteria must ask the court for a 2-level variance to receive this reduction.

Section 924(c) Stacking, section 403:

Section 924(c) prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a "crime of violence" or "drug trafficking crime. The statute prescribes a mandatory minimum penalty of at least five years of imprisonment, with increasingly longer penalties based on how the firearm was used (seven years if the firearm was brandished and ten years if the firearm was discharged). The FSA limits the "stacking" of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense. The 25-year mandatory minimum sentence can still apply if a defendant is convicted of a § 924(c) offense after a prior § 924(c) conviction has become final. *See* **Summary**, at 7; **SRC PowerPoint**, slides 32-34.

Crack Retroactivity, section 404:

The Fair Sentencing Act, made effective on August 3, 2010, increased the quantity of crack cocaine that triggered mandatory minimum penalties under the federal drug statute. Prisoners sentenced before August 3, 2010, who did not otherwise receive the benefit of the statutory penalty changes made by the Act, are eligible under section 404 of the FSA for a sentence reduction. *See* **Summary**, at 8; **SRC PowerPoint**, slides at 35-36. In the year since the FSA was passed, sentences for 2,387 defendants were reduced by an average of six years due to motions filed under section 404. *See* **USSG, *The First Step Act of 2019*: *One Year of Implementation* ("USSG One Year Update")** (Aug. 2020), https://bit.ly/33cvKKi. Federal Defender offices have generally been appointed on all section 404 matters in their district. Defendants seeking section 404 relief out of the SDGA

and the EDKY, which do not have Federal Defender offices, should contact NACDL to secure pro bono counsel (eblackwood@nacdl.org).

Compassionate release, section 603(b):

Section 603(b) of the FSA significantly changed the process for a defendant to seek a reduction in sentence under 18 U.S.C. § 3582. Prior to the FSA, only the BOP could file a compassionate release motion on a prisoner's behalf but rarely did so. From 2006 to 2011, an average of only 24 prisoners were released each year through BOP-filed motions. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), at 1, https://bit.ly/2S3Apb3. To increase the use and transparency of compassionate release, Congress enacted section 603 of the FSA, to authorize courts to modify a term of imprisonment "upon motion of the defendant." 18 U.S.C. § 3581(c)(1)(A). In the year since the FSA was enacted, 145 prisoners were granted release. *See* **USSG One Year Update**. As of September 28, 2020, that number had increased to 1,661 prisoners released, due in large part to the COVID-19 pandemic. *See* BOP, *First Step Act*, https://bit.ly/30wYJ9Z.

Before filing a motion with the district court, the statute requires that the prisoner first make a compassionate release request to the warden of his or her prison. Under the statute, a sentencing court may reduce a defendant's sentence upon their motion "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Most courts have interpreted this language to mean that, 30 days after the prisoner makes his request to the warden, the court can rule on the compassionate release motion. *See, e.g, United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) ("Prisoners who seek compassionate release have the option to take their claim to federal court within 30 days, no matter the appeals available to them."); *see also* **SRC *3 ½ pages on 3 ways to get into Court for Compassionate Release*; NACDL Everything You Wanted To Know about Compassionate Release in the Age of COVID-19 (But Didn't Know To Ask) PowerPoint ("NACDL Powerpoint")**, slides 24-33.

The statutory requirements for a sentence reduction under section 3582, as amended by FSA, are that the court find (1) "extraordinary and compelling reasons" for the reduction, (2) ensure any reduction is consistent with applicable policy statements, and (3) consider the relevant sentencing factors under section 3553(a). 18 U.S.C. § 3582(c)(1)(A). *See* **NACDL PowerPoint**, slides 7-9. Extraordinary and compelling reasons are not defined in the statute, but examples are given in the notes of the policy statement found in U.S.S.G. § 1B1.13. The examples fall into four categories based on a defendant's (1) terminal illness,

(2) serious physical or mental health illness, (3) advanced age and deteriorating health, or (4) compelling family circumstances. *See* U.S.S.G. § 1B1.13 comment n.1(A)–(C). There is also a catch-all provision for "extraordinary and compelling reason[s] other than, or in combination with" the other reasons, as determined by the Director of the BOP. *Id.* comment n.1(D). *See* **NACDL PowerPoint**, slides 10-11. However, given conflicts between section 3582, as amended by the FSA, and § 1B1.13, many courts have found that "[w]hile the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under section 3582(c)(1)(A)(i)." *United States v. Beck*, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019); **NACDL PowerPoint**, slides 12-14. This means that many courts have looked to reasons other than those listed in § 1B1.13 to determine what constitutes extraordinary and compelling reasons. *See* **SRC *Compassionate Release "Extraordinary and Compelling" Timeline*.**

Court have now begun to consider factors beyond the examples listed in § 1B1.13 such as whether a prisoner's age or medical issues places him or her at higher risk for severe complications or death if they were to contract COVID-19; the increased threat of COVID-19 to prisoners in BOP facilities; BOP's failure to provide adequate medical treatment to prisoners; and the fact that a prisoner, sentenced today, might be subject to a much lower sentence in light of intervening changes in the law such as the FSA. The Federal Compassionate Release Clearinghouse has focused its efforts on seeking compassionate release for prisoners with medical conditions that make them particularly vulnerable to COVID-19. *See, e.g., United States v. Jucutan,* No. 1:15CR17, Dkt. 170, at *6 (D. M.I. Sept. 10, 2020) (granting compassionate release for defendant with asthma and obesity in light of the COVID-19 pandemic); *see also* **NACDL PowerPoint**, slides 14-15. There have also been significant and successful efforts to obtain compassionate release for defendants originally sentenced to brutally long sentences who would face much lower penalties today in light of inventing case law, such as the FSA. *See, e.g., United States v. Maumau*, No. 2:08CR758-TC, 2020 WL 806121, at 7 (D. Utah Feb. 18, 2020); ("[T]his court concludes that the changes in how § 924 sentences are calculated is a compelling and extraordinary reason to provide relief on the facts present here," which also included "[the defendant's] young age at the time of the sentence [and] the incredible length of the mandatory sentence imposed"); *United States v. Hope* No. 90-cr-06108-KMW, 2020 WL 2477523 (S.D. Fla. Apr. 10, 2020) (granting compassionate release because defendant would not be mandatory life eligible today in light of the FSA's changes to 21 U.S.C. § 851, has serious medical issues, has already served 30 years in prison, and has been rehabilitated).

Compassionate Release "Extraordinary and Compelling" Timeline

1984

Congress: Comprehensive Crime Control Act/Sentencing Reform Act enacted and create 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t) (originally codified at § 994(s)).

1994

BOP/DOJ: promulgated its regulation for "Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g)) at 28 CFR, part 571, subpart G, §§ 571.60 – 571.64. Current version here (several updates have been made to these regs., but none impact E&C definition).

BOP: issues compassionate release program statement 5050.44 (1-7-1994) (SRC does not have copy of this PS but the 1998 PS references it).

BOP: the BOP Director issued a letter dated July 22, 1994 to Executive BOP Staff re: Compassionate Release Requests, which set forth some general guidance including that CR may be appropriate for persons with terminal illness when life expectancy is 1 year or less, and for "other cases" that "still fall within the medical arena, but may not be terminal or lend themselves to a precise predication of life expectancy [yet are] extremely serious and debilitating." The memo also provides factors facilities should consider when deciding whether to recommend release, including the nature and circumstance of the offense, personal history and age, appropriate release plan, danger to the public, nature and severity of illness, and length of sentence/time left to serve. The 1994 Letter is available on pp. 67-68 here.

1998

BOP: issues compassionate release program statement: P5050.46 (5-19-98) (copy on file with SRC). No real guidance was provided, aside from what is in the CFRs. A summary of this program statement is also available on pp. 61-62 of the 2013 OIG Report.

2006

USSC: promulgates Amendment 683, which added 1B1.13. The Policy Statement just parroted the statute (as it does now) with the addition of §3142(g). The application notes basically said that anything the BOP director said was fine. Application Note 1(A) states that: "A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such [to satisfy this policy statement]." Application Note 2 states that: "Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement."

In its Background for 1B1.13, the Commission characterized the amendment as "an initial step" towards implementing 28 U.S.C. § 994(t) and that the Commission "intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute."

2007

USSC: promulgates Amendment 698, which amends 1B1.13's Application Note (1)(A) and provides several examples of "extraordinary and compelling reasons," including: (i) terminal illness; (ii) permanent physical condition or deteriorating physical or mental health condition that substantially diminishes self-care and for which treatment promises no substantial improvement; (iii) death/incapacitation of family member

who cares for defendant's minor child(ren); and (iv) "As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii)"). According to the Commission, this amendment "provide[s] four examples of circumstances that, provided the defendant is not a danger to the safety of any other person or to the community, would constitute "extraordinary and compelling reasons.'"

2013

BOP: issues a revised program statement: P5050.48 (Apr. 22, 2013), which rescinds P5050.46. This revision (also reflected in a change to the CFRs) removed the regional director from the decision tree and Warden recommendations went straight to the GC's office. Additional guidance for medically based RIS requests was also provided in an internal memorandum, dated April 30, 2013 (SRC does not have copy). *See* Allen Ellis & EJ Hurst II, *Federal BOP Puts a Little Compassion in Its Newest Release Program*, ABA Federal Sentencing (2014).

BOP: issues a revised Program Statement: P5050.49 (August 12, 2013), which incorporated the April 30, 2013 Memo. (SRC does not have copy of this Program Statement but presume it is the P5050.49, CN-1 minus the highlighting). Changes included:

- Criteria regarding requests based on medical circumstances.
- Criteria regarding requests based on non-medical circumstances for elderly inmates.
- Criteria regarding requests based on non-medical circumstances in which there has been the death or incapacitation of the family member caregiver of an inmate's child.
- Criteria regarding requests based on non- medical circumstances in which the spouse or registered partner of an inmate has become incapacitated.
- A list of factors that should be considered for all requests.
- Information regarding the electronic tracking database.

2015

BOP: issues a revised program statement: P5050.49, CN-1 (Mar. 25, 2015), which rescinds P5050.49 and adds a minor addition that BOP's medical director will "develop and issue medical criteria" to help evaluate whether someone qualifies in the "Elderly Inmates with Medical Conditions" RIS category.

2016

USSC: promulgates Amendment 799, which, among other things, broadens the Commission's guidance on what should be considered 'extraordinary and compelling reasons' for compassionate release." but, aside from adding the title "Other Reasons," does not change the wording on the final E/C example. This Amendment also adds Application Note 4, which states that "A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)." But while the Commission acknowledges that "only the Director of the Bureau of Prisons has the statutory authority to file a motion for compassionate release, the Commission finds that the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of reduction)."

- **Note:** The Commission also changes the title of the policy statement from "Reduction in Term of Imprisonment *as a Result of Motion by Director of Bureau of Prisons*" to "Reduction in Term of Imprisonment *Under 18 U.S.C. § 3582(c)(1)(A)*"

2018

Congress: First Step Act of 2018 enacted, which amends § 3582 and, among other things, allows defendants to file CR motions directly with the court.

2019

BOP: issues its current program statement: P5050.50 (Jan. 17, 2019), which rescinds 5050.49 CN-1 and reflects the new requirements codified in § 3582:

- Requiring inmates be informed of reduction in sentence availability and process;
- Modifying definition of "terminally ill;"
- Requiring notice and assistance for terminally ill offenders;
- Requiring requests from terminally ill offenders to be processed within 14 days;
- Requiring notice and assistance for debilitated offenders; and
- Specifying inmates may file directly to court after exhaustion of administrative remedies, or 30 days from receipt of a request by the Warden's Office.

Since the passage of the First Step Act of 2018, the Sentencing Commission has been without a quorum.

Prepared by Sentencing Resource Counsel for the Federal Public and Community Defenders (last updated 9/4/2020)

3½ pages on 3 ways to get into court for Compassionate Release: Exhaustion, 30-Day Lapse, or Excused Compliance

18 U.S.C. §3582(c)(1)(A): permits a court to reduce a defendant's term of imprisoment

> "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf **or**
>
> the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, **whichever is earlier**"

A. Request to Warden[1]: Start the Clock

1. **Attorney-Initiated Requests:** If your client has not already made a request (or if you have concerns your client's request may be insufficient), you can do (re)do it for him. *See* 28 C.F.R. § 571.61 ("The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request.").
   a. App. A: Memo re Attorney-Initiated Request for Compassionate Release
   b. App. B: Sample Email Request
   c. If you don't want to make the request, see App. C: Blank + Sample Client request.

2. **Include information required by BOP:** "The inmate's request shall at a minimum contain the following information:
   a. The extraordinary or compelling circumstances that the inmate believes warrant consideration.
   b. Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment." 28 C.F.R. § 571.61; BOP PS 50505.50; *but see* 18 U.S.C. § 3582(c)(1)(A) (having a release plan or way to pay for treatment are not statutory requirements for a grant in reduction-in-sentence).

3. Note: a request to the warden is not a request for a reduction in sentence. It is a request that BOP make a motion to the court for a reduction in sentence. BOP has no authority to grant, only to move the court. 18 U.S.C. § 3582(c)(1)(A).

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[1] Where there is no BOP warden, submit request to the "Chief Executive Office of the facility," *US v. Franco*, __F.3d__, 2020 Wl 5249369 (5th Cir. Sep. 3, 2020), the Residential Reentry Manager, *US v. Campagna*, 2020 WL 1489829 (S.D.N.Y Mar. 27, 2020), private facility warden, *US v. Arreola-Bretado*, 2020 WL 2535049 (S.D. Cal. May 15, 2020) and/or BOP Director, General Counsel, *US v. Ullings*, 2020 WL 2394096, at *2-*3 (N.D. Ga. May 12, 2020), *US v. Hernandez*, 2020 WL 1684062 (S.D.N.Y. Apr. 2, 2020), *US v. Jepsen*, 2020 WL 1640232, at *3 (D. Conn. Apr. 1, 2020), and/or Regional Counsel, *US v. Gonzalez*, 2020 WL 1536155, at *1 (E.D. Wash. Mar. 31, 2020). You're using email, right? So send it to all of them. Courts have held, and the government generally agrees, no exhaustion is required if there is no warden. S*ee, e.g.*, *US v. Jacobs*, 4:19-CR-00149 (S.D. Iowa Jul. 2, 2020) (no request b/c no warden); *US v. Williams*, 2020 WL 3073320, at *3 (D. Md. Jun. 10, 2020) (same); *US v. Barringer*, 2020 WL 2557035, at *2 (D. Md. May 19, 2020) (same); *US v. Norris*, 2020 WL 2110640, at *2 (E.D.N.C. Apr. 30, 2020) (same);;; *US v. Gonzalez*, 2020 WL 1536155, at *1 (E.D. Wash. Mar. 31, 2020). In *Jacobs*, *supra*, ECF 81 at 3, the government conceded exhaustion is not required where there is no warden. Nevertheless, especially if you are in the Fifth Circuit, find the "CEO." *Franco*, supra.

4. In these emergency conditions, consider filing in court simultaneously with/shortly after request to warden is submitted. If your court will not excuse compliance with § 3582(c)(1)(A), ask for relief on the 31st day.[2]

B. **Two Statutory Gateways to Court: Exhaust or Wait**

1. **Fully exhaust all administrative rights to appeal a failure of the BOP to bring a motion**
   a. Remember: You may not need full exhaustion of administrative rights to get into court. Provision is in alternative: court may grant after full exhaustion **or** 30 days.
   b. Still, if warden denies request within 30 days, begin administrative appeal. 28 CFR §571.63.
      1) Some courts have held that the "lapse of 30 days" means 30 days must pass *without action by warden*: if warden responds within 30 days, administrative exhaustion is required.[3]
      2) Client must "submit" request/appeal himself. You may assist him, but he must submit it himself. 28 C.F.R. §542.16. Prepare the forms, send to your client to submit, send email confirmation.
         a) App. D: Washington Lawyer's Committee Exhaustion Flow-Chart
         b) App. E: forms BP-9, BP-10, BP-11

2. **Or Wait for a "Lapse of 30 Days"**
   a. Many courts have held "lapse of 30 days" requires only that 30 days pass after submitting request: no need to appeal warden denial, even if received within 30 days. [4]

[2] *See, e.g., US v. Tinsley*, 3:12-cr-20 (W.D. Va. Apr. 28, 2020); *US v. Spears*, 2019 WL 5190877, at *3 (D. Or. Oct. 15, 2020). In *US v. Alam*, 960 F.3d 831 (6th Cir. 2020), the Sixth Circuit held that motions should be dismissed if filed prior to the 30 days, but in *US v. Gardner*, 4:14-cr-20735-TGB (E.D. Mich. Jul. 22, 2020), the district court held it would be "ridiculous" to require the defendant to dismiss and immediately refile.

[3] *See, e.g., US v. Peuser*, 2020 WL 2732088, at *1-2 & n. 1 (D. Neb. May 26, 2020) (collecting cases); *US v. Smith*, 2020 WL 2487277, at *6-9 (E.D. Ark. May 14, 2020); *US v. Bolze*, 2020 WL 2521273, at *3 (E.D. Tenn. May 13, 2020); *US v. Ng*, 2020 WL 2301202 (S.D.N.Y. May 8, 2020); US *v. Miller*, 2020 WL 113349, at *2 (D. Id. Jan. 8, 2020). Note: DOJ disagrees with this position. See § B.2.1, below, & nn. 5, 6. Also: check local conditions. SRC understands that in some jurisdictions, the USAO has taken the position that defendant need not appeal a denial of a warden request, but that if he does, 3582(c)(1)(A) requires 30 days to lapse from the appeal.

[4] *See, e.g., US v. Harris*, ___ F.3d ___, 2020 WL 5198870 (3d Cir. 2020) (accepting government's concession of error and vacating DJ order requiring full exhaustion where denial came within 30 days); *US v. Alam*, 960 F.3d 831 (6th Cir. 2020); *US v. Somerville*, 2020 WL 2781585, at *4-5 (W.D. Pa. May 29, 2020); *US v. Griggs*, 2020 WL 2614867, *5 (D.S.C. May 22, 2020); *US v. Hardin*, 2020 WL 2610736, at *2 (N.D. Ohio May 22, 2020); *US v. Washington*, 2:07-cr-00258-CMR, ECF 529, at 3 (E.D. Pa. May 14, 2020); *US v. Jenkins*, 2020 WL 2466911, at *4 (D. Colo. May 8, 2020); *US v. Amarrah*, 2020 WL 2220008, at *4 (May 7, 2020); *US v. Bazzle*, 2:11-cr-00074-BMS, ECF 84 at 1 n.1 (E.D. Pa. May 5, 2020); *US v. Ardila*, 2020 WL 2097736, at *1 (D. Conn. May 1, 2020); *US v. Robinson*, 2020 WL 1982872, at *2 (N.D. Cal. Apr. 27, 2020); *US v. Norris*, 3:17-cr-00106-SRU, ECF 119 at 2 (D. Conn. Apr. 16, 2020); *US v. Spears*, 2019 WL 5190877, at *1, *3 (D. Or. Oct. 15, 2019).

1) This is the "official position" of both DOJ[5] and BOP.[6]
2) District court should not overrule DOJ's position.[7]
   a) Court may not override party's intentional waiver of non-jurisdictional affirmative defense. *Wood v. Milyard*, 566 U.S. 463, 474 (2012).
   b) Courts constrained by principle of party presentation. *US v. Sineneng-Smith*, 140 S.Ct. 1575, 1589 (2020).
   c) Especially when party is the federal government. *Greenlaw v. US*, 554 U.S. 237, 244 (2008).

b. Several courts have *expressly* held the 30 days begins when defendant submits request to BOP staff.[8]
c. Several courts have recognized defendant need not resubmit request for changed circumstances.[9]

C. Equitable Exceptions to Exhaust-or-Wait

1. **Submit warden request first**: To get an equitable exception, you need to show you tried in good faith.

2. **Exceptions**

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[5] *See, e.g.*, Government Brief, *US v. Harris*, 20-1723 (3d Cir. June 9, 2020) (asking COA to reverse and remand because DJ had adopted G's incorrect position on exhaustion); Govt Supplemental Response, *US v. Woodson*, 1:13-cr-20180-CMA (S.D. Fl. June 5, 2020) (stating "the official position of the Department of Justice as well as the Bureau of Prisons"); Brief for the United States, *US v. Alam*, 20-1298, at 24 (6th Cir. Apr. 16, 2020); Brief of the United States, *US v. Millage*, 20-30086, at 14 n. 14 (9th Cir. Apr. 24, 2020); Government Response, *US v. Stephens*, 3:10-cr-00210-WHR, at 8 (S.D. Oh. May 6, 2020); Govt Opposition, *US v. Carter*, 1:16-cr-00156-TSC, at 16 n. 9 (D.D.C. May 4, 2020); Government's Letter, *US v. Meli*, 1:17-cr-00127-KMW (S.D.N.Y May 1, 2020); Govt Response, *US v. Robinson*, 3:18-cr-00597-RS, at 3 (N.D. Cal. Apr. 24, 2020); Answer, *Wilson v. Williams*, 4:20-cv-00794-JG, ECF 10, at 12-13, ECR 10-2 at ¶5 (N.D. Oh. Apr. 17, 2020).

[6] *See, e.g.*, Interoffice Memorandum/Email, *US v. Davis*, 1:96-cr-00912-ERK (E.D.N.Y Aug. 20, 2020) (stating position of BOP Office of General Counsel); Govt Supplemental Response, *US v. Woodson*, 1:13-cr-20180-CMA (S.D. Fl. June 5, 2020) (stating "the official position of the Department of Justice as well as the Bureau of Prisons"); BOP's First Step Act-Frequently Asked Questions, Compassionate Release; Memorandum for Inmate Population, FCI Loretto, Office of the Warden (June 2, 2020); Declaration of Case Management Coordinator at FCI Elkton, *Wilson v. Williams, et al.*, 4:20-cv-00794-JG, ECF 10-2 at ¶ 5 (N.D. Ohio, Apr. 7, 2020). [some links require access to "Defending in the Age of Covid19" folder].

[7] *See, e.g.*,*US v. Whalen*, 2020 WL 3802714, *5-7 (D. Me. Jul. 7, 2020) (holding government waived non-jurisdictional rule by conceding exhaustion); *US v. Barnes*, 2020 WL 3791972, at *3 (E.D. Tenn. Jul. 7, 2020) (same); *US v. Davenport*, 2020 WL 3432630, *2 n.2 (M.D. Pa. Jun. 23, 2020) (same); *cf.* Govt Notice, *US v. Davis*, 20-1695 (2d Cir. Aug. 20, 2020) (G notice to COA of DJ advising COA that if matter were remanded court would agree with *BOP* position 3582(c)(1)(A) requires only 30-day wait).

[8] *See, e.g.*, *US v. Somerville*, 2020 WL 2781585, at *3 n. 2 (W.D. Pa. May 29, 2020); *US v. Feucht*, 0:11-cr-60025-DMM, at 3-4 (S.D.Fl. May 28, 2020); *US v. Bess*, 2020 WL 1940809, at *2 n.2 (W.D.N.Y Apr. 22 2020); *US v. Resnick*, 2020 WL 1651508, *6 (S.D.N.Y. Apr. 2, 2020); *but see US v.* Miller, 2020 WL 2202437, at *1 (D. Id. May 6, 2020).

[9] *See, e.g.*, *US v. Torres*, 1:87-cr-00593-SHS, ECF 556 at 5-7 (S.D.N.Y Jun. 1, 2020); *US v. Welch*, 0:09-cr-60212-KAM, ECF 101 at 3-4 (S.D. Fl. May 21, 2020); *US v. Bazzle*, 2:11-cr-00074-BMS, ECF 84 at 1 n.1 (E.D. Pa. May 5, 2020); *US v. Brown*, 2020 WL 2091802, *3-5 (S.D. Iowa Apr. 29, 2020); *US v. Coker*, 2020 WL 1877800, at *3-4 (E.D. Tex. Apr. 15, 2020); *US v. Resnick*, 2020 WL 1651508, at *6 (S.D.N.Y. Apr. 2, 2020); *US v. Muniz*, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020); *US v. Edwards*, 2020 WL 1650406, at *3 (W.D. Va. April 2, 2020); *but see US v. Butcher*, 2020 WL 2610738, at *1 n.1 (N.D. Oh. May 22, 2020) (issue exhaustion required); US *v. Smith*, 2020 WL 2487277, at *10 (E.D. Ark. May 14, 2020) (request stale).

a. A few courts have held exhaust-or-wait rule is subject to equitable exceptions.[10]
   1) Not jurisdictional
   2) Subject to equitable exceptions.

b. Judicial Conference has proposed legislation permitting exceptions during national emergency where administrative exhaustion is futile or 30-day lapse would cause serious harm to defendant's health.

c. Senators Durbin and Grassley have proposed legislation reducing the 30-day period to 10-days during COVID19 pandemic national emergency.

3. **No Exceptions**
   a. Nevertheless, most courts—including every court of appeal to have addressed the question--have held the rule does not permit equitable exceptions.[11]

   b. Where court will not excuse compliance, but agrees it can grant after 30 days, it will generally make more sense to wait 30 days than to appeal district court's decision.[12]

   c. Should I appeal a ruling that my client must exhaust all administrative rights because the warden denied his request within 30 days? Harder question. Consider a motion for reconsideration in light of DOJ's "official position" or exploring the possibility of expediting final administrative decision.

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[10] *See, e.g., US v. Jackson*, 2020 WL 2735724, at *2 (W.D. Va. May 26, 2020); *US v. Morris*, 2020 WL 2735651, at *3-6 (D.D.C. May 24, 2020); *US v. White*, 2020 WL 2557077, *2-3 (E.D. Mich. May 20, 2020); *US v. Schneider*, 2020 WL 2556354, at *2-5 (C.D. Ill. May 20, 2020); *US v. El-Hanafi*, 2020 WL 2538384, at *2-3 (S.D.N.Y May 19, 2020); *US v. Rountree*, 2020 WL 2610923, at *4-6 (N.D.N.Y May 18, 2020); *US v. Agomuoh*, 2020 WL 2526113, at *4-7 (May 18, 2020); *US v. Cardena*, 2020 WL 2719643, at *2-3 (N.D. Ill. May 15, 2020); *US v. Arreola-Bretado*, 2020 WL 2535049, at *2 (S.D. Cal. May 15, 2020); *US v. Al-Jumail*, 2020 WL 2395224, at *2-4 (E.D. Mich. May 12, 2020); *US v. Hunt*, 2020 WL 2395222, at *3-4 (E.D. Mich. May 12, 2020); *US v. Ramirez*, 2020 WL 2404858, at *9 (D. Mass. May 12, 2020); *US v. Valencia*, 2020 WL 2319323, at *2-6 (S.D.N.Y May 11, 2020); *US v. Connell*, 2020 WL 2315858 (N.D. Cal. May 8, 2020); *US v. Pena*, 2020 WL 2301199, at *2-3 (S.D.N.Y May 8, 2020); *US v. Flenory*, 2020 WL 2124618, at *5 (E.D. Mich. May 5, 2020); *US v. Kelly*, 2020 WL 2104241, at *3-6 (S.D. Miss. May 1, 2020); *US v. Pinkerton*, 2020 WL 2083968, at *3–5 (C.D. Ill. Apr. 30, 2020); *US v. Love*, 14-cr-4-PLM, ECF 41, at 3 (W.D. Mich. Apr. 21, 2020); *US v. Bess*, 2020 WL 1940809, at *7 (W.D.N.Y. Apr. 22, 2020); *US v. Sanchez*, 2020 WL 1933815, at *4–5 (D. Conn. Apr. 22, 2020); *US v. Atwi*, 2020 WL 1910152, at *3 (E.D. Mich. Apr. 20, 2020; *US v. Gileno*, 2020 WL 1916773, at *5 (D. Conn. Apr. 20, 2020); *US v. Scparta*, 2020 WL 1910481, *4-8 (S.D.N.Y Apr. 20, 2020); *US v. Guzman Soto*, 2020 WL 1905323, at *4–5 (D. Mass. Apr. 17, 2020); *US v. Russo*, 2020 WL 1862294, at (*4-7 (S.D.N.Y. Apr. 14, 2020); *US v. Ben-Yhwh*, 2020 WL 1874125, at *3 (D. Haw. Apr. 13, 2020); *US v. Haney*, 2020 WL 1821988, at *3-4 (S.D.N.Y. Apr. 13, 2020); *US v. Sawicz*, 2020 WL 1815851, at *2 (E.D.N.Y Apr. 10, 2020); *Miller v. US*, 2020 WL 1814084, at *2-3 (E.D. Mich. Apr. 9, 2020); *US v. Carver*, 4:19-cr-6044-SMJ (E.D. Wash. Apr. 8, 2020); *US v. Zukerman*, 2020 WL 1659880, at *3 (SDNY Apr. 3, 2020); *US v. Colvin*, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020); *US v. Perez*, 2020 WL 1546422, at *3 (S.D.N.Y. Apr. 1, 2020).

[11] *See US v. Franco*, ___F.3d ___, 2020 WL 5249369 (5th Cir. Sep. 3, 2020); *US v. Alam*, 960 F.3d 831 (6th Cir. 2020); *US v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *US v. Carter*, 2020 WL 254425, at *1 & n.2 (S.D.W.V. May 19, 2020) (collecting cases).

[12] *See* SRC Appeals Outline, "When at first you don't succeed . . ."

Attorney-Initiated Requests for Compassionate Release

If your client is unable to submit his own request, or staff will not take it, you may send a request on behalf of your client:

Send request to the email address for the facility on BOP.gov (e.g., HER/ExecAssistant@bop.gov), and cc: the attorney for the facility (pp.53-54 of https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf). Ask for confirmation of receipt.

In the folder **Communicating with BOP**, there is additional BOP contact information, as well as a method for obtaining BOP numbers, available only when connected to your office network via VPN

In your request, indicate that the request is being sent by you because, under Program Statement 5050.50 (3)(a) or (b) the client is either terminally ill or debilitated, that he is also at heightened risk for serious illness or death from COVID19, and therefore you are asking the Warden accept and process the request from the attorney.

Remember, PS 5050.50 provides that the inmate's request shall at a minimum contain the following information:

(1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.

(2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.

Authority:

PS 5050.50: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (dated 2019.01.17); https://www.bop.gov/policy/progstat/5050_050_EN.pdf

At page 3, the Program Statement quotes 28 C.F.R. §571.61: "The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request. Staff shall refer a request received at the Central Office to the Warden of the institution where the inmate is confined."

2. **INITIATION OF REQUEST – EXTRAORDINARY OR COMPELLING CIRCUMSTANCES**

§ 571.61 Initiation of request – extraordinary or compelling circumstances.

a. A request for a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) shall be submitted to the Warden. Ordinarily, the request shall be in writing, and submitted by the inmate. An inmate may initiate a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing. The inmate's request shall at a minimum contain the following information:

(1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.

(2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.

b. The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request. Staff shall refer a request received at the Central Office to the Warden of the institution where the inmate is confined.

A request for a RIS is considered "submitted" for the purposes of 18 USC §3582 (c)(1), when received by the Warden in accordance with this section.

DTC (5/21/2020)

Davina Chen

From: Davina Chen
Sent: Thursday, May 21, 2020 8:28 AM
To: Davina Chen
Subject: Sample CR and HC request to warden

From: Miles Pope
Sent: Tuesday, April 14, 2020 4:35 PM
To: 'FLF/ExecAssistant@bop.gov' <FLF/ExecAssistant@bop.gov>
Cc: 'NCRO/ExecAssistant@bop.gov' <NCRO/ExecAssistant@bop.gov>; 'rwinter@bop.gov' <rwinter@bop.gov>
Subject: Xxxxx X. Xxxxxx (Register No. XXXXXX-XXX)

Good afternoon,

I'm an assistant federal public defender, and I am writing on **:** Xxxxx X. Xxxxxx's behalf to both renew his request for compassionate release and ask that he be promptly released from custody to serve the remainder of his term on home confinement. Mr. Xxxxxx is highly supervisable and poses a low risk of reoffending. Additionally, his advanced age and grave medical problems place him at a high risk of contracting a severe or fatal case of COVID-19. Moreover, Mr. Xxxxxx has a sound release plan. He will release to live with his mother in a safe environment – drug and crime-free – and he will enjoy abundant support from his many family members.

Compassionate Release:

Mr. Xxxxxxx's advanced age and serious, chronic medical problems (including congestive heart failure, high blood pressure, asthma, and diabetes (PSR ¶ 63) place him at high risk of contracting a severe or fatal case of COVID19. His serious medical condition substantially diminishes his ability to provide self-care within the environment of a correctional facility and he is not expected to recover from these serious medical conditions.

He can live with his motion, *******, who can be reached at (***) ***-****. She lives at **********, which is a 2 bedroom apartment, where she lives in with her daughter.

He is not a danger to the community as he is a low risk offender, has not committed any acts of violence, and has no serious disciplinary history in BOP

Home Confinement

I believe that Mr. Xxxxxxx should receive priority treatment for release to home confinement under Attorney General Barr's memorandum. He meets each criterion set forth in that memo for prioritizing compassionate release:

- His age and medical conditions make him extremely vulnerable to COVID-19
- As I understand it, he is housed in minimum security
- Based on my understanding of his risk factors, his PATTERN score should be minimum
- He has a verifiable reentry plan to live in a safe, drug-free, and supportive environment
- His non-violent drug offense and his criminal history reflect that he poses virtually no danger to the community

In light of these issues, release to home confinement or a grant of compassionate release would be appropriate, and I am asking you to take whatever steps you can to expeditiously transfer Mr. Xxxxxx out of custody.

Please acknowledge receipt of this request, and please do not hesitate to reach out to me with any questions you may have.

Kind regards,
Miles Pope
Assistant Federal Defender
Federal Defender Services of Idaho

Submitted to Prison Staff on:
_____/_____/_____

_____/_____/2020
(Month) (Day)

Dear Warden_____:
(Warden's Last Name)

My name is_____and my Register No. is_____. I am writing to respectfully request that I be considered for an early release from prison under the Compassionate Release Program, under 18 U.S.C. § 3582(c)(1), and that you treat this as a formal request for a reduction in sentence (RIS).

I believe I am a good candidate for Compassionate Release for the following reasons.

I have been incarcerated since_____. I am currently_____-years-old.

Since I have been incarcerated, I have received the following medical treatment: _____

_____.

My current physical and mental health problems include: _____

_____

_____.

I take the following medications: _____

_____

_____.

I believe I am (or a family member who needs my care is) at high risk of complications from COVID-19

because _____.

Other information that makes me a good candidate for compassionate release includes: _____

_____

_____.

When I am released from prison, I plan to live with _____

at _____.

When I am released, I will receive medical treatment at: _____

The cost of my medical treatment will be paid by: _____

Based on the information above, given my personal circumstances and the COVID-19 pandemic, I request early release under the Compassionate Release Program.

Thank you for your time and consideration.

_____, Register Number: _____
(Full name)

May / 1 / 2020
(month) (day)

Submitted to Prison Staff on:
May / 3 / 2020

Dear Warden Smith:
(Warden's Last Name)

My name is Ted Jones and my Register No. is 77777-089. I am writing to respectfully request that I be considered for an early release from prison under the Compassionate Release Program, under 18 U.S.C. § 3582(c)(1), and that you treat this as a formal request for a reduction in sentence (RIS).

I believe I am a good candidate for Compassionate Release for the following reasons. I have been incarcerated since May 1, 2010. I am currently 47 -years-old.

Since I have been incarcerated, I have received the following medical treatment: regular evaluations to treat and check my medication for COPD, diabetes, high blood pressure, and high cholesterol I have also talked with a counselor about my mental health.

My current physical and mental health problems include: COPD, Type II diabetes, high blood pressure, high cholesterol, chronic back and knee pain, obesity, depression and anxiety.

I take the following medications: albuterol, insulin, lisinopril, atorvastatin, wellbutrin.

I believe I am (or a family member who needs my care is) at high risk of complications from COVID-19 because my mother is 75 year's old and has had a stroke; I have COPD and high blood pressure.

Other information that makes me a good candidate for compassionate release includes: My mother had a stroke several years ago and can't take care of herself. My sister takes care of her, but needs more help. I have never lost any good time. My last write up was in 2012.

When I am released from prison, I plan to live with my mother, Alice Jones, and my sister, Kate at their house at 2020 78th Street, Kenosha, WI, 53142.

When I am released, I will receive medical treatment at: ABC Medical Clinic, Address, City, State.

My medical treatment will be paid by XYZ Insurance Company, Address, City, State.

Based on the information above, given my personal circumstances and the COVID-19 pandemic, I request early release under the Compassionate Release Program.

Ted Jones, Register Number: 77777-089

WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

BOP Grievance Guide: A Guide to Administrative Remedy Requests at Federal Prisons

Based on P.S. 1330.18

.

Following all the steps helps to protect your legal rights.

You must finish all administrative steps before suing about prison conditions under federal law.

If you stop before completing the entire process, for any reason, a court may say that you have not "exhausted" your administrative remedies and dismiss your case. There are strict time limits you must follow in order to complete the grievance process.

This Guide was created by the D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. It was last updated in July 2018. It is based on BOP Program Statement 1330.18 published January 6, 2014.

It is not an official document of the Bureau of Prisons.

It does not replace the advice of an attorney. It is not legal advice and does not create an attorney client relationship. You are responsible for meeting all necessary deadlines and requirements.

11 Dupont Circle, NW Suite 400 ▪ Washington, DC 20036 ▪ Telephone: 202-319-1000 ▪ Facsimile: 202-319-1010 ▪ washlaw.org

(202) 775-0323 CLIENT LINE- COLLECT CALLS ACCEPTED

Updated July 2018

This guide will help you with the Administrative Remedy Request process.

You must finish all administrative steps before suing about prison conditions under federal law. This is because of the Prison Litigation Reform Act (PLRA).

If you stop before completing the entire process, for any reason, the court may say that you have not "exhausted" your administrative remedies and dismiss your case. There are strict time limits you must follow in order to complete the grievance process.

It also creates a paper trail and shows you tried to resolve the problem. It might even work.

General Tips

- The full regulation is in P.S. 1330.18. You can read it in your law library.
- Use one grievance form for each complaint, instead of writing about multiple unrelated issues on one form.
- Describe the problem in as much detail as possible. If you run out of room, you can attach ONE extra letter-size page.
- Make at least three copies of each of your grievances. You can write out the copies by hand.
- If you miss the deadline to file a grievance, file it anyway. Explain in the grievance why you are late.
- For situations in which filing a grievance with the staff at the prison would put you in danger, you can skip Step 1, the informal complaint, and send your BP-9 form straight to the Regional Director. You should write "Sensitive" on the grievance and explain why filing the grievance with staff at the prison would put you in danger.
- Keep copies of any documents you include with your grievance – you will not get them back.
- Include copies of prior grievances and responses as you move through each step (e.g., when filing a BP-10, you must include a copy of your BP-9 and the Warden's response).

Sample Language

Review the sample language below to get an idea of how to write your own grievance. A good grievance is one that specifies why you are making the request and states exactly what you want. We have provided a good example and a bad example of two common situations.

Medical care situation:

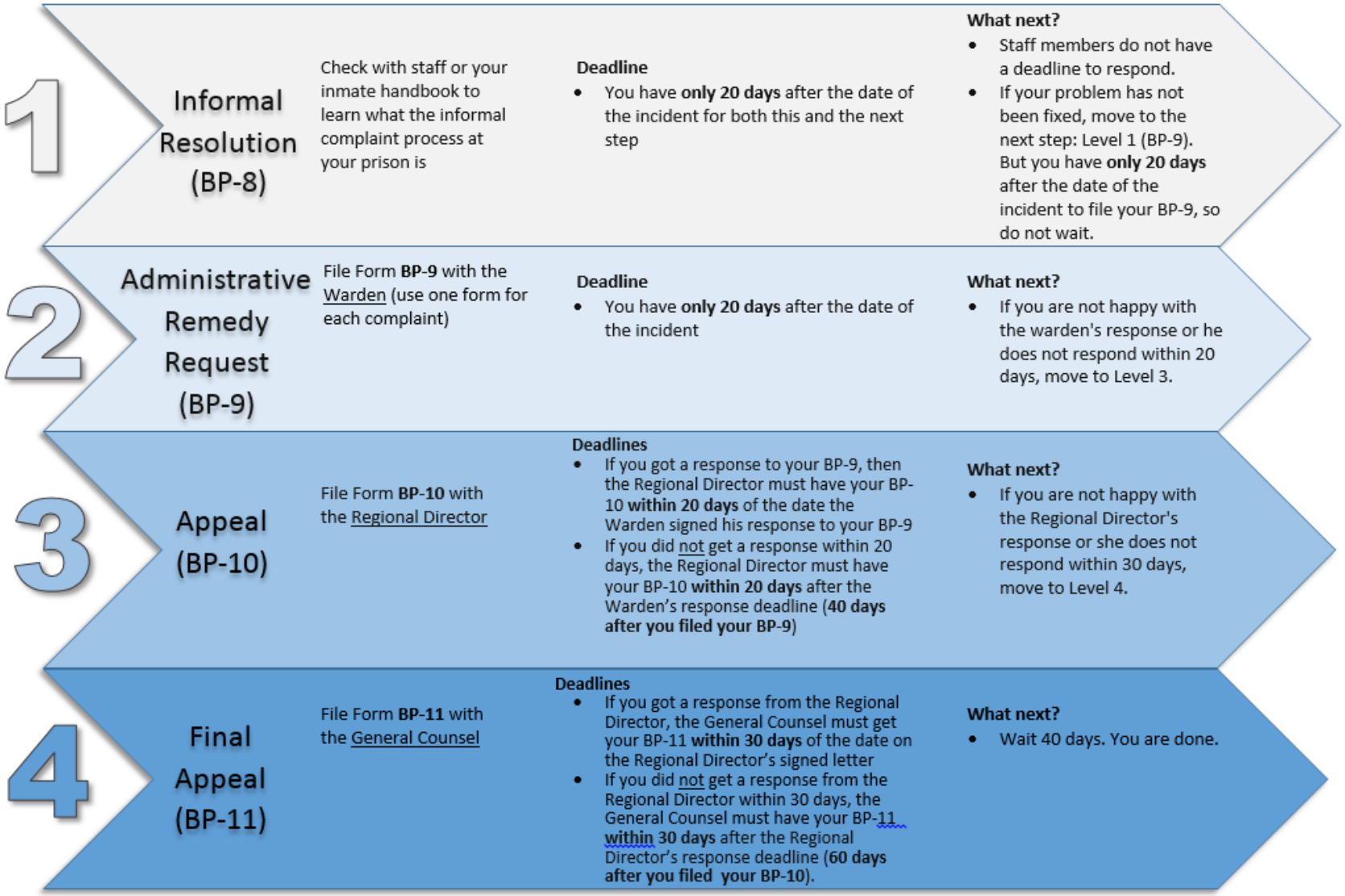
- Bad example: "*I want an x-ray done on my knee.*"
- Good example: "*I have had sharp pain in my knee for the last 3 weeks. I would like to get an x-ray done as soon as possible to get a diagnosis of my issue. If an x-ray is not appropriate, I would like to know why not and I would like appropriate treatment.*"

Assault situation:

- Bad example: "*I want to be moved out of my cell."*
- Good example: "*I was assaulted by my cellmate on March 18, 2018. We have not been separated, and I fear for my safety. I would like to be separated from him immediately.*"

***Note: Complaints about sexual abuse and involving disability issues have slightly different procedures.** If you don't have our guides to those issues, write and ask us for a copy.

Overview of the Administrative Remedy Process



ADMINISTRATIVE REMEDY REQUEST WORKSHEET

1. INFORMAL RESOLUTION

A. Date of Incident: _____
B. Add 20 days to date on line **A**: _____
This is your deadline to file your Informal Complaint and BP-9.
C. Date you made an Informal Complaint: _____

2. BP-9:

Submit the original BP-9 form with carbon copies by the date calculated on line **B.** *If you use an extra page, you must submit two copies to the Warden. Keep at least one copy of your full submission at all times.*

D. What day did you file your BP-9? _____
E. Add 20 days to the date on line **D**: _____
This is when you should receive a response to your BP-9. The warden has 20 days to respond.

If you receive a Continuance Form that extends the Warden's deadline, update line ***E*** *with the new response deadline.*

Did you receive a response to your BP-9?

If yes:	If no:
F. Date of Warden's response: _____	**F.** Date on Line **E:** _____
G. Add 20 days to date on line **F:** _____	**G.** Add 20 days to date on line **F:** _____
This is your deadline to file your BP-10.	*This is your deadline to file your BP-10.*

3. BP-10:

Submit the original BP-10 form with carbon copies by the date calculated on line **G.** *If you use an extra page, you must submit three copies to the Regional Director. Keep at least one copy of your full submission at all times. You can find the address for your Regional Director on Page 6.*

H. What day did you file your BP-10? _____
I. Add 30 days to the date on line **H**: _____
This is when you should receive a response to your BP-10. The Regional Director has 30 days to respond.

Did you receive a response to your BP-10?

If yes:	If no:
J. Date of Reg. Director's response: _____	**J.** Date on Line **I:** _____
K. Add 30 days to date on line **J:** _____	**K.** Add 30 days to date on line **J:** _____
This is your deadline to file your BP-11. You should send it as early as possible to make sure it arrives before the deadline.	*This is your deadline to file your BP-11. You should send it as early as possible to make sure it arrives before the deadline.*

4. **BP-11:**
   Submit the original BP-11 with carbon copies by the date calculated on line ***K.*** *If you use an extra page, you must submit four copies of it to the Office of General Counsel. Keep at least one copy of your full submission at all times. You should send it to this address:*

   National Inmate Appeals Administrator
   Office of General Counsel
   320 First St., NW
   Washington, DC 20534

   L. What day did you file your BP-11? _____
   M. Add 40 days to the date on line **L**: _____
   This is when you should receive a response to your BP-11. General Counsel has 40 days to respond.

The grievance process is now complete. This means that you have finished all of the administrative steps required before suing about prison conditions under federal law.

***Note: If you are filing about a disability issue, remember that there is another administrative process to complete before you can go to court.**

If you do file in court, it is good to have two copies of what you submitted at each level.

Addresses of Bureau of Prisons Regional Directors

If you are in Delaware, Kentucky, Maryland, North Carolina, Tennessee, Virginia, or West Virginia:
Regional Director
Mid-Atlantic Regional Office
302 Sentinel Drive, Suite 200
Annapolis Junction, MD 20701

If you are in Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, or Wisconsin:
Regional Director
North Central Regional Office
400 State Avenue, Suite 800
Kansas City, KS 66101

If you are in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, or Vermont:
Regional Director
Northeast Regional Office
U.S. Custom House, 7th Floor
200 Chestnut Street
Philadelphia, PA 19106

If you are in Arkansas, Louisiana, New Mexico, Oklahoma, or Texas:
Regional Director
South Central Regional Office
U.S. Armed Forces Reserve Complex
344 Marine Forces Drive
Grand Prairie, TX 75051

If you are in Alabama, Florida, Georgia, Mississippi, Puerto Rico, or South Carolina:
Regional Director
Southeast Regional Office
3800 Camp Creek Parkway, S.W.
Building 2000
Atlanta, Georgia 30331

If you are in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, or Wyoming:
Regional Director
Western Regional Office
Federal Bureau of Prisons
7338 Shoreline Drive
Stockton, CA 95219

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST

_____ _____
DATE | SIGNATURE OF REQUESTER

Part B- RESPONSE

_____ _____
DATE | WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____ _____
DATE | RECIPIENT'S SIGNATURE (STAFF MEMBER)

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL

_____ _____

DATE | SIGNATURE OF REQUESTER

Part B - RESPONSE

_____ _____

DATE | REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: _____

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____ _____

DATE | SIGNATURE, RECIPIENT OF REGIONAL APPEAL

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A—REASON FOR APPEAL

_____ _____

DATE | SIGNATURE OF REQUESTER

Part B—RESPONSE

_____ _____

DATE | GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: _____

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____ _____

DATE | SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

Printed on Recycled Paper

BP-231(13)
APRIL 1982

First Step Act, Sections 401-404 – Enacted Dec. 21, 2018
Summary of Changes

Old 841(b)(1)(A)-(B)/960(b)(1)-(2)	New 841(b)(1)(A)-(B)/960(b)(1)-(2) as amended by Sec. 401
21 USC § 841(b)(1)(A) • 10 years to life for drug type and quantity • 20 years to life if one prior final conviction for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if two or more prior final convictions for "felony drug offense" • Life if one prior final conviction for "felony drug offense" + drug was but/for cause of death/SBI	21 USC § 841(b)(1)(A) • 10 years to life for drug type and quantity • **15** years to life if one prior final conviction for "**serious drug felony**" or "**serious violent felony**" • 20 years to life if drug was but/for cause of death/SBI • **25 years to life** if two or more prior final convictions for "**serious drug felony**" or "**serious violent felony**" • Life if one prior final conviction for "**serious drug felony**" or "**serious violent felony**" + drug was but/for cause of death/SBI
21 USC § 841(b)(1)(B) • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • □ Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI	21 USC § 841(b)(1)(B) • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" • 20 years to life if drug was but/for cause of death/SBI • □ Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" + drug was but/for cause of death/SBI
21 USC § 960(b)(1) • 10 years to life for drug type and quantity • 20 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • □ Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI	21 USC § 960(b)(1) • 10 years to life for drug type and quantity • **15** years to life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" • 20 years to life if drug was but/for cause of death/SBI

	• Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" + drug was but/for cause of death/SBI
21 USC § 960(b)(2) • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI	21 USC § 960(b)(2) • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" + drug was but/for cause of death/SBI
Felony Drug Offense "The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 USC § 802(44). Note: Includes simple possession, misdemeanors in states that make misdemeanors punishable by imprisonment for more than one year, no staleness limit, no minimum term of imprisonment served.	**Serious Drug Felony** "The term 'serious drug felony' means" an "**offense described in section 924(e)(2)** [] for which (A) the offender **served a term of imprisonment of more than 12 months**; and (B) the offender[]" was **released "within 15 years of the commencement of the instant offense**." 21 USC § 802(57). 18 USC § 924(e)(2) (defining "serious drug offense"): "(i) an **offense under [21 USC § 801 et seq., 21 USC § 951 et seq., or chapter 705 of title 46]** for which a **maximum term of imprisonment of ten years or more** is prescribed by law; or (ii) an **offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 USC § 802]**), for which a **maximum term of imprisonment of ten years or more** is prescribed by law"

No enhancement for priors defined as violent.	**Serious Violent Felony** "The term 'serious violent felony' means (A) **an offense described in section 3559(c)(2)**[] for which the offender **served a term of imprisonment of more than 12 months**; and (B) **any offense that would be a felony violation section 113** [] if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender **served a term of imprisonment of more than 12 months**." 21 USC § 802(58). 18 USC 113 (Assaults within maritime and territorial jurisdiction) defines six "felony violations." *See* 18 U.S.C. § 113(a)(1)-(3), (6)-(8). 18 USC § 3559(c)(2)(F): "[T]he 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 113(a)); assault with intent to commit rape **[defined in 3559(c)(2)(A)]**; 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 **[defined in 3559(c)(2)(E)]**; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118) **[subject to 3559(c)(3)(A)]**; carjacking (as described in section 2119); extortion **[defined in 3559(c)(2)(C)]**; arson **[defined in 3559(c)(2)(B) and subject to 3559(c)(3)(B)]**; firearms use **[defined in 3559(c)(2)(D)]**; 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 **[subject to 3559(c)(3)(A)]**~~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"~~ Note: The residual clause of §3559(c)(2)(F)(ii) is void for vagueness. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Old Safety Valve – 18 U.S.C. § 3553(f)	New Safety Valve, as amended by Sec. 402
Applies to offenses under 21 USC §§ 841, 844, 846, 960, 963	Also applies to offenses under title 46 §§ 70503 or 70506.
Criminal History: defendant does not have more than 1 criminal history point as determined under the sentencing guidelines	**Criminal History**: 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." **Violent Offense**: "As used in this section, the term 'violent offense' means a crime of violence, as defined in section 16, that is punishable by imprisonment." Because § 16(b) is void, 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. Note: Section 16(b) is void for vagueness. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).
	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."
Violence: defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or	same

induce another participant to do so) in connection with the offense.	
Death/SBI: offense did not result in death or serious bodily injury to any person.	same
Role: defendant was not an organizer, leader, manager, or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined by 21 USC 848.	same
Proffer: not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful information or the government is already aware of the information shall not preclude the court from determining that the defendant has complied with this requirement.	same
	Note: The First Step Act did not make any changes to Sentencing Guidelines that pertain to safety valve, § 5C1.2 (Limitation on Applicability of Statutory Minimum in Certain Cases) and §§ 2D1.1 (Drug Trafficking) and 2D1.11 (Listed Chemicals), each of which provide for a 2-level reduction in the guideline offense level for any defendant who meets the safety valve subdivision criteria at § 5C1.2. Thus, as a matter of proper guideline application, a defendant is eligible for a 2-level reduction only if the defendant meets the old statutory safety valve criteria still listed at § 5C1.2. If a defendant meets the expanded statutory safety valve criteria, and a court chooses to reduce the sentence below the guideline range, that sentence is considered a variance under the guidelines.

Old 924(c)(1)(C)	New 924(c)(1)(C), as amended by Sec. 403
18 USC § 924(c)(1)(C): In the case of a second or subsequent conviction under this subsection, 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. Note: As interpreted by the Supreme Court in *Deal v. United States*, 508 U.S. 129 (1993), Section 924(c)(1)(C) required stacking of the 25-year or life minimum for offenses charged in the same case with no intervening conviction. As interpreted, it was not a recidivist provision.	18 USC § 924(c)(1)(C): In the case of a **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. Note: Section 924(c) sentences are still consecutively imposed. Section 924(c)(1)(D) still provides: "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."

Sections 2 and 3, Fair Sentencing Act 2010	Section 404, First Step Act
Section 2 of the Fair Sentencing Act of 2010 reduced mandatory minimums and minimum supervised release terms by: □ increasing the quantity of crack from 50 grams to 280 grams under 841(b)(1)(A)(iii) and 960(b)(1)(C) □ increasing the quantity of crack from 5 grams to 28 grams under 21 USC 841(b)(1)(B)(iii) and 960(b)(2)(C) □ effectively increasing the quantity of crack from less than 5 grams or an unspecified quantity to less than 28 grams under 841(b)(1)(C) and 960(b)(3) Section 3 of the Fair Sentencing Act of 2010 eliminated the mandatory minimum for simple possession under 21 USC 844(a). Note: The changes in the statutory penalties were not retroactive, but on June 21, 2012, the Supreme Court held that they applied to all defendants sentenced after the date of enactment (August 3, 2010) including those who committed the offense before that date. *See Dorsey v. United States*, 132 S. Ct. 2321 (2012).	Any person who was 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). There are only two circumstances in which the court "shall [not] entertain" an eligible person's motion: the 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," 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). 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). The 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).

The First Step Act of 2018

One Year of Implementation

United States Sentencing Commission

August 2020

The First Step Act of 2018

One Year of Implementation

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AUGUST 2020

Table of Contents

This report examines the impact of five provisions of the First Step Act of 2018 related to sentencing reform.

Introduction

The First Step Act of 2018 (the "First Step Act" or "Act") was signed into law on December 21, 2018.[1] The Act contains numerous provisions relating to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. It focuses principally on creating a framework for recidivism reduction programming and incentives to be implemented by the Attorney General, the Federal Bureau of Prisons (BOP), and other criminal justice agencies. Additionally, the Act includes five provisions related to sentencing reform. Specifically, the Act:

- **reduces certain enhanced penalties** imposed pursuant to **21 U.S.C. § 851** for some repeat offenders and changes the prior offenses that qualify for such enhanced penalties;
- **broadens** the existing **statutory safety valve** eligibility criteria at **18 U.S.C. § 3553(f)**, which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met;
- **limits "stacking"** of the 25-year penalty imposed under **18 U.S.C. § 924(c)** for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense;
- **applies** the **Fair Sentencing Act** of 2010 **retroactively**; and
- **authorizes** the **defendant** to **file a motion** for "**compassionate release**," pursuant to **18 U.S.C. § 3582(c)(1)(A)**, where previously only the BOP was so authorized.

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FIRST STEP ACT

SIGNED INTO LAW ON DECEMBER 21, 2018

The First Step Act of 2018 includes **five provisions related to sentencing reform**. Each of these changes has been the subject of ongoing consideration within the criminal justice community and was the subject of Commission recommendations in its mandatory minimum reports and other work.[2]

authorizes the defendant to file a motion for "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A), where previously only the BOP was so authorized
(see page 46)

reduces certain enhanced penalties imposed pursuant to 21 U.S.C. § 851 for some repeat offenders and changes the prior offenses that qualify for such enhanced penalties
(see page 7)

The First Step Act has now been in effect for a full calendar year. This publication examines the **impact of the new law** on each of the **five sentencing provisions**, **comparing** data from the first full calendar year that the First Step Act was in effect ("**First Step Year One**"), December 21, 2018 through December 20, 2019, with data from the last full fiscal year prior to its enactment, **fiscal year 2018**.[3]

applies the Fair Sentencing Act of 2010 retroactively
(see page 41)

broadens the existing statutory safety valve eligibility criteria at 18 U.S.C. § 3553(f), which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met
(see page 17)

limits "stacking" of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense
(see page 34)

Key Findings

This publication examines the impact of the First Step Act, analyzing data from the first year following its enactment, compared to data from the last full fiscal year prior to its enactment, fiscal year 2018. As part of this analysis, the Commission makes the following key findings:

REDUCING DRUG RECIDIVIST PENALTIES

Enhanced recidivist penalties imposed pursuant to 21 U.S.C. § 851 applied to fewer offenders in First Step Year One, as a result of the First Step Act's narrowing of qualifying prior drug offenses. When enhanced penalties did apply, they were less severe than in fiscal year 2018.

- The number of offenders who received enhanced penalties decreased by 15.2 percent, from 1,001 offenders in fiscal year 2018 to 849 offenders in First Step Year One.

- The new 15-year enhanced mandatory minimum penalty, which was reduced from 20 years by the First Step Act, applied to 219 offenders in First Step Act Year One. By comparison, the 20-year enhanced mandatory minimum penalty applied to 321 offenders in fiscal year 2018.

- The new 25-year enhanced mandatory minimum penalty, which was reduced from life imprisonment by the First Step Act, applied to 21 offenders in First Step Act Year One. The enhanced mandatory minimum penalty of life imprisonment (for an offense resulting in death or serious bodily injury) applied to only 11 offenders in First Step Act Year One. By comparison, the enhanced mandatory minimum penalty of life imprisonment applied to 42 offenders in fiscal year 2018.

Few offenders were exposed to an enhanced penalty, or exposed to a more severe enhanced penalty, on the new basis of a "serious violent felony" conviction.

- Of the 849 offenders for whom the section 851 information applied at sentencing, only 36 had been previously convicted of one or more qualifying "serious violent felony" offenses that was relied upon by the government to support an 851 enhancement.[4]

- Of these 36 offenders, 25 also had at least one "serious drug felony" conviction. Only 11 offenders were exposed to an enhanced penalty solely based on one or more "serious violent felony" convictions.

- The most common "serious violent felony" convictions were weapons offenses,[5] robbery, and aggravated assault.

EXPANDING SAFETY VALVE

Offenders were more likely to receive relief from a mandatory minimum penalty or a reduction in sentence as a result of the First Step Act's expansion of the safety valve eligibility criteria at 18 U.S.C. § 3553(f).

- In First Step Act Year One, of 13,138 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 41.8 percent (n=5,493) received statutory safety valve relief from the mandatory minimum penalty. By comparison, in fiscal year 2018, of 10,716 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 35.7 percent (n=3,820) received statutory safety valve relief.

- In First Step Act Year One, of 19,739 drug trafficking offenders, 36.1 percent (n=7,127) benefited from the safety valve, either by receiving relief from a mandatory minimum, a guideline reduction, or a variance based on the new expanded eligibility criteria. By comparison, of 18,349 drug trafficking offenders, 32.1 percent (n=5,885) benefited from the safety valve in fiscal year 2018.

Most drug trafficking offenders who received safety-valve relief in First Step Year One (80.8%; n=5,758) were "already eligible" for relief under the old safety valve criteria. There were 1,369 (19.2%) offenders "newly eligible" as a result of the First Step Act's expanded criteria.

- Most newly eligible safety valve recipients qualified under the Act's expanded criminal history provisions (87.9%; n=1,204).

- Newly eligible safety valve recipients received sentences on average 17 months longer than already eligible recipients, 53 months compared to 36 months.

- There were notable changes in the demographic characteristics, particularly in racial composition, between newly eligible and already eligible safety valve recipients. Newly eligible safety valve recipients were more likely to be White (30.9% compared to 16.2%) or Black (16.0% compared to 9.8%), and less likely to be Hispanic (49.9% compared to 70.5%) than already eligible recipients.

LIMITING 924(c) "STACKING"

The 25-year penalty for a "second or subsequent offense" under 18 U.S.C. § 924(c) applied less frequently in First Step Year One, as a result of the First Step Act's limitation of the penalty to section 924(c) offenders with a final prior firearms conviction, as opposed to those with multiple section 924(c) charges in a single case.

- In fiscal year 2018, one 25-year penalty was imposed consecutively to another firearm mandatory minimum penalty in most cases (92.1%; n=117) involving multiple section 924(c) counts. Multiple consecutive 25-year penalties were imposed in two cases (1.6%).

- In First Step Year One, out of the 215 cases involving multiple section 924(c) counts, the 25-year penalty was imposed in only five cases.

- In First Step Year One, five-, seven-, and ten-year penalties typically replaced what would have been a 25-year penalty prior to the First Step Act. In half (50.7%; n=109), a seven-year penalty was the highest penalty imposed, followed by ten years in 30.7 percent of cases (n=66) and five years in 14.0 percent of cases (n=30).

RETROACTIVELY APPLYING THE FAIR SENTENCING ACT OF 2010

Since authorized by the First Step Act, 2,387 offenders received a reduction in sentence as a result of retroactive application of the Fair Sentencing Act of 2010.[6]

- Offenders' sentences were reduced, on average, by 71 months, from 258 months to 187 months.

- The majority (66.2%) of the offenders who received statutory relief under the First Step Act were in Criminal History Category VI, and more than half (57.4%) were originally sentenced as career offenders.

COMPASSIONATE RELEASE

In the first year after passage of the First Step Act, 145 offenders were granted compassionate release under 18 U.S.C. § 3582(c)(1)(A), a five-fold increase from fiscal year 2018, during which 24 compassionate release motions were granted.[7]

- In two-thirds of these cases (67.1%; n=96), the offender filed a motion seeking relief, rather than the Bureau of Prisons, a procedural change authorized by the First Step Act.

Reducing Drug Recidivist Penalties

The First Step Act changed the prior offenses that trigger the recidivist penalties (at 21 U.S.C. §§ 841 and 960) and reduced the length of those penalties.[8]

Section 401 of the First Step Act changed the scope and severity of enhancements for repeat drug offenders. Section 851 of title 21 of the United States Code provides for enhanced mandatory penalties for drug trafficking offenders who have qualifying prior offenses.[9] Federal drug trafficking offenders are primarily convicted of offenses under title 21 of the United States Code, which prohibits the distribution, manufacture, or importation of controlled substances, and possession with intent to distribute controlled substances.[10] The most commonly prosecuted drug offenses that carry mandatory minimum penalties are 21 U.S.C. §§ 841 and 960.[11] Under both provisions, mandatory minimum penalties are tied to the quantity and type of controlled substance involved in the offense.[12] When certain quantity thresholds are met, a five-year mandatory minimum penalty and a maximum term of 40 years applies, while larger amounts increase the mandatory minimum penalty to ten years, with a maximum term of life imprisonment.[13] Higher penalty ranges apply if death or serious bodily injury results from use of the controlled substance.[14]

These mandatory minimum penalties may be enhanced if a drug offender has a qualifying prior conviction or convictions. Increased penalties are not, however, automatically triggered upon conviction. Prosecutors must take affirmative steps for these higher penalties to apply, including filing an information with the court specifying the previous convictions to be relied upon. These steps are set forth in 21 U.S.C. § 851.[15]

The First Step Act changed the prior offenses that trigger the recidivist penalties (at 21 U.S.C. §§ 841 and 960) and reduced the length of those penalties. First, the Act both narrowed and expanded the type of prior offenses that trigger mandatory enhanced penalties. Prior to the Act, a defendant's sentence was enhanced if the defendant had been convicted of a prior "felony drug offense."[16] The Act *narrowed* the triggering prior offenses by replacing "felony drug offense" with "serious drug felony."[17] As a result, a defendant's prior drug offense qualifies as a predicate offense only if it was an offense of the type specifically defined in 18 U.S.C. § 924(e)(2)(A), the defendant *served* a term of more than 12 months' imprisonment for that offense, and the offender was released within 15 years of the instant offense. Prior to the Act, any drug offense *punishable* by more than one year of imprisonment

Table 1. Common 851 Enhancements

		Common 851 Enhancements	
Provisions	**Statutory Penalty**	**Before First Step Act**	**After First Step Act**
21 U.S.C. § 841(b)(1)(A)	10-year mandatory minimum	**20-year** mandatory minimum ***after one*** prior "felony drug offense" conviction **Life** mandatory minimum ***after two or more*** prior "felony drug offense" convictions	**15-year** mandatory minimum ***after one*** prior "serious drug" or "serious violent" felony conviction **25-year** mandatory minimum ***after two or more*** prior "serious drug" or "serious violent" felony convictions
21 U.S.C. § 841(b)(1)(B)	5-year mandatory minimum	**10-year** mandatory minimum ***after one*** prior "felony drug offense" conviction	**10-year** mandatory minimum ***after one*** prior "serious drug" or "serious violent" felony conviction
21 U.S.C. § 841(b)(1)(C)	20-year statutory maximum	**30-year** statutory *maximum* ***after one*** prior "felony drug offense" conviction	**30-year** statutory *maximum* ***after one*** prior "felony drug offense" conviction

qualified as a predicate offense, regardless of the length of time imposed or served for that offense. The First Step Act *expanded* the class of triggering offenses by adding "serious violent felony."[18] A "serious violent felony" is defined as an offense for which the defendant *served* a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) 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.[19]

Second, the Act reduced the length of some of the enhanced penalties. Before the First Step Act, offenders who otherwise qualified for the ten-year mandatory minimum penalty were subject to an enhanced mandatory minimum penalty of 20 years if they had one qualifying prior conviction, and a mandatory term of life imprisonment if they had two qualifying prior convictions.[20] As demonstrated in Table 1, the First Step Act reduced the 20-year mandatory minimum penalty (for offenders with one prior qualifying offense) to 15 years and the life mandatory minimum penalty (for two or more prior qualifying offenses) to 25 years.[21] As they were before the First Step Act, offenders who otherwise qualify for a five-year mandatory minimum penalty are subject to an increased statutory range of ten years to life imprisonment if they have a qualifying prior conviction.[22] The First Step Act did not amend the length of the penalties imposed at section 841(b)(1)(B) or 960(b)(2). As a result, a qualifying predicate offense (a "serious drug offense" or a "serious violent felony") increases a five-year penalty to ten years.

Some provisions, 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3), do not include a statutory mandatory minimum penalty but provide for an enhanced statutory maximum penalty.[23] The First Step Act amended 21 U.S.C. §§ 841(b)(1)(A) & (B) and 960(b)(1) & (b)(2) only. Thus, the enhanced statutory maximum penalties provided for at sections 841(b)(1)(C) and 960(b)(3) are unchanged and are still triggered by a prior "felony drug offense," rather than a "serious drug felony" or "serious violent felony."[24]

Although the recidivist drug enhancements are found in the penalty provisions of various drug statutes, they are commonly referred to as "851 enhancements." Consistent with common usage, this publication thus uses the term "851 enhancement" to refer to the increased penalty applicable to offenders who have been convicted of a prior predicate offense.

This publication explores offenders for whom an 851 information was filed and those for whom the 851 remained in place at sentencing, without consideration of whether the offender ultimately received relief from that penalty. Where this publication uses the term "applied at sentencing," it refers to cases in which the 851 information was not withdrawn by the government or found to not apply by the court. These offenders may, however, have received relief from the enhanced penalty as a result of the statutory safety valve, 18 U.S.C. § 3553(f), or for providing substantial assistance pursuant to 18 U.S.C. § 3553(e).

Application of Penalties Imposed Pursuant to Section 851

The Commission analyzed the frequency and length of the recidivist penalties applied in Year One compared to fiscal year 2018. The First Step Act affected the sentences of offenders who could have been exposed to an 851 enhancement in two ways. First, as a result of the change in qualifying predicate offenses, some offenders who previously would have qualified for an enhancement because of a prior "felony drug offense" no longer qualify, and some offenders became newly eligible for a recidivist enhancement based on a prior "serious violent felony." Second, the First Step Act altered the length of the statutory recidivist enhancements. These issues are explored in turn below.

While most offenders included in this analysis are drug trafficking offenders, some have additional counts of conviction that required other guideline application (for example, money laundering, racketeering, or murder), resulting in a higher offense level than the drug trafficking guideline associated with the enhanced drug penalty. For more detail on offenders included in this analysis, see Appendix Figure 1.

Section 851 Enhancements Filed

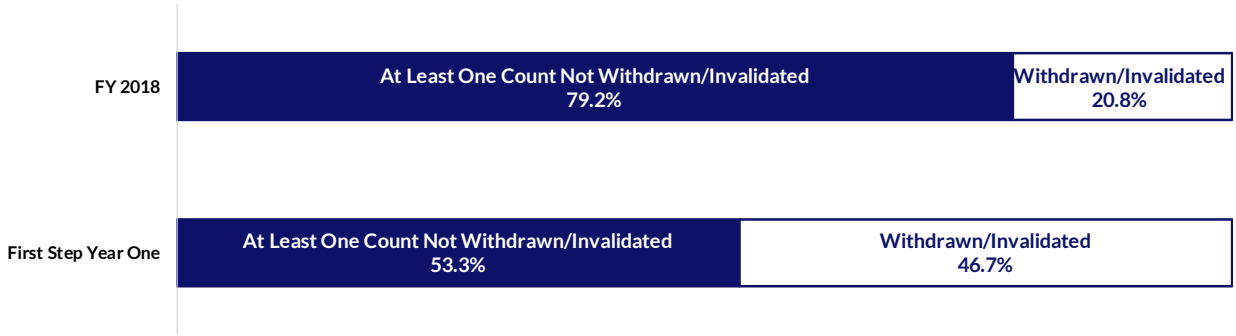
As noted above, enhanced recidivist penalties are triggered only where prosecutors take the affirmative step of filing an information pursuant to the procedural requirements set forth in 21 U.S.C. § 851. A court must impose a sentence consistent with the enhanced statutory penalties only if an information is filed and the court finds that the prior conviction qualifies under section 851.

Prosecutors filed an information at a similar rate in Year One, compared to fiscal year 2018. In fiscal year 2018, an information was filed in 1,274 cases, approximately seven percent of all drug trafficking cases. In Year One, an information was filed in 1,607 cases, approximately eight percent of all drug trafficking cases.[25] While the overwhelming majority of cases in which an 851 information was filed in each year were drug trafficking cases, some offenders were sentenced under other guidelines.[26]

Section 851 Enhancements Withdrawn or Invalidated

Even when an 851 information was filed, there were cases in which the government later withdrew it or in which the court found the recidivist enhancement inapplicable because the offender's prior criminal conviction was insufficient to satisfy the requirements for the enhanced penalties. This occurred with greater frequency in Year One, due in large part to the Act's change in qualifying predicate offenses. In fiscal year 2018, the government withdrew the 851 information in 256 cases (20.3%), and the court found that it did not apply in an additional seven cases (0.5%). As a result, there were 1,001 cases (79.2%) in which an information was not withdrawn or found invalid before sentencing.[28] In contrast, in Year One, the government withdrew the 851 information in 610 cases (38.3%) in which it was filed. The court found that the enhancement did not apply in 134 cases (8.4%).[29] In nearly all

Figure 1. Enhanced Drug Penalty Status at Sentencing[27]
FY 2018 and First Step Year One



these 134 cases, the court indicated that the enhancement did not apply because certain offenses no longer qualified as predicate offenses following the First Step Act. As a result, in Year One, there were 849 cases (53.3%) in which the information was not withdrawn or invalidated before sentencing.[30]

Qualifying Prior Offenses

As discussed above, following the First Step Act, an 851 enhanced mandatory minimum penalty can be triggered by a prior "serious drug felony" or "serious violent felony."

Of the 849 offenders for whom the 851 information applied at sentencing, most were exposed to an enhanced penalty on the basis of one or more "serious drug felony" convictions; few were exposed to an enhanced penalty based on a qualifying "serious violent felony" conviction. As demonstrated in Figure 2, most commonly, offenders had two or more qualifying drug convictions and no qualifying violent conviction (59.6%; n=504), followed by offenders with one qualifying drug conviction and no qualifying violent conviction (36.1%; n=305). Only 36 offenders had one or more qualifying "serious violent felony" convictions that the government relied upon for an 851 enhancement. Of those 36 offenders, 25 also had at least one qualifying drug conviction; only 11 offenders were exposed to enhanced penalties solely based on one or more "serious violent felony" convictions.[32]

Figure 2. Prior Drug and Prior Violent Offenses—851 Applied[31]
First Step Year One

Total Offenders	**845**	**100.0%**
No Drug Priors w/		
One Violent Prior	8	0.9%
Two or More Violent Priors	3	0.4%
One Drug Prior w/		
No Violent Priors	305	36.1%
One Violent Prior	8	0.9%
Two or More Violent Priors	2	0.2%
Two or More Drug Priors w/		
No Violent Priors	504	59.6%
One Violent Prior	12	1.4%
Two or More Violent Priors	3	0.4%

Figure 3. Violent Prior Offenses—851 Applied[33]
First Step Year One

Total Priors *(not offender-based)*		**46**	**100.0%**
Weapons Offenses		15	32.6%
Aggravated Assault		12	26.1%
Robbery		10	21.7%
Simple Assault		3	6.5%
Murder/Attempted Murder		2	4.3%
Other Violent Offenses		2	4.3%
Unspecified Manslaughter		1	2.2%
Arson		1	2.2%

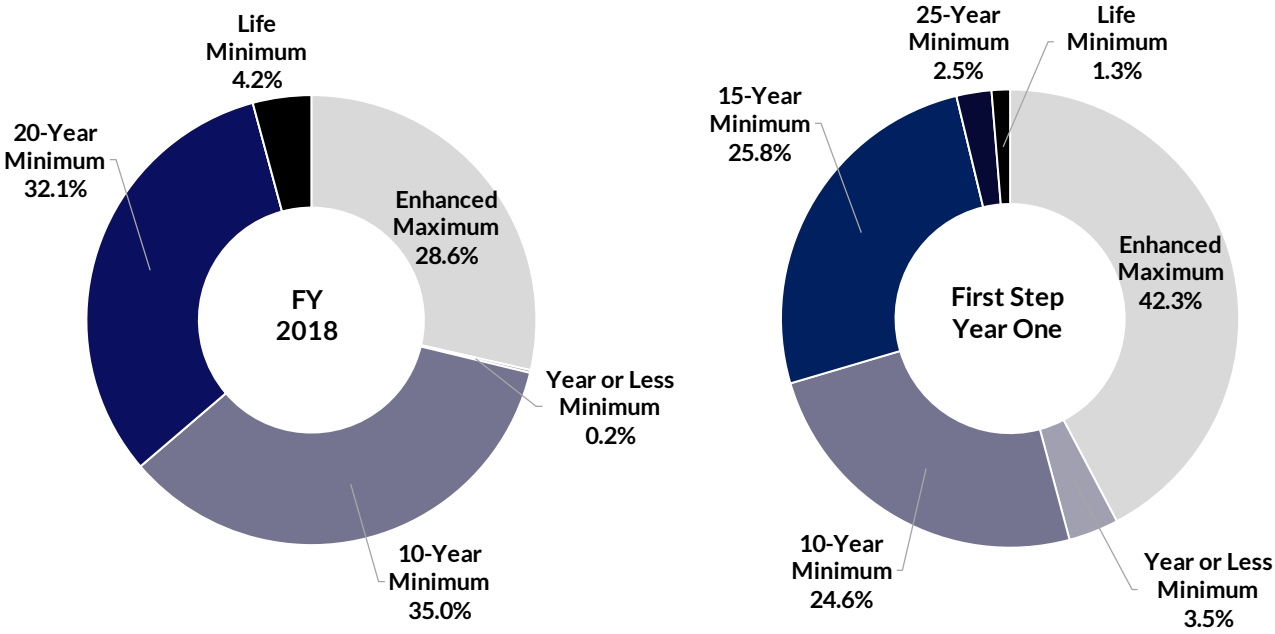
As shown in Figure 3, the most common "serious violent felony" convictions were weapons offenses (n=15), aggravated assault (n=12), and robbery (n=10).[34]

Length of Enhanced Penalty Imposed

The filing of an 851 information has one of two principal effects depending on the statute of conviction. In most instances, the 851 information triggers an increase in an already applicable mandatory minimum penalty. In other cases, where the statute of conviction does not provide for a mandatory minimum penalty, the 851 information triggers an enhanced statutory maximum penalty.[35] For example, an offender convicted of trafficking a quantity of drugs that does not meet the quantity threshold necessary to trigger a mandatory minimum penalty would face a 20-year statutory maximum penalty under 21 U.S.C. § 841(b)(1)(C). However, if such offender has a prior "felony drug offense" and an 851 information is filed, the applicable statutory maximum increases to 30 years.

In Year One, offenders for whom the 851 information applied at sentencing were more frequently convicted of an offense carrying an enhanced statutory maximum penalty only. In fiscal year 2018, of these 1,001 offenders, 715 offenders (71.4%) were convicted of an offense carrying an enhanced statutory minimum penalty and 286 (28.6%) were convicted of an offense carrying an enhanced statutory maximum penalty only. In Year One, of the 849 offenders who did not have the

Figure 4. Length of Enhanced Statutory Penalty—851 Applied[36]
FY 2018 and First Step Year One



851 withdrawn or invalidated, 490 (57.7%) were convicted of an offense carrying an enhanced statutory minimum penalty and 359 (42.3%) were convicted of an offense in which only the statutory maximum penalty was enhanced.

The First Step Act narrowed the type of prior drug offenses that trigger an 851 enhanced mandatory minimum penalty (replacing "felony drug offense" with "serious drug felony") but did not change the predicate convictions that trigger an enhanced statutory maximum penalty. As a result, after the First Step Act, prior drug convictions that would no longer qualify to enhance a statutory minimum penalty continue to qualify to enhance a statutory maximum penalty (for example, where the sentence imposed or served was one year or less). The narrowing of offenses that trigger enhanced statutory minimum penalties, but not statutory maximum penalties, likely contributes to the increased percentage of 851 cases that involved an enhanced statutory maximum penalty only.

As a result of the First Step Act's changes to the lengths of the 851 enhanced penalties, the lower 15- and 25-year enhanced penalties typically replaced the 20-year and life penalties that applied in fiscal year 2018. The average sentence length for offenders receiving an 851 enhancement decreased. On average, the sentences for offenders for whom the 851 applied at sentencing were eight months shorter in Year One compared to fiscal year 2018 (179 months compared to 187 months).[37]

In fiscal year 2018, of those offenders for whom the information applied at sentencing, 321 offenders (32.1%) were convicted of an offense carrying a 20-year penalty. In Year One, offenders could no longer be subject to a 20-year 851 enhanced penalty. Instead, 219 offenders (25.8%) were convicted of an offense carrying the new 15-year penalty, which prior to the First Step Act would have been enhanced to a 20-year penalty.

There was a notable decrease in application of the enhanced life penalty for offenders with two or more qualifying convictions. In fiscal year 2018, 42 offenders (4.2%) were convicted of an offense carrying an enhanced mandatory minimum penalty of life imprisonment; in Year One, only 11 offenders (1.3%) were convicted of an offense carrying an enhanced mandatory minimum penalty of life imprisonment. Instead, 21 offenders (2.5%) were convicted of the new 25-year penalty, which prior to the First Step Act would have been enhanced to a term of life imprisonment. The 11 offenders whose conviction carried an enhanced life term were convicted of a controlled substance offense that resulted in death or serious bodily injury *and* had at least one qualifying predicate conviction; the mandatory minimum penalty remains life imprisonment for these offenders following the First Step Act.[38]

Drug Type

The distribution of drug type among the offenders for whom an 851 information was filed was similar in Year One and fiscal year 2018. Methamphetamine offenders accounted for approximately 40 percent of drug offenders for whom an 851 information was filed during both years (42.5% in fiscal year 2018 and 38.5% in Year One). And, in both years, methamphetamine offenders were the most likely to have an 851 enhancement apply at sentencing (39.9% in fiscal year 2018 and 30.3% in Year One). However, in each year, methamphetamine offenders represented a smaller portion of offenders for whom the information applied at sentencing than they did of offenders for whom the information was filed. This decrease was more notable in Year One.

In both fiscal year 2018 and Year One, heroin and "other" drug offenders accounted for a larger portion of offenders for whom the 851 enhancement applied at sentencing than they did of all offenders for whom the 851 information was filed. In Year One, compared to fiscal year 2018, heroin and "other" drug offenders accounted for a larger portion of both the offenders for whom an 851 information was filed and the offenders for whom the 851 enhancement applied at sentencing. Most of the "other" drug cases in which an 851 enhancement applied at sentencing involved fentanyl or a fentanyl analogue.[40]

Figure 5. Primary Drug Type—All Filed and Not Withdrawn/Invalidated[39]
FY 2018 and First Step Year One

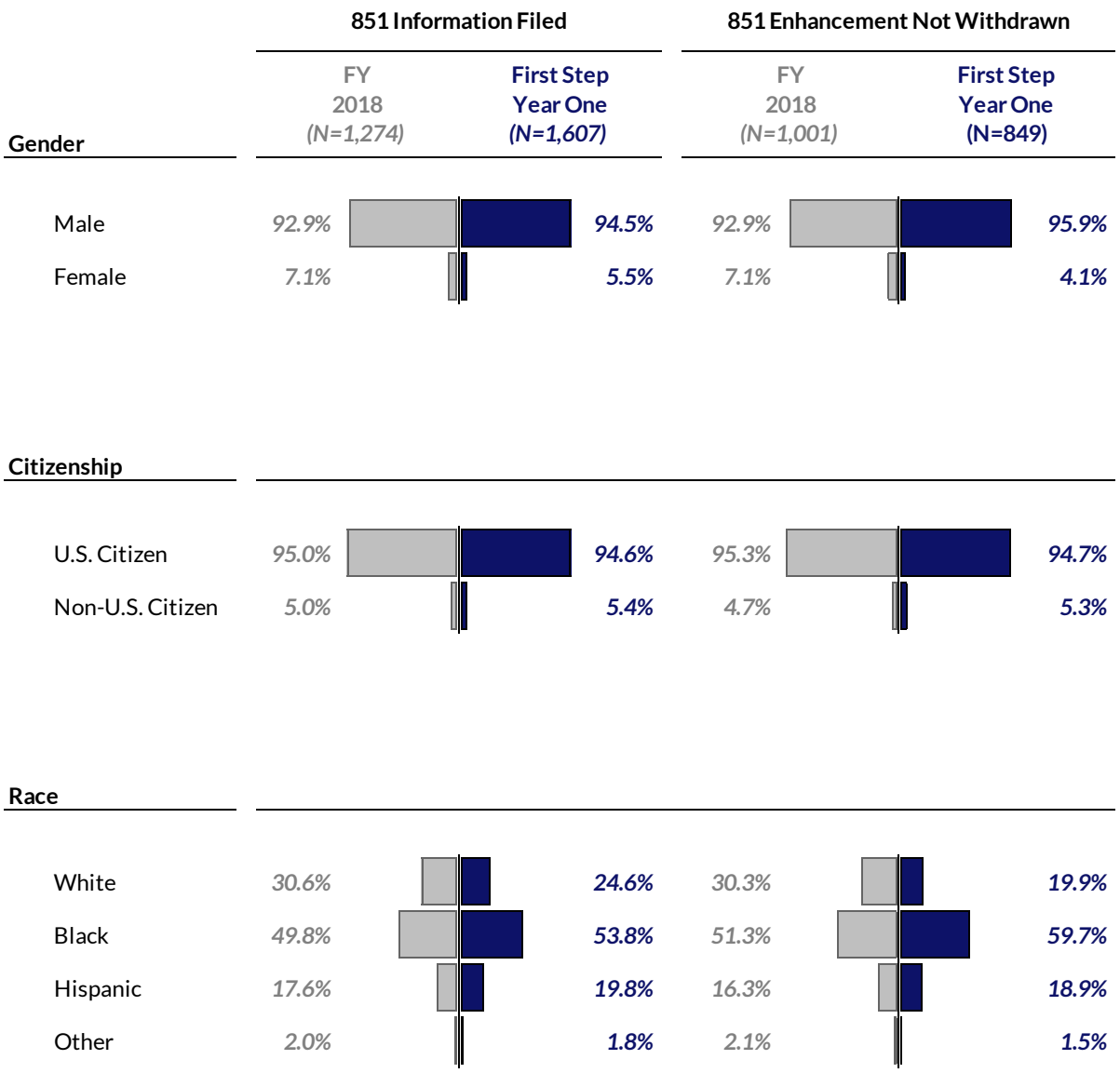
	851 Information Filed		851 Enhancement Not Withdrawn	
Drug Type	FY 2018	First Step Year One	FY 2018	First Step Year One
Powder Cocaine	*16.3%*	***16.2%***	*17.4%*	***17.2%***
Crack Cocaine	*16.3%*	***15.5%***	*15.2%*	***16.3%***
Heroin	*14.6%*	***15.9%***	*16.0%*	***18.1%***
Marijuana	*5.5%*	***4.6%***	*5.8%*	***6.2%***
Methamphetamine	*42.5%*	***38.5%***	*39.9%*	***30.3%***
Other	*4.8%*	***9.3%***	*5.7%*	***11.9%***

Demographics

The demographic characteristics of offenders against whom an 851 information was filed and not withdrawn or invalidated were similar in Year One and fiscal year 2018. As demonstrated in Figure 6 on the next page, the overwhelming majority of offenders whose sentences were enhanced were male, United States citizens during both time periods.

However, although the provisions applied most frequently to Black offenders during both time periods, Black offenders accounted for a larger portion of offenders for whom an information was filed and filed and not withdrawn or invalidated in Year One. The portion of White offenders in each group decreased during the same time period. In fiscal year 2018, Black offenders accounted for 49.8 percent (n=634) of offenders for whom an 851 information was filed and 51.3 percent (n=514) of offenders for whom the 851 enhancement applied at sentencing, which increased to 53.8 percent (n=864) of those filed and 59.7 percent (n=507) of those applied at sentencing in Year One. In fiscal year 2018, White offenders accounted for 30.6 percent (n=390) of offenders for whom an 851 information was filed and 30.3 percent (n=303) of offenders for whom the 851 enhancement applied at sentencing, decreasing to 24.6 percent (n=396) of those filed and 19.9 percent (n=169) of those applied at sentencing in Year One.

Figure 6. Demographic Characteristics—All Filed and Not Withdrawn/Invalidated[41]
FY 2018 and First Step Year One



Expanding the Statutory Safety Valve

The First Step Act broadened the existing statutory safety valve eligibility criteria at 18 U.S.C. § 3553(f), which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met.[42]

Section 402 of the First Step Act expanded the eligibility criteria for the statutory safety valve,[43] thereby allowing a greater number of drug offenders to receive relief from a mandatory minimum penalty or, where no mandatory minimum applies, a reduction in sentence.

Many drug trafficking offenses carry mandatory minimum terms of imprisonment that are triggered by the quantity of drugs involved in the offense.[44] As part of the Violent Crime Control and Law Enforcement Act of 1994,[45] Congress enacted the statutory "safety valve" to authorize courts to impose a sentence without regard to a statutory minimum penalty if the court finds that the defendant meets all five criteria set forth in the statute.[46]

The First Step Act amended the safety valve provision, expanding it in two ways. First, the Act extended applicability of the safety valve to maritime cases.[48] Second, it extended eligibility to offenders who have up to four criminal history points, "excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines."[49] Offenders who have a "prior 3-point offense" or a "prior 2-point violent offense" are excluded from eligibility, regardless of their criminal history score.[50] The Act provides that a "violent offense" is a "crime of violence, as defined by 18 U.S.C. § 16, that is punishable by imprisonment."[51]

As originally enacted, the safety valve applied to offenses under 21 U.S.C. §§ 841, 844, 846 and 21 U.S.C. §§ 961 and 963 and contained five requirements:

1. *the defendant must have not more than one criminal history point, as determined under the sentencing guidelines;*
2. *the defendant must not "use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense";*
3. *the offense cannot have resulted in death or serious bodily injury to any person;*
4. *the defendant must be a limited actor (not an organizer, leader, manager, or supervisor), who was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848; and*
5. *the defendant must provide all information and assistance possible to law enforcement.*[47]

Incorporation of the Statutory Safety Valve and the 2-Level Guideline Reduction

When Congress first enacted the safety valve, it directed the Commission to promulgate or amend guidelines and policy statements to "carry out the purposes of [section 3553(f)]."[52] The *Guidelines Manual* incorporates the safety valve provision in two places. First, §5C1.2 (Limitation on Applicability of Statutory Minimum in Certain Cases) adopts the statutory language of section 3553(f), providing that where a defendant meets the criteria, "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence."[53] Second, §§2D1.1 (Drug Trafficking) and 2D1.11 (Listed Chemicals) each provide for a 2-level reduction in the guideline offense level for any defendant who meets the safety valve subdivision criteria at §5C1.2, including defendants whose conviction does not carry a mandatory minimum penalty.[54]

The First Step Act did not make any changes to the *Guidelines Manual*, nor did the Act provide emergency amendment authority to the Commission.[55] Thus, as a matter of proper guideline application, a defendant is eligible for a 2-level reduction only if the defendant meets the *old* statutory safety valve criteria still listed at §5C1.2. If a defendant meets the expanded statutory safety valve criteria, and a court chooses to reduce the sentence below the guideline range, that sentence is considered a variance under the guidelines.

First Step Act's Expansion of the Safety Valve

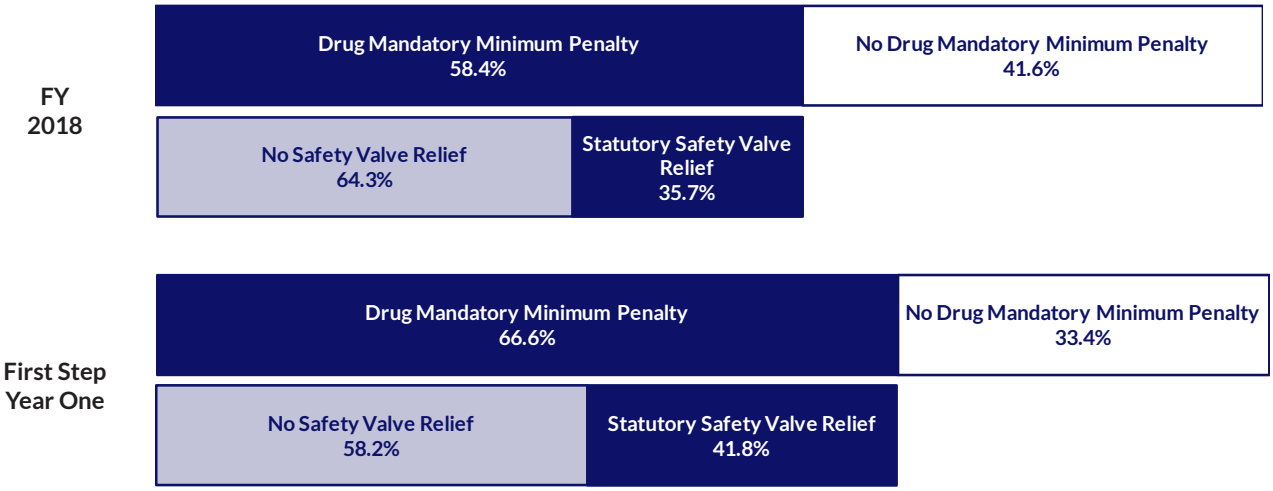
This section proceeds in two parts. The first part, consistent with the analyses throughout this report, presents data comparing safety valve recipients in Year One and fiscal year 2018. The second part provides further analysis of Year One safety valve recipients, comparing two groups of offenders—those offenders who were eligible under the narrower statutory safety valve criteria in place before First Step Act expansion ("Already Eligible offenders") to those offenders who became eligible under the expanded provisions ("Newly Eligible offenders"). Except where specifically noted, the terms "safety valve recipients," "safety valve offenders," or offenders who "received relief," used throughout this section refer to the offenders who met the statutory safety valve criteria and, as a result, received any form of safety valve relief (*i.e.*, relief from a mandatory minimum penalty or a reduction in sentence as a result of meeting the safety valve criteria when no mandatory minimum applied).

First Step Year One and FY 2018

During Year One, there were 19,739 drug trafficking cases,[56] an increase from fiscal year 2018 (n=18,349).[57] As demonstrated in Figure 7, the number of offenders convicted of an offense carrying a drug mandatory minimum penalty also increased. In Year One, 66.6 percent of offenders (n=13,138) were convicted of a drug offense carrying a mandatory minimum penalty, while 33.4 percent (n=6,601) were not. By comparison, in fiscal year 2018, 58.4 percent (n=10,716) were convicted of a drug offense carrying a mandatory minimum penalty, while 41.6 percent (n=7,633) were not.

There was an increase in the number and percentage of offenders who received relief from a mandatory minimum penalty pursuant to the safety valve in Year One.[59] In Year One, of the 13,138 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 5,493 (41.8%) received safety valve relief from the mandatory minimum penalty—an increase from fiscal year 2018, when 3,820 of 10,716 drug trafficking offenders convicted of a drug offense carrying a mandatory minimum penalty (35.7%) received such relief.

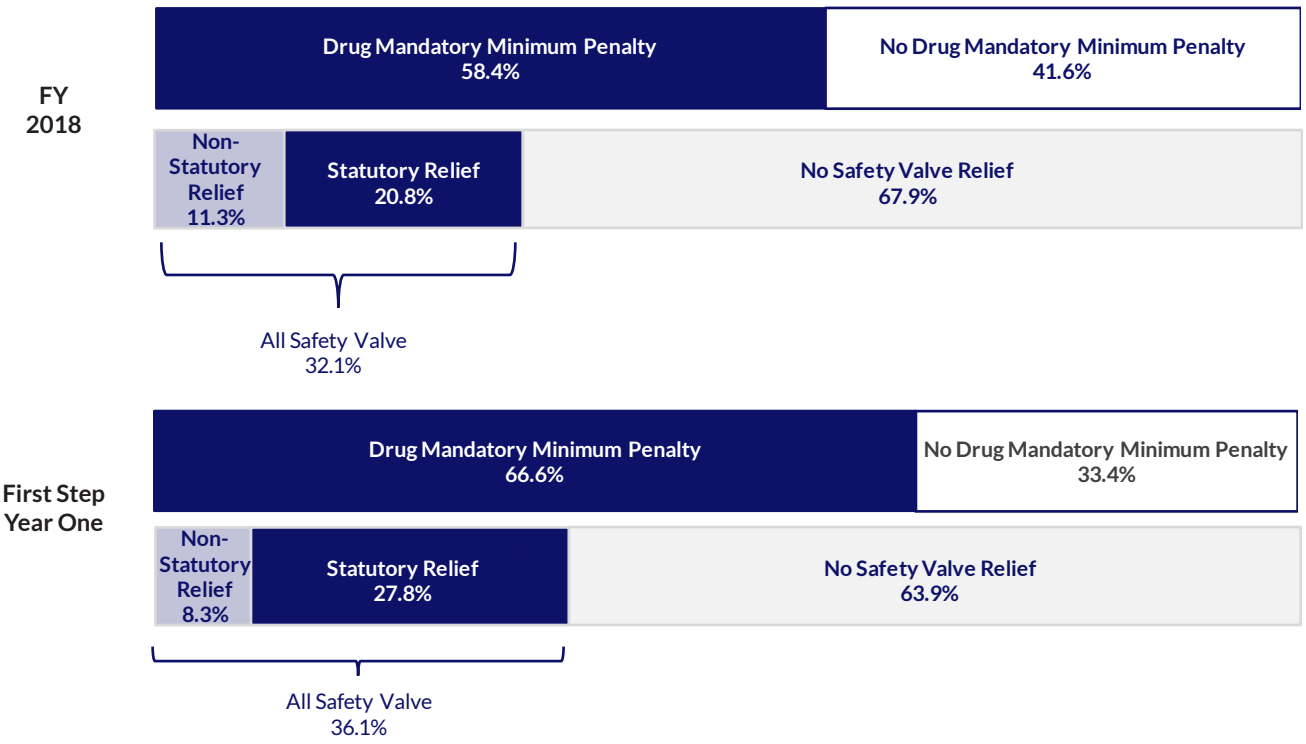
Figure 7. Safety Valve Relief Status by Drug Mandatory Minimum Penalty Status[58]
FY 2018 and First Step Year One



As discussed above, offenders who meet the criteria but are convicted of no offense carrying a mandatory minimum penalty may receive a sentence reduction. In Year One, an additional 1,634 offenders who faced no mandatory minimum penalty received a reduction in their sentence (either as a 2-level guideline reduction or as a variance) as a result of meeting the statutory safety valve criteria. In fiscal year 2018, an additional 2,065 offenders received a 2-level reduction in the guideline offense level only.[60]

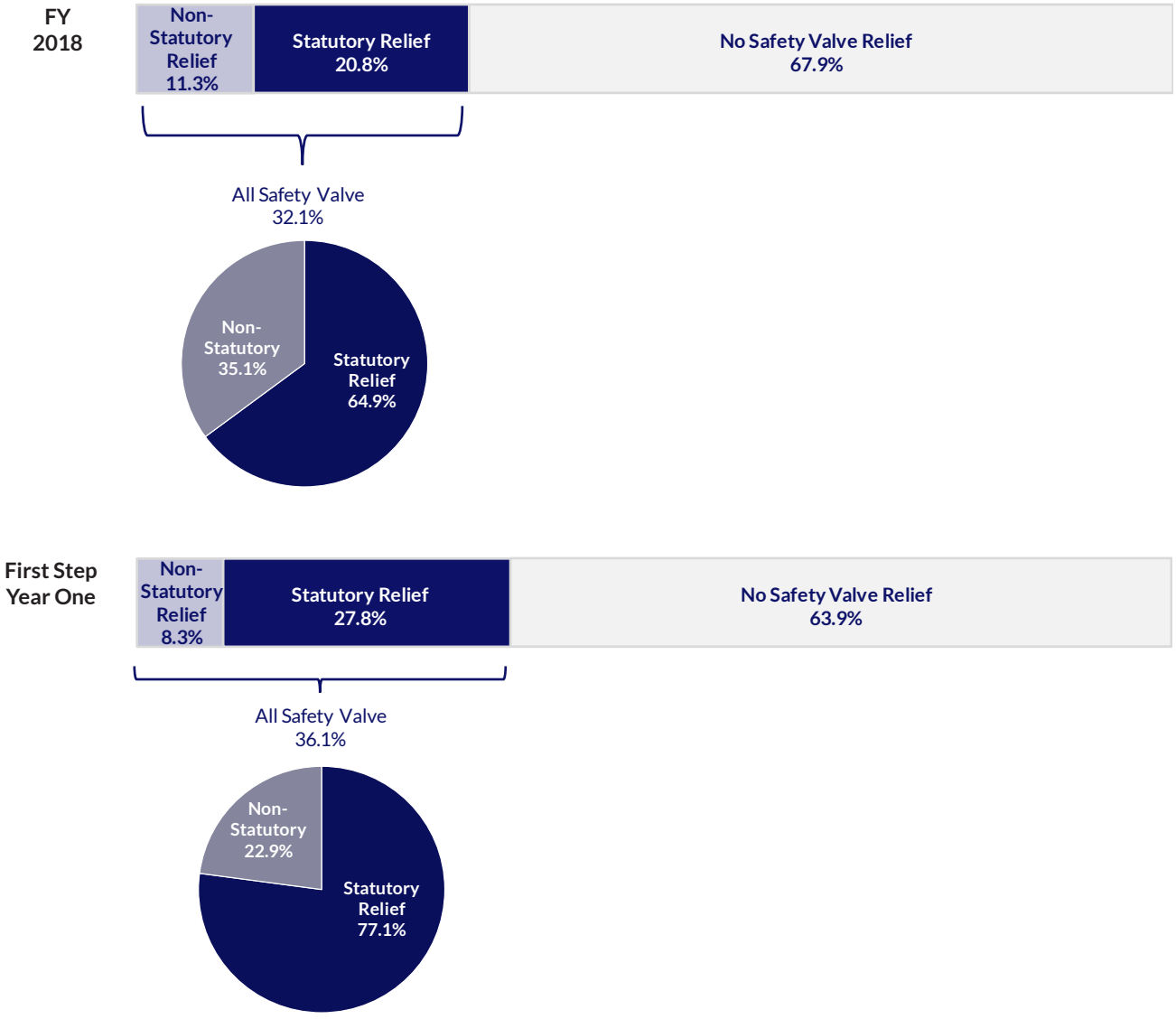
Thus, when considering drug trafficking offenders who received *any* form of safety valve relief, there was also an increase in Year One, compared to fiscal year 2018. In Year One, a total of 7,127 drug trafficking offenders (36.1%) received some form of safety valve relief, and the remaining 12,612 offenders (63.9%) did not—an increase from fiscal year 2018, when a total of 5,885 drug trafficking offenders (32.1%) received some form of safety valve relief, and the remaining 12,460 offenders (67.9%) did not.

Figure 8. Safety Valve Relief Status for All Drug Trafficking Cases[61]
FY 2018 and First Step Year One



Of offenders who received any form of safety valve relief, there was also a shift in the nature of that relief. As demonstrated in Figure 9, in Year One, of the 7,127 offenders who received any form of safety valve relief, more than three-quarters received relief from a mandatory minimum penalty (77.1%; n=5,493), an increase from fiscal year 2018, when 64.9 percent (n= 3,820) of the 5,885 offenders who received any form of safety valve relief were relieved of a mandatory minimum penalty.

Figure 9. Nature of Safety Valve Relief for All Drug Trafficking Offenders[62]
FY 2018 and First Step Year One

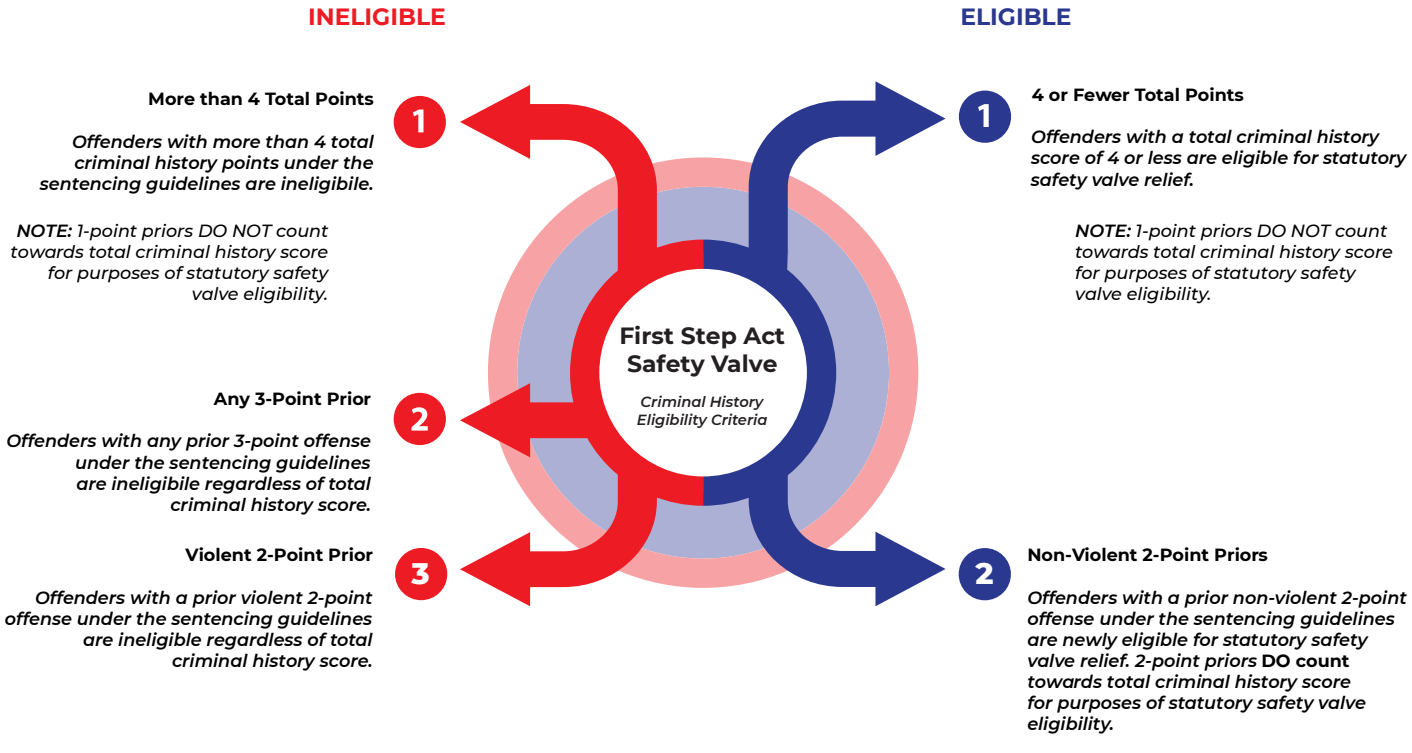


The increase in the number and percentage of offenders receiving relief appears to be largely attributable to the First Step Act's safety valve expansion. Of the 7,127 offenders who received relief in Year One, the majority (80.8%; n=5,758) met the requirements under the *old* safety valve criteria and, therefore, would have received relief absent the First Step Act's expansion. These offenders had zero or one criminal history points and were convicted under one of the statutes initially included under the safety valve provision. An additional 1,369 Newly Eligible offenders became eligible as a result of the First Step Act's expansion of the safety valve criteria. These offenders are discussed in more detail in the second part of this section.

Number of Criminal History Points

In fiscal year 2018, prior to the First Step Act's expansion, 5,885 offenders received safety valve relief. These offenders all had zero or one criminal history points.[63] Similarly, in Year One, the overwhelming majority of offenders who received safety valve relief had zero or one criminal history points (83.1%; n=5,923). Among those with zero criminal history points were 165 offenders who became newly eligible for relief as a result of the addition of the maritime provisions. The remaining 1,204 offenders (16.9%) had more than one criminal history point and became newly eligible for relief as a result of the First Step Act's expanded criminal history provision. The criminal history scores of the Newly Eligible offenders are discussed in the second part of this section.

Figure 10. New Criminal History Criteria for Statutory Safety Valve Relief



Average Sentence Length

The average sentence lengths for all drug trafficking offenders and for safety valve offenders remained stable between fiscal year 2018 and Year One. As demonstrated in Figure 11, in fiscal year 2018, the average sentence was 76 months for all drug trafficking offenders and 39 months for all offenders who received safety valve relief. In Year One, the average sentence was 77 months for all drug trafficking offenders and 40 months for offenders who received relief.

Figure 11. Average Sentence Length[64]
FY 2018 and First Step Year One

Drug Type

As demonstrated in Figure 12, the distribution of drug type among safety valve offenders remained relatively consistent when comparing Year One and fiscal year 2018. In Year One, cocaine and marijuana offenders received safety valve relief less frequently, while methamphetamine offenders received relief more frequently.

Figure 12. Primary Drug Type in Safety Valve Cases[65]
FY 2018 and First Step Year One

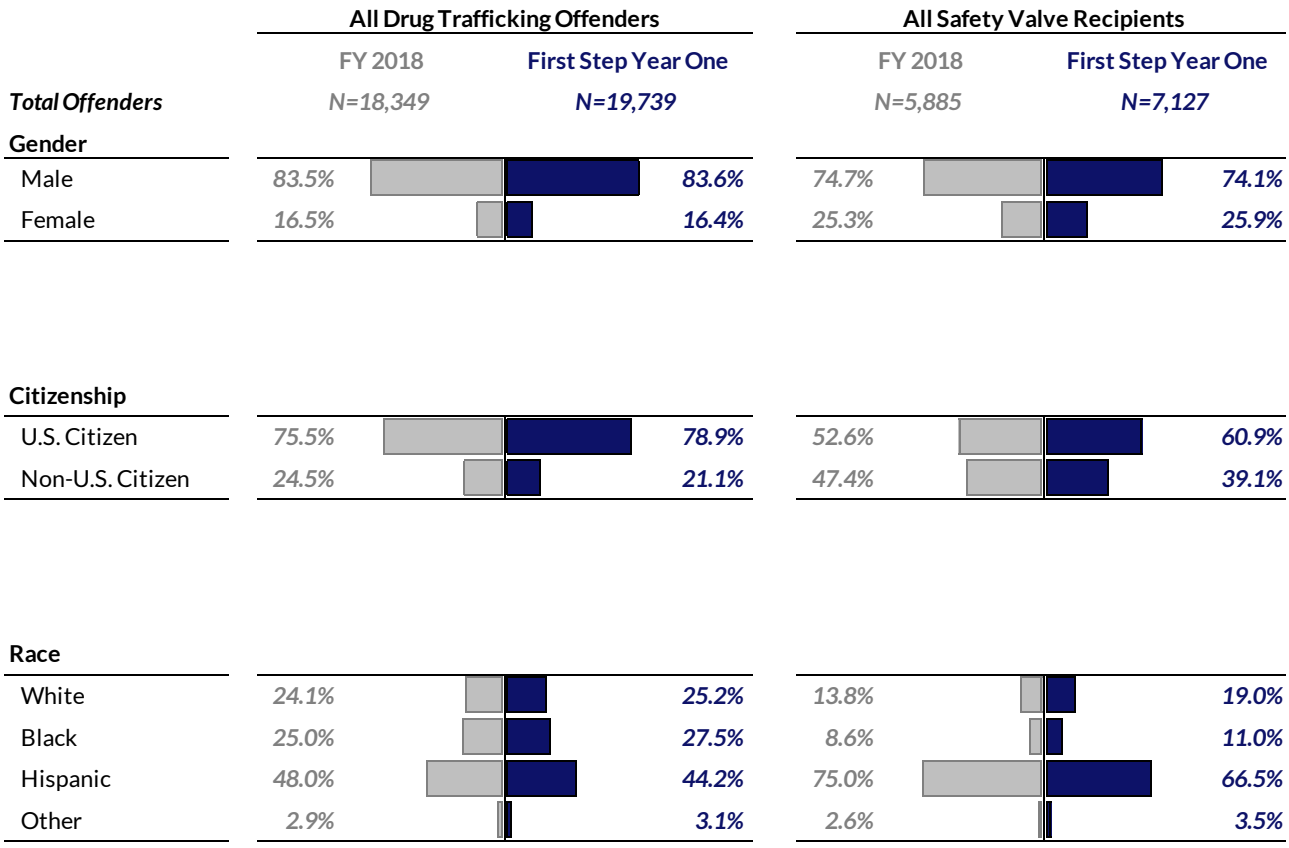
	All Safety Valve Recipients	
Drug Type	FY 2018	First Step Year One
Powder Cocaine	27.4%	22.9%
Crack Cocaine	1.3%	2.0%
Heroin	10.7%	10.5%
Marijuana	17.1%	11.7%
Methamphetamine	37.2%	43.4%
Other	6.4%	9.4%

Demographics

Although Hispanic offenders continued to represent the largest group to receive safety valve relief, they accounted for a smaller percentage of safety valve recipients in Year One than in fiscal year 2018; the percentage of White and Black offenders increased. In fiscal year 2018, 75.0 percent (n=4,406) of safety valve recipients were Hispanic offenders, followed by White offenders (13.8%; n=812), Black offenders (8.6%; n=504), and Other Race offenders (2.6%; n=155). In Year One, 66.5 percent (n=4,739) of safety valve recipients were Hispanic offenders, 19.0 percent (n=1,355) were White offenders, 11.0 percent (n=781) were Black offenders, and 3.5 percent (n=247) were Other Race offenders. As discussed more in the next part of this section, this shift in demographics is largely attributable to the Newly Eligible offenders.

United States citizens represented a larger percentage of safety valve recipients in Year One. In fiscal year 2018, slightly over half (52.6%; n=3,092) of offenders who received safety valve relief were United States citizens. In Year One, the percentage of United States citizens increased to 60.9 percent (n=4,333).

Figure 13. Demographic Characteristics for All Drug Trafficking Offenders and Safety Valve Recipients[66]
FY 2018 and First Step Year One



Male offenders comprised approximately three-quarters of safety valve recipients in both fiscal year 2018 (74.7%; n=4,397) and in Year One (74.1%; n=5,280).

Year One Safety Valve Offenders: Already Eligible and Newly Eligible Offenders

Of the 7,127 offenders who received relief in Year One, the majority (80.8%; n=5,758) met the requirements for relief under the *old* safety valve criteria and, therefore, would have received relief absent the First Step Act's expansion. These Already Eligible offenders had zero or one criminal history points and were convicted under one of the statutes originally included under the safety valve provision.

The remaining 1,369 Newly Eligible offenders became eligible as a result of the First Step Act's expansion of the safety valve criteria. As demonstrated in Figure 14, of the 1,369 offenders who received relief under the new safety valve criteria, 165 offenders (12.1%) became eligible as a result of convictions under the maritime statutes and 1,204 (87.9%) became eligible as a result of the First Step Act's criminal history expansion.

Figure 14. Distribution of Offenders Eligible for Safety Valve[67]
First Step Year One

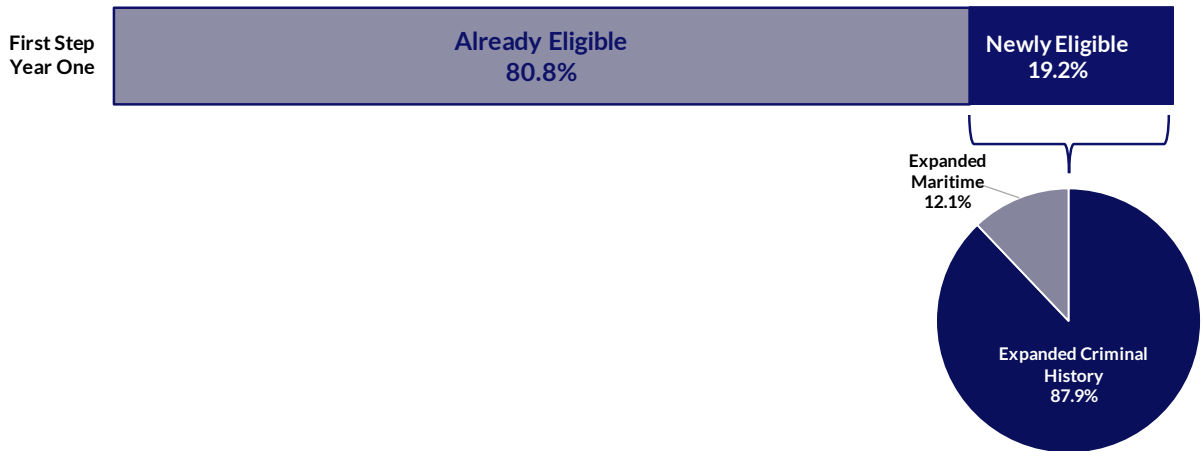
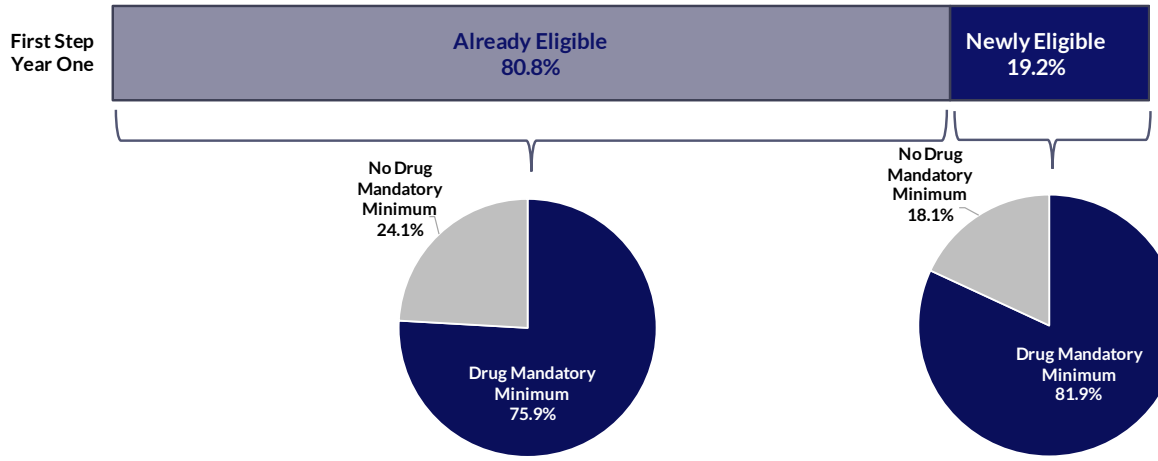


Figure 15. Drug Mandatory Minimum Status Among Offenders Eligible for Safety Valve[68]
First Step Year One

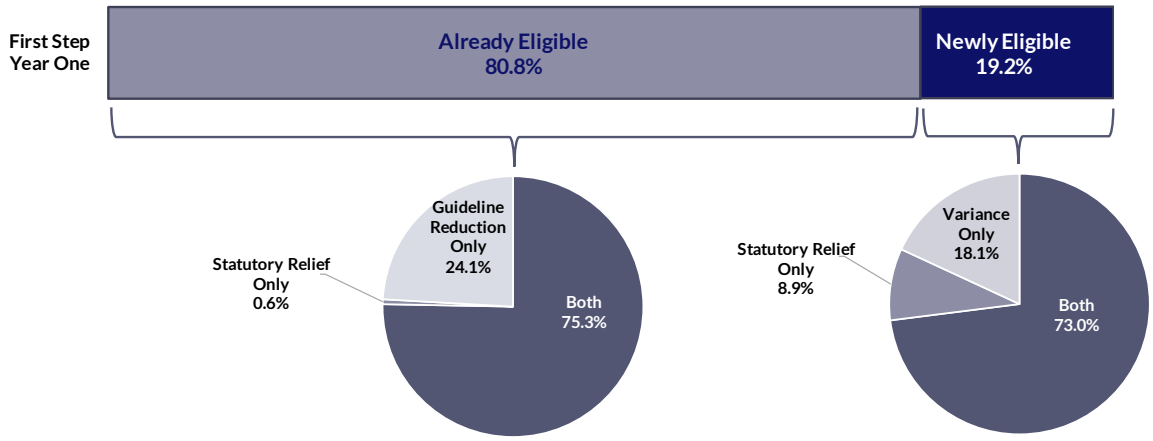


Drug Mandatory Minimum Status and Safety Valve Relief

Newly Eligible offenders were convicted of an offense carrying a drug mandatory minimum penalty at a higher rate than Already Eligible offenders. Among Already Eligible offenders, 75.9 percent (n=4,372) were convicted of a drug offense carrying a mandatory minimum penalty, while 24.1 percent (n=1,386) were not. By comparison, of the Newly Eligible offenders, 81.9 percent (n=1,121) were convicted of a drug offense carrying a mandatory minimum penalty, while 18.1 percent (n=248) were not.

The nature of relief offenders received was similar between the two groups, but Already Eligible offenders received a 2-level guideline reduction under §2D1.1 at a higher rate than the Newly Eligible offenders received a comparable reduction. Because §5C1.2 has not been amended to reflect the First Step Act's expansion of the safety valve, if courts choose to reduce a Newly Eligible offender's sentence below the guideline range because he or she was eligible for the expanded safety valve, that sentence is considered a variance under the guidelines. As demonstrated in Figure 16, of the 5,758 Already Eligible offenders, three-quarters (75.3%; n=4,337) received relief from the statutory minimum penalty *and* a 2-level guideline reduction under §2D1.1, 1,386 offenders (24.1%) were not convicted of an offense carrying a drug

Figure 16. Nature of Relief Among Offenders Eligible for Safety Valve[69]
First Step Year One



mandatory minimum penalty and received the 2-level guideline reduction only, and 35 offenders (0.6%) received statutory relief only. Of the Newly Eligible offenders, nearly three-quarters (73.0%; n=999) received relief from a statutory minimum penalty *and* a variance below the applicable guideline range, 248 (18.1%) were not convicted of an offense carrying a drug mandatory minimum penalty and received a variance below the guideline range only, and 122 (8.9%) received statutory safety valve relief only.

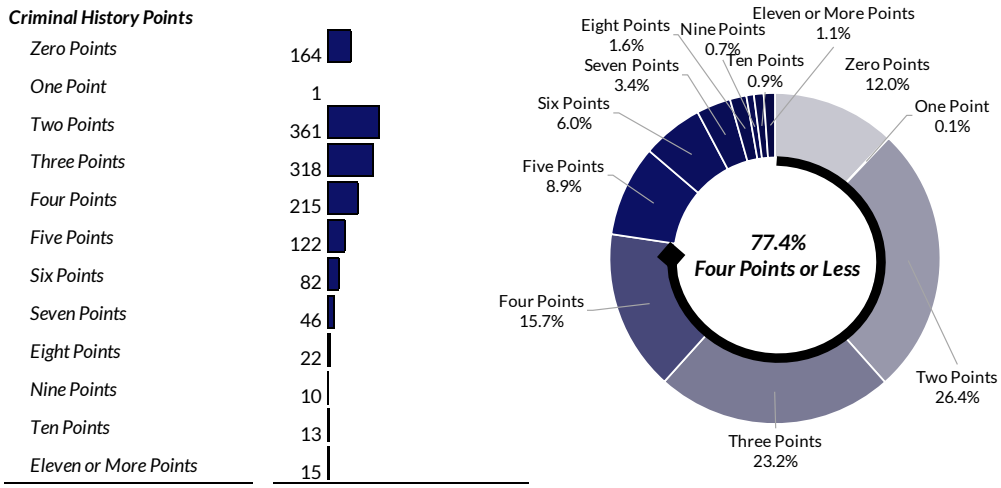
Criminal History

Already Eligible offenders can have no more than one criminal history point. Most Already Eligible offenders had zero criminal history points (84.6%; n=4,869), and the remaining 889 (15.4%) had one criminal history point. This is consistent with fiscal year 2018, when 85.8 percent (n=5,049) of safety valve recipients had zero criminal history points, and the remaining 823 offenders (14.0%) had one criminal history point.[70]

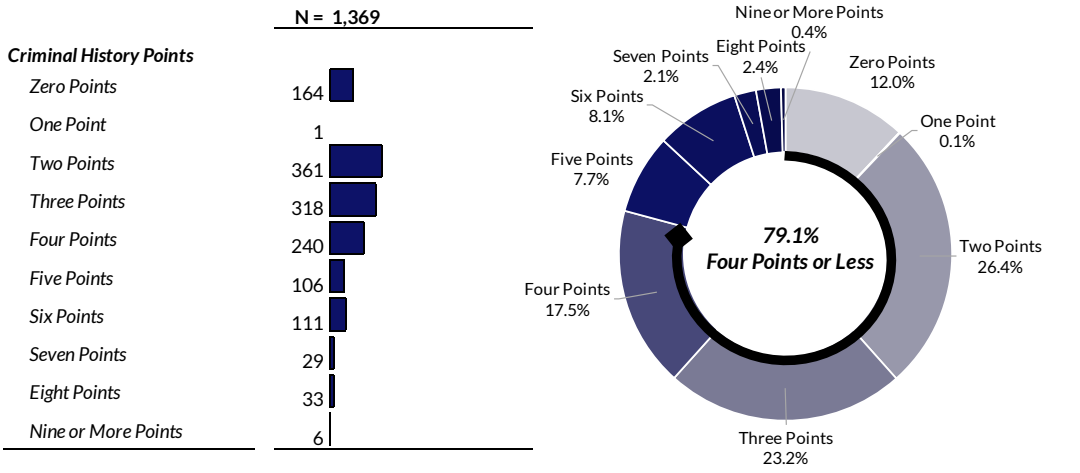
Newly Eligible offenders had a wider distribution of criminal history points used in the calculation of their Criminal History Category. This is consistent with the changes made by First Step Act. As described above, an eligible defendant can have no more than four criminal history points, comprised of up to two non-violent 2-point offenses. An eligible defendant can have *any* number of 1-point offenses due to the Act "excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines."[71]

Figure 17 A, B, and C. Total Criminal History Points for Newly Eligible Safety Valve Offenders[72]
First Step Year One

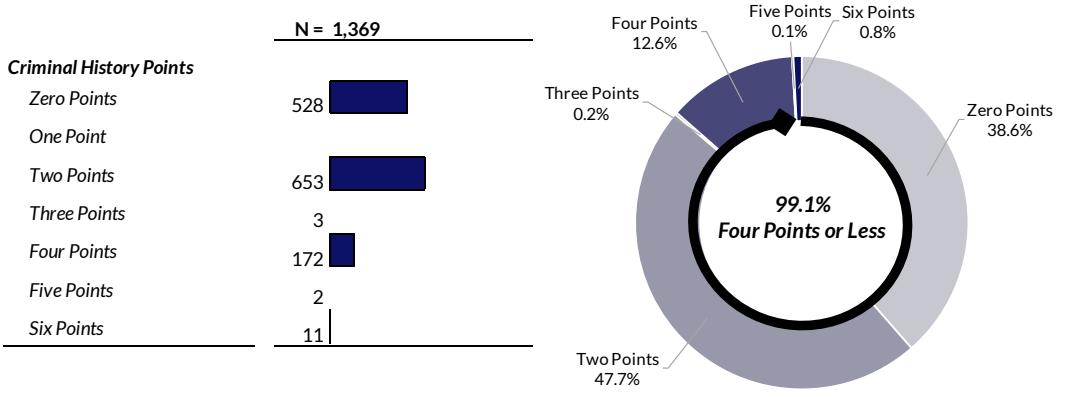
17A. Point Calculation Without Guideline Cap on 1-Point Offenses



17B. Points Used to Determine Criminal History Category



17C. Points Used for Safety Valve Determination Post-First Step Act



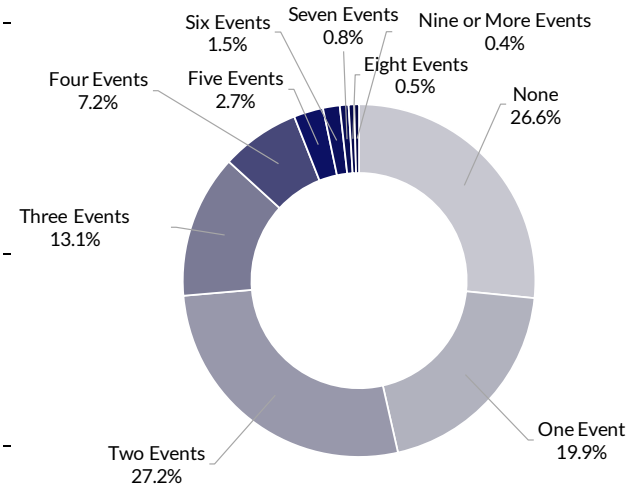
As demonstrated in Figure 17, before excluding 1-point offenses for safety valve consideration, nearly 80 percent (79.1%; n=1,084) of the Newly Eligible offenders had four or fewer criminal history points and half had two or three criminal history points applied in the calculation of their Criminal History Category (49.6%; n=679).[73] One-fifth (20.9%; n=285) had more than four criminal history points. Newly Eligible offenders with zero criminal history points are those who were convicted under the maritime statutes, 46 U.S.C. §§ 70503 or 70506.

A slightly wider distribution is seen when considering all criminal history events without the cap used for calculating an offender's Criminal History Category. The criminal history rules provide that prior sentences assigned one point under §4A1.1(c) are counted "up to a total of 4 points for this subsection."[74] Thus, an offender can have some 1-point offenses above the 4-point cap. While the court can consider these added points for departure reasons,[75] they are not included in the total points used in determining the Criminal History Category.

As demonstrated in Figure 18, among the 1,369 Newly Eligible offenders, 26.6 percent (n=364) had no 1-point events, 19.9 percent (n=272) had one 1-point event, 27.2 percent (n=372) had two 1-point events, 13.1 percent (n=180) had three 1-point events, and 7.2 (n=99) had four 1-point events.

The remaining 6.0 percent (n=82) of Newly Eligible offenders had more than four 1-point events, though only four are counted for criminal history purposes

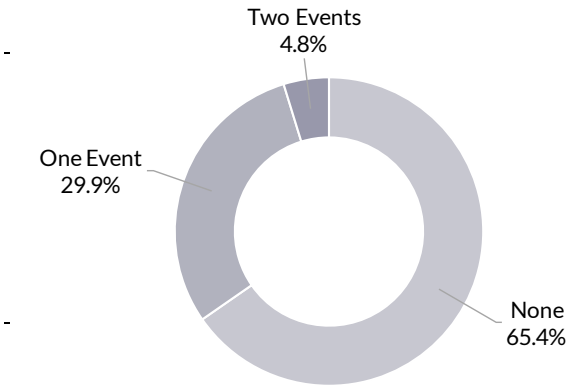
Figure 18. Number of 1-Point Events Without Guideline Cap for Newly Eligible Safety Valve Offenders[76]
First Step Year One



under §4A1.1(c).[77] Of those offenders with more than four 1-point criminal history events, most had five (45.1%; n=37), six (25.6%; n=21), or seven (13.4%; n=11). One offender had 16 1-point events, the most among the Newly Eligible. As demonstrated in Figure 17A, when these criminal history events above the guideline cap on 1-point offenses are considered, 38 Newly Eligible offenders (2.7%), had nine or more points. One offender had 22 points, the most among Newly Eligible offenders.

When considering the impact of the First Step Act (see Figure 17C), excluding all 1-point offenses from safety valve consideration, the majority of Newly Eligible offenders had either two (47.7%; n=653) or zero (38.6%; n=528) remaining points. Over ten percent (12.6%; n=172) had four remaining points, the maximum number a defendant can have and remain eligible.[78]

Figure 19. 2-Point Events for Newly Eligible Safety Valve Offenders[80]
First Step Year One



As a corollary of not counting 1-point offenses, and the exclusion of any offender with a 3-point offense from receiving relief, 2-point offenses have become the primary factor in determining an offender's eligibility. The majority of Newly Eligible offenders (65.4%; n=894) had no 2-point criminal history events, 29.9 percent (n=409) had one 2-point criminal history event, and 4.8 percent (n=65) had two 2-point criminal history events.[79] An offender who has any *violent* 2-point offense is prohibited from receiving relief.

Of the 1,369 Newly Eligible offenders, 35.9 percent (n=491) received points under §4A1.1(d) ("status points") for committing an offense while under a criminal justice sentence.[81] Five Newly Eligible offenders (0.4%) were sentenced as career offenders under §4B1.1.[82] None received points under §4A1.1(e) for a crime of violence offense that did not otherwise receive points,[83] were sentenced as Armed Career Criminals pursuant to 18 U.S.C. § 924(e), or received an enhancement under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).[84] Because Already Eligible offenders can have no more than one criminal history point, none received points under §4A1.1(d) or (e). No Already Eligible offenders were sentenced as career offenders or Armed Career Criminals. One Already Eligible offender received an enhancement under §4B1.5.

Average Sentence Length

There was a substantial difference in the average sentence length when comparing Already Eligible and Newly Eligible offenders. As demonstrated in Figure 20, the average sentence for Already Eligible offenders was 36 months, three months shorter than the average sentence for all offenders receiving safety valve relief in fiscal year 2018 (39 months). Of Newly Eligible offenders, most of whom qualified under the expanded criminal history provision, the average sentence was 53 months, 17 months longer than for Already Eligible offenders.

Figure 20. Average Sentence Length[85]
First Step Year One

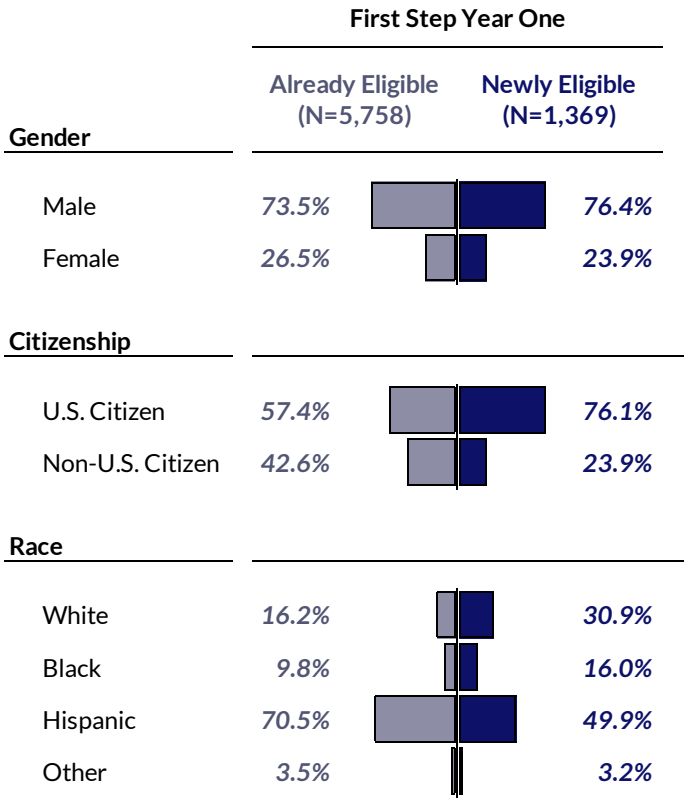
Drug Type

The distribution of drug type among Newly Eligible offenders was generally consistent with that of the Already Eligible offenders. However, a larger percentage of the Newly Eligible offenders were methamphetamine (48.5% compared to 42.2%) or crack offenders (4.2% compared to 1.5%), and a smaller percentage were marijuana offenders (6.9% compared to 12.8%).

Figure 21. Primary Drug Type for Newly Eligible Offenders[86]
First Step Year One

	First Step Year One	
Drug Type	Already Eligible	Newly Eligible
Powder Cocaine	*22.9%*	*22.9%*
Crack Cocaine	*1.5%*	*4.2%*
Heroin	*10.8%*	*9.4%*
Marijuana	*12.8%*	*6.9%*
Methamphetamine	*42.4%*	*48.5%*
Other	*9.8%*	*8.1%*

Figure 22. Demographic Characteristics[87]
First Step Year One



Demographics

There were notable differences in racial composition and citizenship status when comparing Already Eligible offenders to Newly Eligible offenders. Although Hispanic offenders represented the largest portion of each group, Newly Eligible offenders were more frequently White or Black and less frequently Hispanic, compared to Already Eligible offenders. Of Already Eligible offenders, more than two-thirds (70.5%; n=4,056) were Hispanic, followed by White offenders (16.2%; n=933), Black offenders (9.8%; n=562), and Other Race offenders (3.5%; n=203). Among Newly Eligible offenders, Hispanic offenders represented nearly half (49.9%; n=683) followed by White offenders (30.9%; n=422), Black offenders (16.0%; n=219), and Other Race offenders (3.2%; n=44).

Newly Eligible offenders were also more frequently United States citizens than were Already Eligible offenders. Of Already Eligible offenders, 57.4 percent (n=3,294) were United States citizens. This is similar to fiscal year 2018, when slightly over half (52.6%; n=3,092) of offenders who received safety valve relief were United States citizens. Among the Newly Eligible offenders, roughly three-quarters were United States citizens (76.1%; n=1,039).

These changes in the racial composition and citizenship status among Newly Eligible offenders, compared to the Already Eligible offenders, are in part a result of the First Step Act's increase in the number of criminal history points a safety-valve eligible defendant is permitted. Foreign convictions are not counted for purposes of the criminal history rules[88] and, as a result, criminal history scores for non-citizens may underrepresent past criminal activity that would otherwise be countable.

Non-United States citizens account for smaller portions of drug trafficking offenders as the number of criminal history points increases. For example, in Year One, non-United States citizens represented 43.5 percent of drug trafficking offenders with zero criminal history points, 16.7 percent of those with one criminal history point, and, on average, only 9.1 percent of offenders with between two and ten criminal history points.

Similarly, Hispanic offenders have accounted for the largest portions of drug trafficking offenders with zero or one criminal history points, respectively, and have accounted for smaller portions of overall drug trafficking offenders as criminal history points increase. For example, in both fiscal year 2018 and Year One, Hispanic offenders comprised approximately 70 percent of drug trafficking offenders with zero criminal history points (72.1% in fiscal year 2018 and 69.1% in Year One) and just under half of those with one criminal history point (48.4% in fiscal year 2018 and 46.1% in Year One). Black and White drug offenders accounted for larger portions of drug trafficking offenders with three or more criminal history points.

Male offenders comprised approximately three-quarters of both the Already Eligible (73.5%; n=4,234) and the Newly Eligible safety valve recipients (76.4%; n=1,046).

Impact on the Variance Rate

As noted above, because §5C1.2 has not been amended to reflect the First Step Act's expansion of the safety valve, when courts choose to reduce an offender's sentence below the guideline range because he or she was eligible under the expanded statutory safety valve criteria, that sentence is considered a variance under the guidelines. These variances partially account for an increase in the overall variance rate in drug trafficking cases in Year One. In fiscal year 2018, 21.8 percent of drug trafficking offenders received a below-range variance. This increased to 24.8 percent in Year One (a 3.0% increase). When Newly Eligible safety valve cases are removed, however, the below-range variance rate decreases slightly to 23.4 percent. The use of variances to reflect the sentence reduction for Newly Eligible safety valve offenders accounts for 1.4 percent—nearly half—of the 3.0 percent increase in the below-range variance rate for drug trafficking offenders in Year One.

Limiting Section 924(c) "Stacking"

The First Step Act limits "stacking" of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense.[89]

Section 403 of the First Step Act limits "stacking" of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple weapon offenses. Section 924(c) prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a "crime of violence" or "drug trafficking crime."[90] The statute prescribes a mandatory minimum penalty of at least five years of imprisonment, with increasingly longer penalties based on how the firearm was used (seven years if the firearm was brandished and ten years if the firearm was discharged)[91] and the type of firearm involved in the crime (ten years if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon and 30 years if the weapon was a machinegun, a destructive device or was equipped with a silencer or muffler).[92]

Section 924(c) further requires that these mandatory minimum penalties be imposed in addition to, and must run consecutively to, "any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the" underlying crime of violence or drug trafficking crime.[93] The statutory maximum penalty under each of these provisions is life imprisonment.

Section 924(c) also requires a mandatory minimum penalty of 25 years for each "second or subsequent conviction" of an offense under section 924(c).[94] Prior to the enactment of the First Step Act, these longer penalties applied even when a defendant was convicted of multiple section 924(c) counts *in the same case*. The Supreme Court upheld this practice and

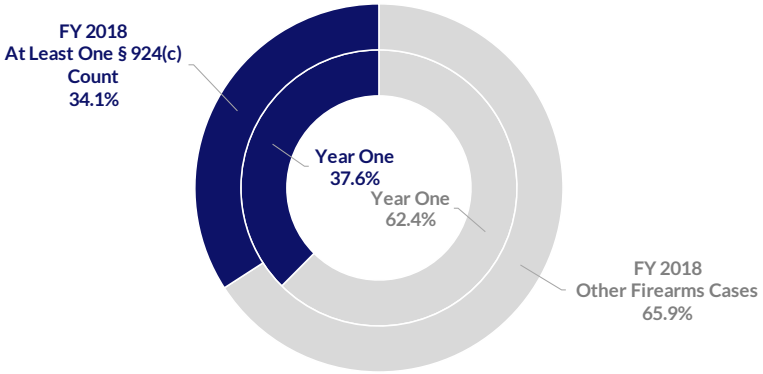
Table 2. Penalties Under 18 U.S.C. § 924(c)

18 U.S.C. § 924(c) Counts Per Indictment	***Pre-First Step Act***	***Post-First Step Act***
1 Count	Mandatory minimum of **5 years**	Mandatory minimum of **5 years**
2 Counts	Mandatory minimums of 5 years + 25 years = **30 years**	Mandatory minimums of 5 years + 5 years = **10 years**
3 Counts	Mandatory minimums of 5 years + 25 years + 25 years = **55 years**	Mandatory minimums of 5 years + 5 years + 5 years = **15 years**

interpretation of the statute, reasoning that any additional convictions of an offense under section 924(c) are "second or subsequent" to the first conviction.[95] Thus, the longer recidivist mandatory minimum penalty had to be served consecutively to any sentences imposed for the underlying offenses *and* other section 924(c) offenses, even when all the offenses were charged in a single indictment.[96] This practice of charging multiple violations of section 924(c) within the same proceeding has commonly been referred to as "stacking" of mandatory minimum penalties.

The First Step Act limits the application of the 25-year penalty by providing that the 25-year enhanced penalty at section 924(c)(1)(C) applies only to offenders whose instant violation of 924(c) occurs *after* a prior section 924(c) conviction has become *final*.[97] As a result, a defendant can no longer be sentenced to a "stacked" 25-year penalty based on another section 924(c) conviction in the same case. The First Step Act did not make any changes to the other penalty provisions of section 924(c) and, as a result, if an offender commits multiple violations of section 924(c) during the course of a crime, the five-, seven-, and ten-year penalties will be imposed consecutively at one sentencing. And, after the First Step Act, where an offender has previously been convicted of a section 924(c) offense that has become final, and subsequently commits multiple violations of section 924(c), the 25-year penalty can then be imposed consecutively at one sentencing. This change to the penalties is demonstrated on the previous page, using the five-year mandatory minimum penalty as an example.

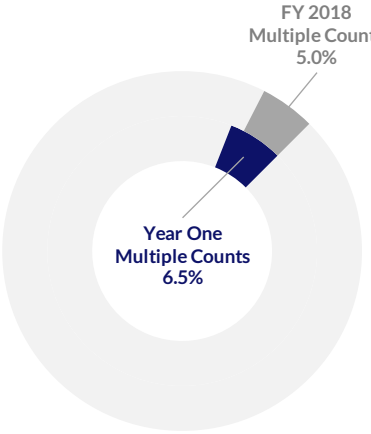
Figure 23. Change in Firearms Offenses Over Time[98]
FY 2018 and First Step Year One



Prevalence of 18 U.S.C. § 924(c) Offenses

Offenders convicted under section 924(c) increased in Year One compared to fiscal year 2018, both as a number and as a percentage of all firearms offenders. In fiscal year 2018, 2,564 offenders were convicted of at least one count under section 924(c), which represents 34.1 percent of all firearms offenders. This number increased to 3,288 offenders in Year One, which represents 37.6 percent of all firearms offenders. The number of total firearms offenders also increased from 7,512 (10.8% of cases overall) in fiscal year 2018, to 8,753 (11.2% of cases overall) in First Step Year One.[99]

Figure 24. Cases Involving Multiple Counts Under Section 924(c) and Number of Section 924(c) Counts[100]
FY 2018 and First Step Year One



	Multiple Counts Under 924(c)			
	FY 2018		First Step Year One	
Number of 924(c) Counts	N	%	N	%
Two	114	89.8%	150	69.8%
Three	5	3.9%	41	19.1%
Four	2	1.6%	12	5.6%
Five	3	2.4%	4	1.9%
Six	0	0.0%	4	1.9%
Seven	0	0.0%	0	0.0%
Eight or More	3	2.4%	4	1.9%

While the number of offenders convicted of multiple counts under section 924(c) increased in Year One, the percentage of 924(c) offenders convicted of multiple counts remained relatively stable, compared to fiscal year 2018. In fiscal year 2018, 2,437 (95.0%) offenders were convicted of a single count and 127 (5.0%) were convicted of multiple counts. By comparison, in Year One, 3,073 (93.5%) offenders were convicted of a single count and 215 (6.5%) were convicted of multiple counts. As demonstrated in Figure 24, during both time periods, offenders convicted of multiple counts under section 924(c) were most frequently convicted of two such counts; however, a greater number of offenders were convicted of three or more counts in Year One. In fiscal year 2018, 114 (89.8%) offenders convicted of multiple counts under section 924(c) were convicted of two such counts, while the remaining 13 offenders were convicted of three or more counts (with a high of 11 counts for a single offender). By comparison, in Year One, 150 offenders (69.8%) were convicted of two such counts, 41 (19.1%) were convicted of three counts, 12 (5.6%) were convicted of four counts, and an additional 12 offenders (5.6%) were convicted of between five and ten counts.

Severity of Penalties Imposed for Section 924(c) Offenses

There was a significant decrease in cases involving the 25-year penalty for a "second or subsequent" offense in Year One. In fiscal year 2018, a 25-year penalty applied in 133 cases (5.2%) in which an offender was convicted under section 924(c). In Year One, a 25-year penalty applied in only 18 cases (0.6%) in which an offender was convicted of at least one count under section 924(c).

The First Step Act's changes to the 25-year penalty are most evident when considering cases involving multiple counts under section 924(c). In fiscal year 2018, in most cases (92.1%; n=117) involving multiple counts under section 924(c), one 25-year penalty applied consecutively to another firearm mandatory minimum penalty. In two additional cases (1.6%), multiple consecutive 25-year penalties applied. By comparison, in Year One, of the 215 cases involving multiple counts, the 25-year penalty was imposed in only five cases. In four of these cases—all where the offender had a final prior section 924(c) conviction—multiple, consecutive 25-year penalties applied. In the fifth case, the offender had no final prior section 924(c) conviction and the penalty was applied consecutively to another firearm mandatory minimum penalty. In the vast majority of remaining cases, five-, seven-, and ten-year penalties typically replaced what would have been a 25-year penalty prior to the First Step Act. In Year One, in half of the cases involving multiple counts (50.7%; n=109) a seven-year penalty was the highest penalty imposed. The highest penalty imposed was ten years in 30.7 percent of cases (n=66) and five years in 14.0 percent of cases (n=30). The specific penalties imposed in Year One are depicted in Figure 25.

The First Step Act's limitation on the use of the 25-year penalty resulted in a considerable decrease in the average sentence length for section 924(c) offenders, particularly those convicted of multiple counts. In fiscal year 2018, offenders convicted of at least one count under section 924(c) had an average sentence of 150 months.[102] In Year One, the average sentence for these offenders was ten months shorter (140 months).[103]

Figure 25. Highest Mandatory Minimum Penalty in Cases with Multiple 18 U.S.C. § 924(c) Counts[101]
FY 2018 and First Step Year One

	FY 2018		First Step Year One	
	N	%	N	%
Total Offenders	127	100.0	215	100.0
Life	5	3.9%	5	2.3%
Multiple Life MM	2	1.6%	4	1.9%
Life + Other Lower MM	3	2.4%	1	0.5%
25-Year	119	93.7%	5	2.3%
Multiple 25-Year MM	2	1.6%	4	1.9%
25-Year + Other Lower MM	117	92.1%	1	0.5%
10-Year	3	2.4%	66	30.7%
Multiple 10-Year MM	1	0.8%	23	10.7%
10-Year + Other Lower MM	2	1.6%	43	20.0%
7-Year	0	0.0%	109	50.7%
Multiple 7-Year MM	0	0.0%	104	48.4%
7-Year + Other Lower MM	0	0.0%	5	2.3%
5-Year	0	0.0%	30	14.0%
Multiple 5-Year MM	0	0.0%	30	14.0%

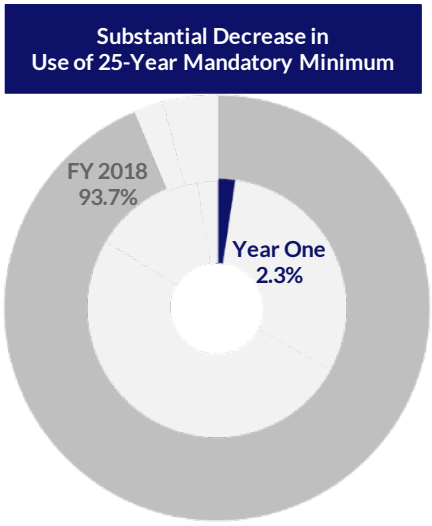
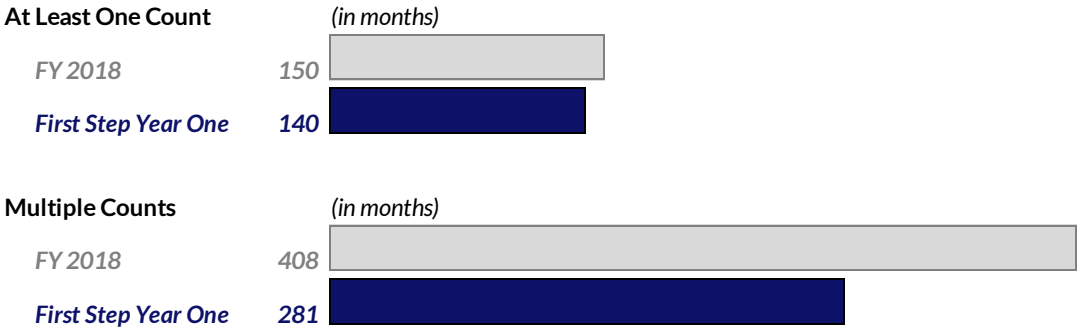


Figure 26. Average Sentence Length in 18 U.S.C. § 924(c) Cases[104]
FY 2018 and First Step Year One

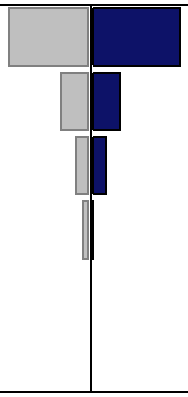


For offenders convicted of multiple counts under section 924(c), the average sentence length was more than ten years shorter in Year One, decreasing from 408 months in fiscal year 2018 to 281 months (a difference of 127 months).

Aside from the substantial change in the number of 25-year penalties for "second or subsequent" offenses, the distribution of mandatory minimum penalty lengths for all section 924(c) offenses remained relatively stable between the two time periods. As demonstrated in Figure 27, in cases involving at least one count under section 924(c), the statute's five-year mandatory minimum penalty was most commonly the highest penalty applied during both time periods—62.3 percent (n=1,597) during fiscal year 2018 and 67.2 percent (n=2,208) during Year One—followed by the seven-year penalty and the ten-year penalty. In fiscal year 2018, the seven-year penalty was the highest penalty applied in 21.8 percent of cases (n=559), and the ten-year penalty was the highest applied in 10.2 percent of cases (n=262). In Year One, the seven-year mandatory minimum for brandishing a firearm was the highest penalty applied in 21.5 percent of cases (n=707), and the ten-year minimum for discharging a firearm, or for an offense involving a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon was the highest penalty applied in 10.3 percent of cases (n=339). Penalties of 30 years and life imprisonment applied in less than one percent of cases during each time period.[106]

Figure 27. Highest Mandatory Minimum Penalty in Cases with At Least One Count Under 18 U.S.C. § 924(c)[105]
FY 2018 and First Step Year One

	FY 2018		First Step Year One	
	N	%	N	%
Total Offenders	2,564	100.0	3,286	100.0
5-Year	1,597	62.3%	2,208	67.2%
7-Year	559	21.8%	707	21.5%
10-Year	262	10.2%	339	10.3%
25-Year	133	5.2%	18	0.5%
30-Year	4	0.2%	7	0.2%
Life	9	0.4%	7	0.2%

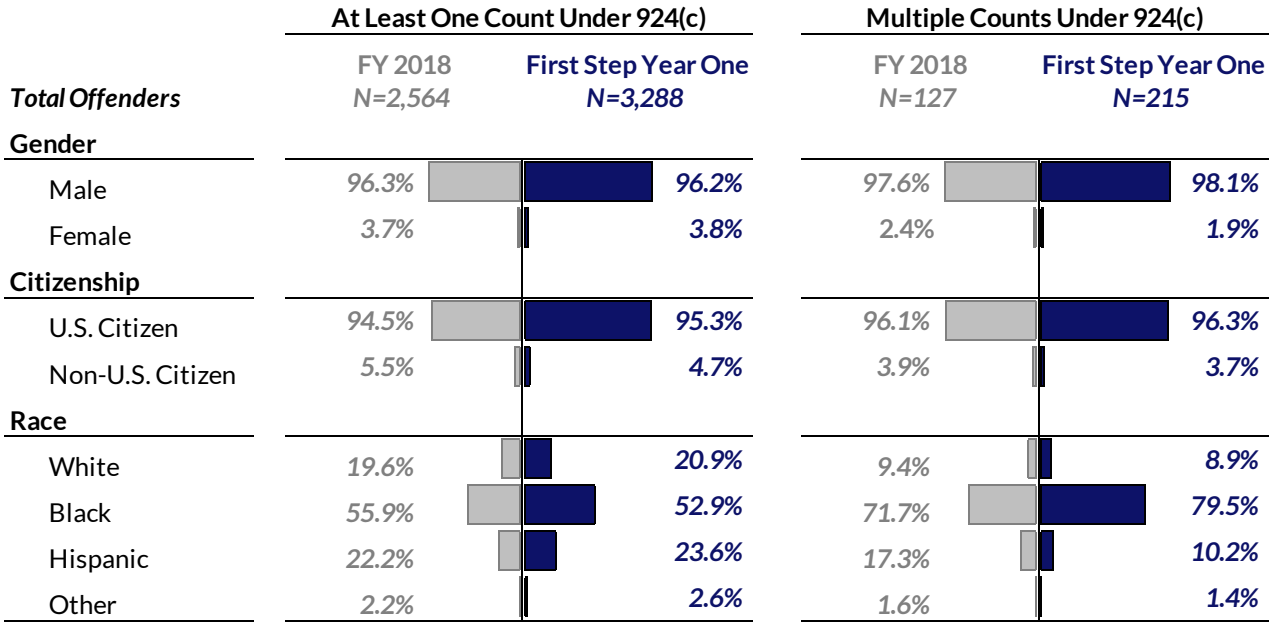


Although the distribution of the penalty lengths remained stable across the two time periods, there was an increase in the *number* of offenders convicted under section 924(c) receiving a five-year penalty, from 1,597 offenders in fiscal year 2018 to 2,208 offenders in Year One (an increase of 611 offenders). These offenders largely account for the 28.2 percent increase in offenders convicted of an offense under section 924(c) during the same time period, from 2,564 to 3,288 offenders (an increase of 724 offenders).

Demographics

Black offenders represented over half of offenders convicted of at least one count under section 924(c), and more than 70 percent the offenders convicted of multiple counts, in both fiscal year 2018 and Year One. The racial distribution of offenders convicted of at least one count under section 924(c) was stable between fiscal year 2018 and Year One. In Year One, Hispanic offenders comprised a smaller portion of offenders convicted of multiple counts under section 924(c) (10.2% compared to 17.3%), while Black offenders comprised a larger portion (79.5% compared to 71.7%).

Figure 28. Demographic Characteristics of Offenders Convicted Under 18 U.S.C. § 924(c)[107]
FY 2018 and First Step Year One



Male offenders were convicted under section 924(c) far more frequently than female offenders during both time periods, accounting for 96.3 percent of offenders convicted of at least one count in fiscal year 2018 and 96.2 percent in Year One. Of offenders convicted of multiple counts under section 924(c), this increased to 97.6 percent in fiscal year 2018 and 98.1 percent in Year One.

The overwhelming majority of offenders convicted of at least one count under section 924(c) were United States citizens in fiscal year 2018 (94.5%; n=2,419) and in Year One (95.3%; n=3,128).

Retroactive Application of the Fair Sentencing Act of 2010

The First Step Act applies the Fair Sentencing Act of 2010 retroactively, authorizing offenders sentenced prior to enactment of the Fair Sentencing Act to seek sentence reductions.[108]

The Fair Sentencing Act of 2010

Section 404 of the First Step Act applies the Fair Sentencing Act of 2010 retroactively, authorizing offenders sentenced prior to enactment of the Fair Sentencing Act to seek sentence reductions. The Fair Sentencing Act, enacted August 3, 2010, reduced the disparity between sentences for crack and powder cocaine (from a 100-to-1 to an 18-to-1 crack-to-powder ratio) for offenders sentenced on or after its effective date.[109] Prior to the Fair Sentencing Act, an offense involving five grams or more of crack cocaine carried a mandatory minimum penalty of five years (and a maximum sentence of 40 years), and an offense involving more than 50 grams of crack cocaine carried a ten-year mandatory minimum sentence (and a maximum sentence of life imprisonment).[110] Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggers these penalties, from five to 28 grams for the five-year mandatory minimum penalty and from 50 to 280 grams for the ten-year mandatory minimum penalty,[111] as demonstrated in Table 3 below.

Section 3 of the Fair Sentencing Act also eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine.[112]

Table 3. Penalties for Crack Cocaine Offenses

Provisions	Statutory Penalties*	Pre-Fair Sentencing Act Quantity	Post-Fair Sentencing Act Quantity
21 U.S.C. §§ 841(b)(1)(B) and 960(b)(2)	5-year mandatory minimum; 40-year statutory maximum *(10-year mandatory minimum after one prior "felony drug offense")*	5 grams	28 grams
21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)	10-year mandatory minimum; life statutory maximum *(20-year mandatory minimum after one prior "felony drug offense")* *(Life after two or more prior convictions for a "felony drug offense" under section 841(b)(1)(A) only)*	50 grams	280 grams

*These penalties do not reflect changes made by the First Step Act, as such changes were prospective only and do not apply retroactively.

The Commission's Retroactive Guideline Amendment

The Fair Sentencing Act applied to defendants sentenced on or after its effective date;[113] however, it did not provide for retroactive application to offenders sentenced prior to its enactment. The Commission amended the drug quantity tables at §2D1.1 to incorporate the changes made by the Fair Sentencing Act into the guidelines and made those changes retroactive.[114] However, while offenders sentenced before August 3, 2010 were eligible for a retroactive *guideline* reduction, they remained subject to the *statutory* penalty in effect at the time they were sentenced. Thus, those offenders who had been sentenced at the mandatory minimum penalty could not receive any reduction, and defendants who were sentenced above a mandatory minimum penalty could receive smaller reductions than would otherwise be available, down to the mandatory minimum penalty. In addition, offenders who were sentenced under the career offender guideline at §4B1.1 were not eligible for the guideline reduction because the amendment did "not have the effect of lowering the defendant's applicable guideline range."[115] As a result, several thousand offenders were ineligible for some or all of the sentence reduction that would have resulted from the retroactive application of the lowered sentencing guideline.

The First Step Act Applies the Fair Sentencing Act Retroactively

The First Step Act provides that an offender sentenced before enactment of the Fair Sentencing Act may be sentenced as if the provisions of the Fair Sentencing Act were in effect at the time the offender was sentenced.[116] Motions for a reduced sentence may be made by the defendant, the Director of the BOP, the government, or the court.[117] Although the First Step Act authorizes offenders to seek a reduction where it was previously unavailable, whether a reduction is warranted and will be granted is within the discretion of the court.[118]

Figure 29. Origin of Motion for Offenders Receiving a Retroactive Sentence Reduction Pursuant to First Step Act[119]

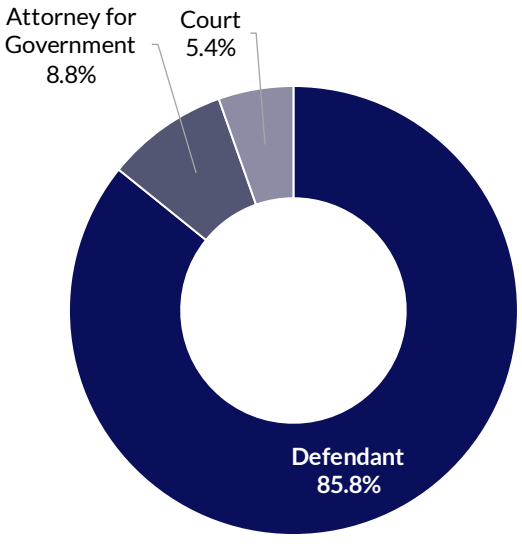
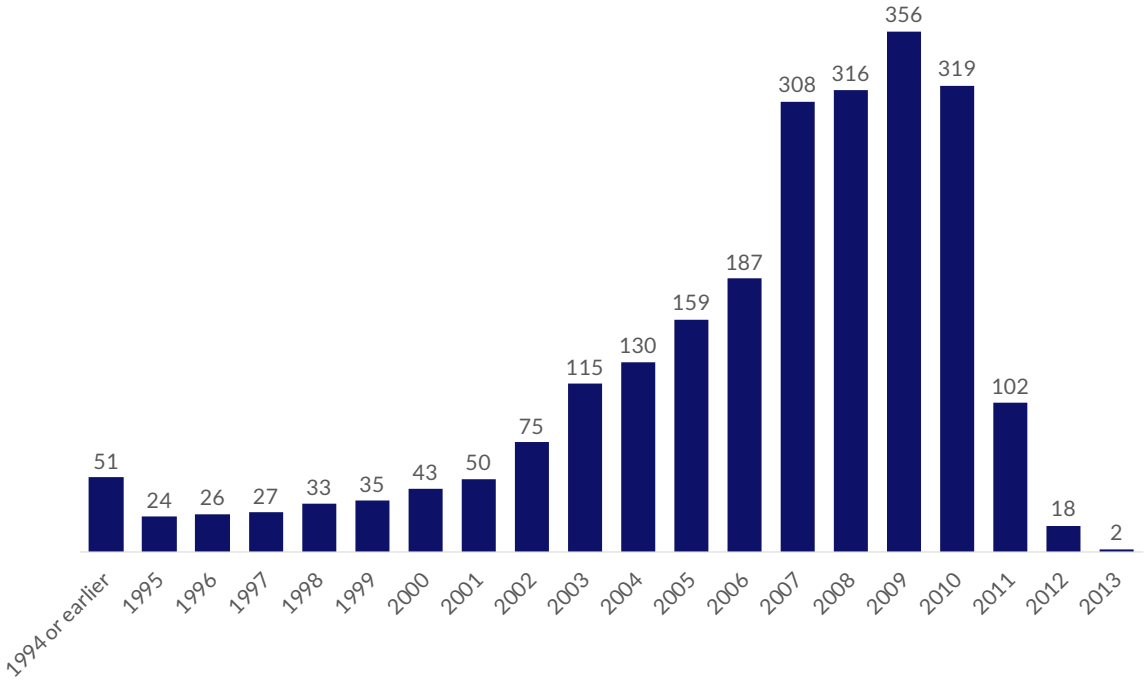


Figure 30. Year of Original Sentence for Offenders Receiving Sentence Reductions Pursuant to Resentencing Provisions of the First Step Act[120]



First Step Act Retroactive Fair Sentence Act Reductions

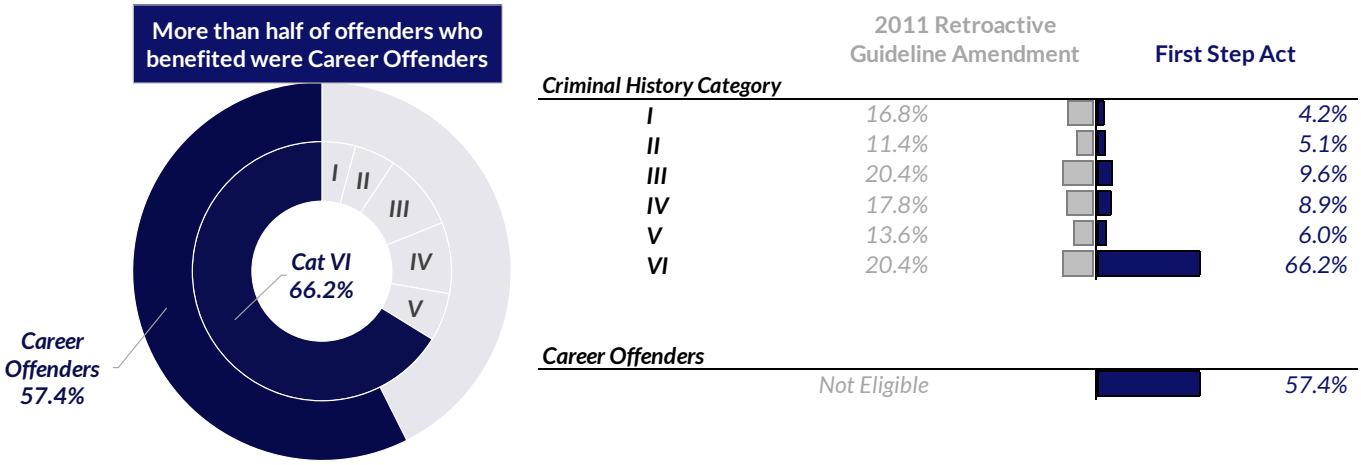
In the year after passage of the First Step Act, courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act. These offenders were originally sentenced between 1990 and 2013, with the majority sentenced between 2003 and 2011.

Most of these motions were filed by the defendant (85.8%; n=2,223). Less than ten percent (8.8%; n=229) were filed by the government and 5.4 percent (n=140) were granted by the court on its own motion. None were filed by the Director of the BOP (see Figure 29).

Average Sentence, Criminal History, and Other Sentencing Factors

The sentence reductions offenders have received as a result of the First Step Act's retroactivity provision have been substantial. The average length of sentence reduction for these offenders was 71 months, or 26 percent—from 258 months to 187 months.[121] These sentence reductions are more than twice as long as the sentence reductions offenders received pursuant to the Commission's Fair Sentencing Act retroactive guideline amendment (on average 30 months or 19.9%).[122] This difference is largely a reflection of the fact that the First Step Act group of retroactivity beneficiaries had much longer original sentences, for two reasons. First, these offenders have more extensive criminal histories and, therefore, higher criminal history scores.

Figure 31. Criminal History of Offenders Receiving Fair Sentencing Act Retroactive Sentence Reductions[123]



Second, many were sentenced under the Career Offender guideline, which provides for an increased offense level, at or near the statutory maximum, and an automatic increase to Criminal History Category VI.[124]

Among the offenders who benefited from the retroactive guideline reduction, only 20 percent were in Criminal History Category VI,[125] and career offenders were ineligible to receive the guideline reduction. In contrast, 66.2 percent of the offenders who received statutory relief under the First Step Act were in Criminal History Category VI, and more than half (57.4%) were originally sentenced as career offenders. Only 9.3 percent of the offenders who received statutory relief under the First Step Act were in Criminal History Categories I and II, compared to 28.2 percent of those who received retroactive application of the Commission's guideline amendment.[126]

The Commission also analyzed selected sentencing factors for offenders receiving sentence reductions under section 404, including whether a weapon was involved in the offense, whether the safety valve applied, whether certain guideline role adjustments applied, and the sentence relative to the guideline range. For more on these sentencing factors, see Appendix Figure 3.

Demographics

The demographic characteristics of offenders receiving reductions under section 404 of the First Step Act are consistent with crack offenders generally. Black offenders accounted for the overwhelming majority of offenders receiving a reduction (91.4%; n=2,172), followed by Hispanic offenders (4.2%; n=100), White offenders (3.7%; n=87), and Other Race offenders (0.8%; n=18). In fiscal year 2018, 80.0 percent of crack offenders were Black, 13.0 percent were Hispanic, 6.3 percent were White, and 0.7 percent were Other Race.[127]

Figure 32. Offense and Offender Characteristics for Offenders Receiving Sentence Reductions Pursuant to First Step Act[130]

Total Offenders

	N	%
Gender		
Male	*2,339*	*98.1%*
Female	*46*	*1.9%*
Citizenship		
U.S. Citizen	*2,305*	*97.2%*
Non-U.S. Citizen	*67*	*2.8%*
Race		
White	*87*	*3.7%*
Black	*2,172*	*91.4%*
Hispanic	*100*	*4.2%*
Other	*18*	*0.8%*
Average Age		
Original Sentencing	*32*	
Resentencing	*45*	

Nearly all offenders receiving sentence reductions were male (98.1%; n=2,339), consistent with the proportion of male crack offenders generally (92.2% in fiscal year 2018).[128]

United States citizens accounted for 97.2% (n=2,305) of offenders receiving sentence reductions, which is consistent with their representation among crack offenders generally (97.9% in fiscal year 2018).[129]

The Commission has published a series of data reports providing more detail regarding the geographical distribution, demographics, sentencing factors, and average sentence reduction for offenders who have received sentence reductions through retroactive application of statutory and guideline changes. The reports are available on the Commission's website at:

https://www.ussc.gov/research/data-reports/retroactivity-analyses-and-data-reports.

Compassionate Release

The First Step Act authorizes the defendant to file a motion for "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A), where previously only the BOP was so authorized.[131]

18 U.S.C. § 3582(c)(1)(A)

Section 603 of the First Step Act authorizes the defendant to file a motion for "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A). Prior to the First Step Act, section 3582(c)(1)(A) authorized a court "*upon motion of the Director of the Bureau of Prisons*," to reduce the term of imprisonment of a federal inmate if the court finds that:

- extraordinary and compelling reasons warrant such a reduction; or

- the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community.[132]

The statute also required that the reduction be consistent with applicable policy statements issued by the Commission.[133]

Congress directed the Commission to promulgate policy statements implementing this provision and describing "what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[134] This policy statement appears at §1B1.13 and largely restates the requirements of the statute, but also requires that the defendant not be a danger to the safety of others or the community generally, regardless of the prong under which the defendant is granted compassionate release.[135] It provides four categories of "extraordinary and compelling reasons," each of which is then further described.

These four categories are:

(A) the medical condition of the defendant;

(B) the age of the defendant;[136]

(C) family circumstances;[137] or

(D) an extraordinary or compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C), as determined by the Director of the Bureau of Prisons.

With respect to prong (A), the medical condition of the defendant, the defendant must *either* be (i) suffering from a terminal illness;[138] or (ii) suffering from (I) a serious physical or medical condition, (II) serious functional or cognitive impairment, or (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.[139]

First Step Act's Changes to 18 U.S.C. § 3582(c)(1)(A)

The First Step Act amended section 3582(c)(1)(A) to allow the *defendant* to file a motion in federal court seeking compassionate release after the defendant has exhausted administrative appeals, or after a failure of the BOP to bring a motion on the defendant's behalf or 30 days from the warden's receipt of a request, whichever is earlier.[140]

The statutory changes made by the First Step Act did not make any changes to the *Guidelines Manual*, nor did the Act provide emergency amendment authority to the Commission.[142] Thus, the policy statement at §1B1.13 does not reflect the First Step Act's changes. The procedural change implemented by the First Step Act, however, is being successfully implemented, with defendants filing motions for and obtaining compassionate release.

During Year One, 145 motions seeking compassionate release were granted, a five-fold increase from fiscal year 2018 (n=24).[143] As demonstrated in Figure 33, of those motions granted during Year One, 96 (67.1%) were filed by the offender and 47 (32.9%) were filed by the BOP.

Figure 33. Origin of Compassionate Release Motion[141]
First Step Year One

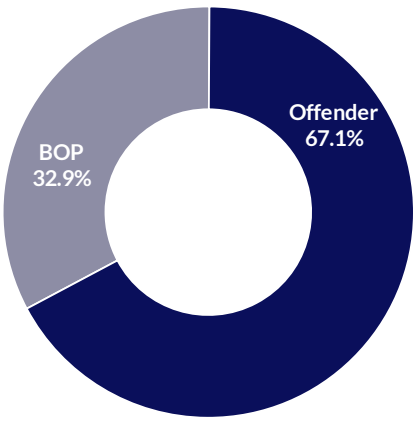
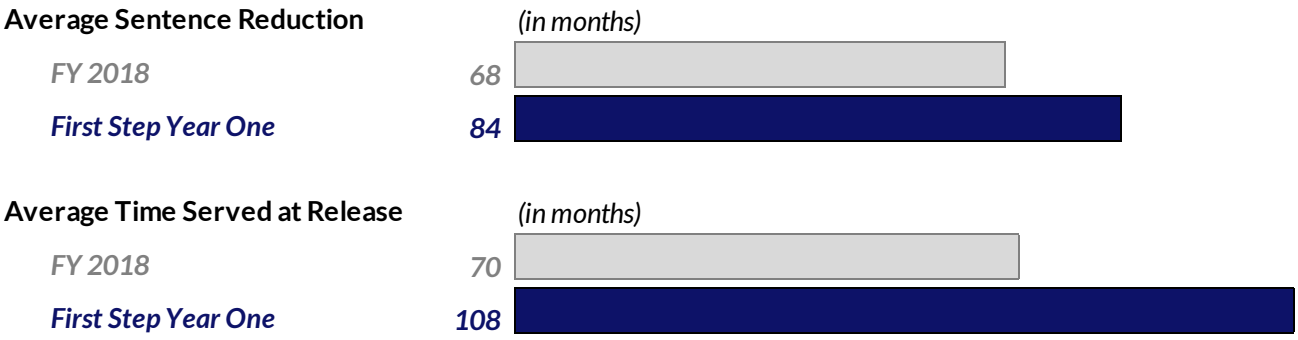


Figure 34. Average Sentence Reduction and Time Served in Compassionate Release Cases[144]
FY 2018 and First Step Year One



Offenders who benefited from compassionate release in Year One received larger reductions and served more time when compared to those granted release in fiscal year 2018. The average length of the reduction in sentence was 68 months in fiscal year 2018; sentences were reduced, on average, by 84 months in Year One.[145] The average months of time served at the time of release also increased, from 70 months to 108 months.[146] The average age at the time of release increased by ten years, from 51 years old at the time of release to 61 years old.

Of the four examples of what may qualify as "extraordinary and compelling reasons" according to the Commission's policy statement, compassionate release was most frequently granted based on the medical condition of the defendant, and, in particular, based on terminal illness. In fiscal year 2018, of the 24 grants of compassionate release, 15 were granted based on the medical condition of the defendant, two were granted based on the age of the defendant, and four were granted for other extraordinary and compelling reasons.[147] None were granted based on family circumstances. Of the 15 granted based on the medical condition of the defendant, 11 were based on a terminal illness, two were based on a condition or impairment that substantially diminishes the ability of the defendant to provide self-care within the correctional facility environment, and in two the type of medical reason was not further specified.

Figure 35. "Extraordinary and Compelling" Reasons for Granting Compassionate Release[148]
FY 2018 and First Step Year One

Number of Cases	FY 2018	First Step Year One	
Medical Condition	*15*	*118*	
Age of Offender	*2*	*15*	**6 mentioned*
Family Circumstances	*0*	*2*	
Other Reasons	*4*	*15*	**2 mentioned*

In Year One, most (81.4%) compassionate release grants were also based on medical reasons. Of the 145 compassionate release motions granted,[149] 118 were based on the medical condition of the defendant, 15 were based on age,[150] two were based on family circumstances, and 15 were based on other extraordinary and compelling reasons.[151] Of the 118 granted for medical reasons, 75 were based on terminal illness, 31 based on a condition or impairment that substantially diminishes the ability of the defendant to provide self-care within the correctional facility environment, and in 12 the type of medical reason was not further specified.

For the primary offense guidelines for offenders granted release in each year, see Appendix Figure 4.

Conclusion

The First Step Act of 2018 amended five federal sentencing provisions. In particular, it: reduced the scope and severity of certain enhanced recidivist penalties for some drug offenders; broadened the existing safety valve at 18 U.S.C. § 3553(f); limited "stacking" of the 25-year penalty imposed for multiple weapon offenses; applied the Fair Sentencing Act of 2010 retroactively; and authorized the defendant to file a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). These provisions have now been in effect for a full calendar year. The Commission analyzed sentencing data related to these specific provisions, comparing the first full year that the First Step Act was in effect (December 21, 2018 through December 20, 2019) with data from the fiscal year prior to its enactment, fiscal year 2018.

The Commission will continue to collect data on the sentencing impact of the First Step Act, release its First Step Act retroactivity data reports on the website,[152] and publish additional reports as appropriate.

Endnotes

1 Pub. L. No. 115–391, 132 Stat. 5194 (2018).

2 U.S. Sentencing Comm'n, Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders 16 (July 2018) [hereinafter Application and Impact of 21 U.S.C. § 851] (summarizing recommendations from *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, including that Congress reassess the severity and scope of section 851 enhancements and reconsider the definition of "felony drug offense" to reduce inconsistent application of the enhancement across districts), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf; U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System 14 (Oct. 2017) (noting 2011 recommendations that Congress expand the safety valve and reassess section 851 enhancements), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf; U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 14 (Mar. 2018) (noting 2011 recommendations regarding 18 U.S.C. § 924(c), including making the enhanced mandatory minimum penalty for a "second or subsequent" offense apply to prior convictions only, rather than to multiple section 924(c) counts in the same proceeding), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf; U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, amend. 759 (effective Nov. 1, 2011) (in retroactively applying Amendment 750—which incorporated the Fair Sentencing Act's changes into the guidelines—explaining that the "statutory changes reflect congressional action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"); USSG App. C, amend. 799 (effective Nov. 1, 2016) (noting low approval rates of compassionate release motions, broadening certain eligibility criteria, and "encourag[ing] the Director of the Bureau of Prisons to file a motion for compassionate release when 'extraordinary and compelling reasons' exist").

3 All the sections in this report compare data from two time periods: fiscal year 2018 and one year after the enactment of the First Step Act. The Commission's FY2018 individual offender datafile contains 69,425 cases. Most Commission reports use the Commission's fiscal-year based individual offender datafiles. However, the First Step Act Year One datafile (hereafter "Year One datafile") is not a traditional "fiscal year" file running from October 1st through September 30th. Rather, the Year One datafile spans approximately three quarters of the FY2019 datafile as well as approximately one quarter of the FY2020 datafile. The exact sentencing dates included in the report are December 21, 2018, through December 20, 2019. The Year One datafile includes 58,760 individual offenders from the Commission's FY2019 datafile, USSCFY2019 who were sentenced between December 21, 2018, through September 30, 2019. Additionally, because this report was completed and published prior to the closure of the FY2020 datafile, a portion of the Year One datafile includes the Commission's preliminary FY2020 datafile, PRELIMFY2020 which includes information on the 19,559 individual offenders sentenced between October 1, 2019, through December 20, 2019, for whom sentencing documents were received as of March 16, 2020. The total individual offender cases included in the Year One datafile is 78,319.

4 A "serious drug felony" is defined as an offense described in 18 U.S.C. § 924(e)(2)(A) for which the defendant *served* a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines "serious drug offense" as an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), chapter 705 of title 46 (Maritime Law Enforcement), or under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

5 *See infra* Figure 3 and note 33 for a list of the offenses that were considered "violent" offenses for purposes of this analysis.

6 The Commission regularly publishes data reports on the First Step Act's retroactive application of the Fair Sentencing Act, which are available at https://www.ussc.gov/research/data-reports/retroactivity-analyses-and-data-reports.

7 As with other sentencing documentation, district courts must send the Commission orders granting a reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). For the Year One time period, the Commission also obtained the Bureau of Prisons' (BOP) list of inmates released pursuant to this provision and cross-referenced its documentation against the BOP's. The Commission did not include in its analysis any grants that were outside of the one-year time period (December 21, 2019 through December 20, 2020) considered in this publication. *See also infra* note 131.

8 Data in this section of the report is from the Commission's individual offender datafile as well as the Commission's Enhanced Drug Penalty Datafile ("851 datafile"). Only cases in which the government filed for an enhanced drug penalty for at least one count of conviction were included in the "851 datafile" included in this section. The government filed an 851 information/indictment which enhanced the drug statutory penalty in 1,274 cases in fiscal year 2018 and 1,607 in Year One. Whenever the text, tables, or figures discuss offenders who have had the enhanced drug penalty(s) "withdrawn," this includes cases in which either the government withdrew all counts of the enhanced drug penalty or cases in which the court found that no enhanced drug penalty applied at sentencing. In fiscal year 2018, there were ten cases in which the status of the enhanced drug penalty was unable to be determined; 14 cases were missing the same information in Year One. Cases missing the above information were removed from the denominator when reporting the percentages of "withdrawn" and "not withdrawn" offenders. A total of 1,001 offenders in fiscal year 2018 and 849 offenders in Year One met the not withdrawn or found inapplicable criteria. Note that these offenders may still have received statutory relief at sentencing via providing substantial assistance to the government or the safety valve.

9 21 U.S.C. § 851. The Commission published a report about the impact of these enhanced penalties as part of its series on mandatory minimum penalties. *See* Application and Impact of 21 U.S.C. § 851, *supra* note 2.

10 21 U.S.C. §§ 841, 960. They also prohibit certain specific acts like distributing drugs to persons who are under the age of 21 or who are pregnant, using persons under the age of 18 in drug operations, and distributing drugs in or near schools and colleges. *See* 21 U.S.C. §§ 859, 860, and 861. A person who commits one of those offenses is subject to a mandatory minimum penalty of at least one year of imprisonment, unless a greater mandatory minimum penalty otherwise applies.

11 Section 841 prohibits the knowing or intentional manufacture, distribution, dispensation, or possession with intent to manufacture, distribute or dispense a controlled substance. Section 960 prohibits the knowing and intentional importation or exportation of a controlled substance. 21 U.S.C. §§ 841, 960. Controlled substance is defined as "a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this subchapter," and includes powder cocaine, crack cocaine, marijuana, methamphetamine, and heroin, among others. 21 U.S.C. § 802(6).

12 The penalties for committing other drug offenses under title 21 are also tied to the same penalty structure. For example, attempts or conspiracies to commit any drug offense are subject to the same penalty structure as the substantive offense. *See* 21 U.S.C. §§ 846, 963.

13 These mandatory minimum penalties became effective on November 1, 1987, for all drug types, except methamphetamine. *See* Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207–2 (1986) (amending 21 U.S.C. § 841(b)(1)). The mandatory minimum penalties for methamphetamine became effective on November 18, 1988. *See* Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4181, 4378 (1988) (amending 21 U.S.C. § 841(b)(1)).

Congress also added a mandatory minimum penalty for simple possession of crack cocaine in 1988. *See* Pub. L. No. 100–690, § 6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844(a)). The Fair Sentencing Act of 2010 altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

14 *See* 21 U.S.C. §§ 841(b) and 960(b).

15 *See* 21 U.S.C. § 851(a) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.").

16 The term "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). Certain state drug offenses that are classified as misdemeanors by the state but are punishable by imprisonment for more than one year qualify as a felony drug offense under this definition. *See* Burgess v. United States, 553 U.S. 124, 126–27 (2008).

17 A "serious drug felony" is defined as an offense described in 18 U.S.C. § 924(e)(2)(A) for which the defendant *served* a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines "serious drug offense" as an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), chapter 705 of title 46 (Maritime Law Enforcement), or under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

18 Pub. L. No. 115–391, § 401.

19 Section 3559(c)(2)(F) defines "serious violent felony" to include a list of a number of enumerated offenses (including, among other offenses, murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses), or as any other 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. 18 U.S.C. § 3559(c)(2)(F). Section 113 prohibits a range of assault offenses occurring within maritime or territorial jurisdictions. 18 U.S.C. § 113.

20 *See* 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)–(H).

21 Pub. L. No. 115–391, § 401.

22 *See* 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)(A)–(H).

23 *See*, *e.g.*, 21 U.S.C. §§ 841(b)(1)(C) (20-year statutory maximum increased to 30-year statutory maximum); *id.* § 960(b)(3) (same). Cases involving an enhanced statutory maximum penalty could nevertheless involve an offense carrying an otherwise applicable mandatory minimum penalty that was not increased through the filing of an 851 information. For example, some offenders were also convicted of a firearms offense carrying a mandatory minimum penalty pursuant to 18 U.S.C. § 924(c). Additionally, some drug statutes carry a short mandatory minimum penalty that is not increased as the result of the filing of an 851 information. For

example, while a prior conviction would trigger an increased statutory maximum for an offender convicted under 21 U.S.C. § 859 (Distribution to persons under age twenty-one), the one-year mandatory minimum term of imprisonment would remain unaffected.

In addition to increasing the minimum and maximum terms of imprisonment, enhancements under section 851 also typically double the required term of supervised release. *See* 21 U.S.C. §§ 841(b)(1), 960(b). The length of these enhanced supervised release penalties are unchanged by the First Step Act. For example, the court still must impose a term of supervised release of at least five years for any offender convicted under 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1). Similarly, offenders convicted under 21 U.S.C. §§ 841(b)(1)(B) and section 960(b)(1) must receive a term of supervised release of at least four years. However, the mandatory term of supervised release is generally doubled when the offender has a qualifying prior conviction.

24 21 U.S.C. §§ 841(b)(1)(C) (20-year statutory maximum increased to 30-year statutory maximum); *id.* § 960(b)(3) (same). *See* United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) ("[T]he First Step Act did not alter the definition of 'felony drug offense[s]' that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)(C)."") (second alteration in original).

25 The total number of cases also increased from 69,425 in fiscal year 2018 to 77,848 in Year One.

26 For detail on all offenders included in this analysis, see Appendix Figure 1.

27 Figure 1 displays the withdrawn/not withdrawn status of cases in which the government filed an 851 information seeking an enhanced drug penalty. Note that this figure does not consider whether the offender received relief from the enhanced drug penalty through the safety valve under 18 U.S.C § 3553(f) or by providing substantial assistance under 18 U.S.C. § 3553(e), but only the "withdrawn/not withdrawn" status.

28 Of the 1,274 cases in which an information was filed, there were ten cases in which there was not clear documentation of whether the information remained in place at the time of sentencing. These ten cases were excluded from this analysis. In 31 of the 1,001 cases, at least one information was withdrawn and at least one was not.

29 In an additional three cases the government withdrew the 851 enhancement and the court found that it did not apply. These cases are included in the "withdrawn" category.

30 Of the 1,607 cases in which an information was filed, there were 14 cases in which there was not clear documentation of whether the information remained in place at the time of sentencing. These 14 cases were excluded from this analysis. In 17 of the 849 cases, at least one information was withdrawn and at least one was not.

31 Figure 2 displays a frequency of the prior drug felonies and prior violent felonies for offenders for whom the 851 enhanced penalty was not withdrawn or invalidated prior to sentencing. Four cases with no drug priors and no violent priors were excluded from the table due to unclear documentation—all four received relief at sentencing due to substantial assistance or safety valve, so the court may not have felt the need to make a specific ruling on withdrawing the motion or making a finding that the enhancement did not apply.

32 Four offenders for whom an 851 information was filed and not withdrawn or invalidated before sentencing had no offense that qualified as a "serious drug felony" or "serious violent felony" conviction under the First Step Act. These offenders were excluded from this analysis. *See supra* note 31.

33 Figure 3 displays the type of violent prior offense committed by offenders in cases where an 851 enhanced penalty was filed and not withdrawn or invalidated. Note that each offender may have committed more than one prior violent offense, so the frequency is offense-based instead of case-based. In addition to the violent offense types listed in the table, the Commission also collected information for Non-Negligent Manslaughter, Vehicular Manslaughter, Forceable Sex Offense, Intimidating a Witness, Intimidating (Not a

Witness), Hit and Run with Bodily Injury, Child Abuse, and Rioting, but no offenders had any of these offense types among their prior felony offenses. Note that some of the violent offense types listed in the table (*e.g.*, "Weapons Offenses" which may encompass minor hunting/safety violations through more serious weapon possession/discharge violations) have not been used in other Commission publications discussing "violent offenses."

34 Sentencing documentation does not consistently identify which prior convictions support an 851 information. For cases in which an 851 information was filed, the Commission identified all prior convictions that appear to meet the current statutory requirements. For cases in which an 851 was filed, there were 102 convictions that appeared to be possible "serious violent felony" predicate offenses. More than half of these (n=56) did not support an enhancement at the time of sentencing. *See also supra* note 33 for a list of the offenses that were considered "violent" offenses for purposes of this analysis.

35 Even in these enhanced statutory maximum cases, the 851 information generally increases the minimum term of supervised release.

36 Figure 4 displays the length of the enhanced statutory penalty (or the length of the most serious penalty if more than one applied). Only offenders whose enhanced penalty still applied at sentencing (*i.e.*, not withdrawn by the government and not found inapplicable at sentencing by the court) were included in this figure. The Year One cases with a drug mandatory minimum of five-years or 20-years were grouped into the "enhanced statutory maximum" category after a sample of the cases was reviewed and it was determined that the enhanced penalty was applied on a count of conviction that had the enhanced statutory maximum and a separate count of conviction had a five-year or 20-year statutory minimum penalty.

37 Offenders whose enhanced penalty was one year or less were excluded from this analysis.

38 *See* 21 U.S.C. § 841(b)(1)(A)–(C). Of these 11 offenders, five were convicted of an offense involving heroin, five were convicted of an offense involving a drug in the "other" category, and one was convicted of an offense involving cocaine.

39 Figure 5 displays the primary drug type for all cases in which an 851 enhancement was filed as well as for those cases in which an 851 enhancement was filed and not withdrawn or found inapplicable by the court for fiscal year 2018 and Year One. In the FY2018 datafile, there was one case missing information about the status of the enhanced drug penalty or relief, and it was excluded from this table.

40 USSC 851 Datafile.

41 Figure 6 displays the demographic characteristics of offenders for whom an 851 enhancement was filed as well as for cases in which the 851 enhancement was not withdrawn or found inapplicable by the court for fiscal year 2018 and Year One.

42 Data in this section of the report is from the Commission's individual offender datafile. All data in this section is limited to offenders whose primary sentencing guideline was USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life While Manufacturing), or 2D1.14 (Narco-Terrorism). In addition, only cases with complete guideline application information were included in this section of the report. In fiscal year 2018, 18,349 offenders met the above criteria; in Year One, 19,739 offenders met the above criteria for inclusion. In fiscal year 2018, there were 5,885 safety valve recipients and in the First Step Year One file there were 7,127 safety valve recipients. Of those 7,127 safety valve recipients in the Year One datafile, 5,758 were "Already Eligible" offenders (*i.e.*, met the criteria prior to the expansion under the First Step Act) and the remaining 1,369 were "Newly Eligible" offenders. Of the 1,369 newly eligible offenders, 165 were in Criminal History Category (CHC) I and newly eligible based on the addition of maritime statutes, while the remaining 1,204 offenders were Newly Eligible based on the expanded criminal history criteria.

In fiscal year 2018, offenders who received either statutory safety valve relief and/or guideline SOC relief are included in the "All Safety Valve Offenders" category. In Year One, offenders assigned to CHC I, who received either statutory safety valve relief or guideline SOC relief and who were convicted under one of the statutes listed in §5C1.2 were reported in the "Already Eligible" safety valve recipients category. Offenders assigned to a CHC greater than I, who received either statutory safety valve relief and/or received a variance below the applicable guideline range for the First Step Act safety valve expansion, or offenders assigned to CHC I who were convicted only under one of expanded safety valve statutes (46 U.S.C. §§ 70503 or 70506) were included in the "Newly Eligible" category. In the Year One file both the "Already Eligible" and "Newly Eligible" safety valve recipients were included in the "All Safety Valve" recipient category.

The individual offender FY2018 and Year One datafiles capture only information about a maximum of four 1-point offenses under USSG §4A1.1(c), as that is the current limit counted for criminal history calculation purposes. To determine the total number of 1-point offenses (*i.e.*, including those not currently counted under §4A1.1(c)), the criminal history point information for the Newly Eligible (n=1,369) Year One cases in the Commission's Criminal History Datafile was also used to supplement data in this section of the report. The supplemental data consists of preliminary fiscal year 2019 and fiscal year 2020 cases identified in the individual offender data and then matched with the corresponding cases in the Commission's Criminal History datafile.

43 Pub. L. No. 115–391, § 402 (amending 18 U.S.C. § 3553(f)).

44 *See*, *e.g.*, 21 U.S.C. §§ 841(b) (providing mandatory minimum terms of imprisonment of five or ten years triggered by amount and type of drug), 846 (attempt and conspiracy subject to same penalty as the underlying offense), 960 (providing mandatory minimum terms of imprisonment of five or ten years triggered by amount and type of drug).

45 Pub. L. 103–322, 108 Stat. 1796 (1994).

46 *Id.* § 80001(a).

47 Specifically, section 3553(f)(5) provides "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."

The First Step Act added, immediately following subsection 3553(f)(5), an instruction that "[i]nformation 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." Pub. L. No. 115–391, § 402. Previously, the statute was silent regarding how information disclosed under section 3553(f)(5) could be used for purposes of sentencing.

48 Sections 70503 and 70506 are the prohibited acts and penalties sections, respectively, of chapter 705 of title 46 (Maritime Drug Law Enforcement Act).

49 Pub. L. No. 115–391, §402.

50 *Id.*

51 The Act does not provide any guidance as how to determine if the prior offense is a "crime of violence." Courts will likely use the categorical approach to determine whether the prior offense meets the definition of "crime of violence" at section 16. There have been very few opinions discussing the legal requirements of the expanded safety valve. At the time of this publication, there was only one reported decision evaluating whether a prior violent offense qualified as a predicate offense. *See* United States v. Hicks, No. 2:19-CR-023, 2019 WL 3292132 (E.D. Tenn. July 22, 2019).

The definition at 18 U.S.C. § 16 is different from the definition of "crime of violence" in the *Guidelines Manual* at USSG §4B1.2. *See* USSG §4B1.2.

52 Pub. L. No. 103–322, § 80001(b).

53 USSG §5C1.2. The Commission first promulgated §5C1.2 in 1994 as an emergency amendment. USSG App. C, amend. 509 (effective Sept. 23, 1994). The amendment was repromulgated under regular procedures the following year, with minor editorial changes. USSG App. C, amend. 515 (effective Nov. 1, 1995). The guideline further provides that for a defendant who meets the criteria in subsection (a) and for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two and Three shall not be less than level 17. USSG §5C1.2(b).

54 USSG §2D1.1(b)(18); §2D1.11(b)(6). Subsections 2D1.1(b)(18) and 2D1.11(b)(6) each provide: "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."

55 In a typical amendment cycle, the Commission first publishes its proposed priorities in the Federal Register and seeks comment in June. After reviewing comment on the proposed priorities, the Commission publishes its list of final priorities in August. The Commission engages with stakeholders, conducts legal research and data analysis, and publishes proposed amendments for comment in January. The Commission then holds a public hearing on proposed amendments and hears from various witnesses, including representatives of the stakeholder groups. Thereafter, typically in April, the Commission votes on whether to adopt any of the proposed amendments. By statute, no later than May 1st the Commission must submit the amendments it has voted to promulgate along with "reasons for amendment" (contained in Appendix C to the Guidelines Manual) to Congress, which has 180 days to decide whether to modify or disapprove them. If Congress does not pass legislation (signed by the President) modifying or disapproving amendments by November 1st, the amendments become effective on that date.

On rare occasions, Congress has authorized the Commission to promulgate "emergency amendments" which can be passed on an expedited basis outside of the regular amendment cycle.

56 The overwhelming majority (98.4%; n=19,429) of these drug trafficking offenders were sentenced under USSG §2D1.1. Only cases with complete guideline information were included in this analysis. For more detail and the complete distribution by primary sentencing guideline, see Appendix Figure 2.

57 The total number of cases also increased from 69,425 in fiscal year 2018 to 78,319 in Year One.

58 Figure 7 displays the drug mandatory minimum penalty status and safety valve status in drug trafficking cases in fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category.

59 For purposes of this analysis, any defendant who was convicted of an offense carrying a drug mandatory minimum penalty and who the court indicated qualified under USSG §5C1.2 is included as an offender who received relief from the mandatory minimum penalty. Some of these offenders, whose guideline range exceeded the mandatory minimum penalty, may have been sentenced above the mandatory minimum penalty, and some of the offenders sentenced below the mandatory minimum penalty may have also received relief as the result of providing substantial assistance to the government. The Commission did not further analyze the specific nature of the relief offenders received for purposes of this publication.

60 The majority of offenders who received relief from a mandatory minimum penalty also received a reduction in sentence. However, in Year One, some Newly Eligible offenders received statutory relief only and did not receive a variance to reflect the guideline safety valve reduction. This is discussed in more detail in the second part of Section Four. For a breakdown of the nature of relief by drug mandatory minimum status in each year, see Appendix Table 3.

61 Figure 8 displays the drug mandatory minimum penalty status and safety valve status in drug trafficking cases in fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category.

It also displays the safety valve status in drug trafficking cases for both fiscal year 2018 and Year One. In fiscal year 2018, the four cases missing information on safety valve application were excluded from this figure. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category.

62 Figure 9 displays the nature of the safety valve relief in safety valve cases in both fiscal year 2018 and Year One. Offenders who received both statutory relief and guideline/variance relief were categorized as receiving statutory relief for this figure.

63 Thirteen offenders had more than one criminal history point, which was not consistent with the statutory requirements then in effect. *See* 18 U.S.C. § 3553(f) (2017).

64 Figure 11 displays the average length of sentence imposed (in months) in both fiscal year 2018 and Year One. Average sentence length imposed for all drug trafficking offenders and all safety valve offenders is displayed for both FY2018 and the Year One files. Cases missing information on the sentence length imposed were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. When sentences are expressed as "time served" on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

65 Figure 12 displays the primary drug type for all safety valve recipients in fiscal year 2018 and Year One.

66 Figure 13 displays the demographic information for all drug trafficking offenders and all safety valve recipients in fiscal year 2018 and Year One. Cases missing demographic information were excluded from this figure.

67 Figure 14 displays the distribution of safety valve cases between safety valve recipients meeting the old safety valve criteria (already eligible) and those newly eligible due to either having zero or one criminal history points and meeting the expanded maritime statutes criteria or meeting the expanded criminal history criteria in Year One.

68 Figure 15 displays the drug mandatory minimum penalty status of the Already Eligible and the Newly Eligible safety valve recipients in Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category.

69 Figure 16 displays the nature of relief among Already Eligible and Newly Eligible safety valve recipients. Those in the already eligible group are classified as either receiving both the guideline (2-level reduction at §2D1.1) and statutory relief, only the guideline relief (offender did not have a drug mandatory minimum), or only the statutory relief. Those in the newly eligible group are classified as either receiving both the statutory relief and a variance for the First Step Act, only a variance for the First Step Act (offender did not have a drug mandatory minimum), or only the statutory relief. Note that the offenders who received a variance may have had other reasons cited for the variance in addition to the First Step Act.

70 Thirteen offenders had more than one criminal history point, which was not consistent with the statutory requirements then in effect. *See* 18 U.S.C. § 3553(f) (2017).

71 Pub. L. No. 115–391, § 402. One-point criminal history events are those assigned one point under §4A1.1(c).

72 Figure 17A displays the total criminal history points for Newly Eligible offenders who received expanded safety valve relief in Year One. The total points include all 1-points events (above the four currently counted in USSG §4A1.1(c)). The Commission's preliminary FY2019 and FY2020 Criminal History Datafiles were used for this figure.

Figure 17B first displays the total criminal history points for Newly Eligible offenders who received expanded safety valve relief in Year One. The points represent how the current criminal history points are calculated in USSG §4A1.1(a) – §4A1.1(e), including that only four 1-point events are countable.

Figure 17C displays the criminal history points for offenders who received expanded safety valve relief in Year One as counted by the court for the expanded eligibility, after excluding 1-point events under USSG §4A1.1(c).

73 Six newly eligible offenders (0.4%) had more than eight total criminal history points, which does not appear consistent with the current statutory requirements.

74 USSG §4A1.1(c).

75 USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

76 Figure 18 displays the 1-point events for Newly Eligible offenders who received expanded safety valve relief in Year One, including all 1-points events (above the four currently counted in USSG §4A1.1(c)). The Commission's preliminary FY2019 and FY2020 Criminal History Datafiles were used for this figure.

77 Section 4A1.1(c) provides that prior sentences that are assigned one point are counted "*up to a total of 4 points for this subsection*." USSG §4A1.1(c) (emphasis added). Although a defendant may have more than four such prior sentences, this provision limits to four the number of points counted towards the defendant's criminal history score.

78 Four offenders (0.3%) had three remaining points. An additional 13 offenders (0.9%) had five or six remaining points, which appears to be inconsistent with the statutory requirement that a defendant have no "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense." 18 U.S.C. § 3553(f)(1). One of these offenders had three offenses each assigned two criminal history points under USSG §4A1.1(b). The other 12 offenders had two offenses each assigned two criminal history points under §4A1.1(b), any number of offenses assigned one point under §4A1.1(c), and two "status" points under §4A1.1(d). In six of the 12, the "status" points were associated with an offense assigned one point under §4A1.1(c), in one they were associated with an offense assigned two points under §4A1.1(b), and in the other five they were associated with multiple offenses, some assigned one point under §4A1.1(c) and some assigned two points under §4A1.1(b).

79 Two-point criminal history events are those assigned two points under USSG §4A1.1(b). One offender who received safety valve relief under the expanded safety valve had three 2-point events, which is inconsistent with the statutory requirements. This offender is excluded from the analysis. In addition, four offenders had at least one 3-point event, which is likewise inconsistent with the statutory requirements.

80 Figure 19 displays the number of criminal history events assigned two points under USSG §4A1.1(b) for offenders who received expanded safety valve relief in Year One. One offender with three 2-point events was removed from this figure.

81 Section 4A1.1(d) provides for a 2-point increase to the defendant's criminal history score "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." USSG §4A1.1(d).

82 *See* USSG §4B1.1.

83 Section 4A1.1(e) provides for a one point increase to the defendant's criminal history score for "each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection." USSG §4A1.1(e).

84 Section 4B1.5 provides for increases to the offense level and, in some cases, the criminal history category, for cases in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 does not apply, and the defendant either has at least one prior sex conviction or engaged in a pattern of activity involving prohibited sexual conduct. *See* USSG §4B1.5.

85 Figure 20 displays the average sentence length imposed (in months) for Already Eligible and Newly Eligible offenders during Year One. Offenders missing information on the length of sentence were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. When sentences are expressed as "time served" on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/ missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

86 Figure 21 displays the primary drug type for Already Eligible and the Newly Eligible safety valve recipients in Year One. Cases missing information on the primary drug type were excluded from this figure.

87 Figure 22 displays the demographic information of Already Eligible and the Newly Eligible safety valve recipients in Year One. Offenders with missing information on gender, race, or citizenship were excluded from that section of the table.

88 USSG §4A1.2(h) ("Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)").

89 Data in this section of the report is from the Commission's individual offender datafile. All data in this section is limited to offenders who were convicted of at least one count under 18 U.S.C. § 924(c). In fiscal year 2018, 2,564 offenders met this criteria; in Year One, 3,288 offenders met this criteria for inclusion. When the text or figures in this section refer to "stacked" counts, this refers to offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) (the statutory minimum penalties are consecutive to each other, as well as to any other count of conviction). In fiscal year 2018, there were 127 offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) out of the 2,564 offenders who had at least one count of conviction under 18 U.S.C. § 924(c); in Year One, there were 215 offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) out of the 3,288 offenders who had at least one count of conviction under 18 U.S.C. § 924(c).

90 The statute defines a "crime of violence" as any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." A "drug trafficking crime" is defined as any felony that is punishable under the Controlled Substances Act, codified at 21 U.S.C. 801 et seq., or the Controlled Substances Import and Export Act, codified at 21 U.S.C. 951, et seq., or chapter 705 of title 46 of the United States Code. 18 U.S.C. § 924(c)(2)–(3).

91 18 U.S.C. § 924(c)(1)(A).

92 *Id.* § 924(c)(1)(B). Both the manner in which the weapon was used and the type of weapon involved are elements of the offense that must be submitted to a jury. In 2013, in *Alleyne v. United States*, the Supreme Court held that any fact that increases a mandatory minimum sentence is an "element" of the crime that must be submitted to a jury and proven beyond a reasonable doubt. 570 U.S. 99 (2013). In particular, *Alleyne* held that the determination of whether a defendant "brandished" a firearm rather than merely carried it was an

element of the offense, rather than a sentencing factor, overruling *Harris v. United States*. 536 U.S. 545 (2002) (determination of whether defendant "brandished" the firearm rather than merely carried it was a sentencing factor properly determined by the court), *overruled by* Alleyne v. United States, 570 U.S. 99 (2013). Prior to *Alleyne*, some provisions of 18 U.S.C. § 924(c) had been treated as elements of the offense that had to be proven beyond a reasonable doubt, while others were treated as sentencing factors that could be determined by the court at sentencing. *Compare*, *e.g.*, Harris v. United States, 536 U.S. 545 (2002) (whether the defendant brandished the firearm, triggering a seven-year mandatory minimum sentence, is a sentencing factor) *with* United States v. O'Brien, 560 U.S. 218 (2010) (whether the offense involved a machinegun, triggering the 30-year mandatory minimum penalty, is an element of the offense).

93 18 U.S.C. § 924(c)(1)(D).

94 The mandatory minimum penalty for a second or subsequent violation of 18 U.S.C. § 924(c) is 25 years of imprisonment. *See* 18 U.S.C. § 924(c)(1)(C)(i). The mandatory minimum penalty for a second or subsequent violation increases to life imprisonment if the firearm involved was a machinegun or destructive device, or if it was equipped with a silencer or muffler. *Id.* § 924(c)(1)(C)(ii).

95 *See* Deal v. United States, 508 U.S. 129 (1993).

96 Although the sentence for an 18 U.S.C. § 924(c) conviction must be imposed consecutively to any other term of imprisonment, in 2017 the Supreme Court held that section 924(c) does not prevent a sentencing court from considering a mandatory minimum sentence that will be imposed pursuant to it when calculating a guidelines sentence for the underlying predicate offense. *Dean v. United States*, 137 S. Ct. 1170 (2017). The Court explained that a sentencing court generally is permitted to consider the sentence imposed for one count of conviction when determining the sentence for other counts of conviction and that nothing in the text of 18 U.S.C. § 924(c) prohibits such consideration. *Id.* at 1175–77. Prior to the *Dean* decision, many sentencing courts interpreted 18 U.S.C. § 924(c) to bar consideration of the mandatory minimum penalty when calculating a sentence for an underlying predicate offense. *See*, *e.g.*, United States v. Dean, 810 F.3d 521 (8th Cir. 2015) (affirming district court's determination that it could not vary from the guidelines range in calculating defendant's sentence for offenses based on the mandatory minimum he would receive under 18 U.S.C. § 924(c)), *overruled by* Dean v. United States 130 S. Ct. 1170 (2017); United States v. Chavez, 549 F.3d 119, 135 (2d Cir. 2008); United States v. Franklin, 499 F.3d 578, 583 (6th Cir. 2007); United States v. Roberson, 474 F.3d 432, 436 (7th Cir. 2007); United States v. Powell, No. 09-4427, 444 F. App'x 517, 522 (3d Cir. 2011); United States v. McCullers, No. 09-4437, 395 F. App'x 975, 978 (4th Cir. 2010). *But see* United States v. Smith, 756 F.3d 1179, 1190 (10th Cir. 2014) ("Nothing in current law prohibits a district court's considering a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence."); United States v. Webster, 54 F.3d 1, 4 (1st Cir. 1995) ("[I]n departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence.").

97 Pub. L. No. 115–391, § 403.

98 Figure 23 displays total number of firearms offenders in fiscal year 2018 and Year One and the percentage firearms cases represents out of all cases.

99 The increase in offenders convicted of at least one count under 18 U.S.C. § 924(c) was more substantial from fiscal year 2018 to Year One than over the previous fiscal year (2,108 offenders and 31.2% of all firearms offenders in fiscal year 2017).

100 Figure 24 displays the number of counts of conviction under 18 U.S.C. § 924(c) offenders had in both fiscal year 2018 and Year One. This figure is limited to offenders who had multiple counts of conviction under 18 U.S.C. § 924(c).

101 Figure 25 displays the highest mandatory minimum penalty for offenders convicted of multiple counts under 18 U.S.C. § 924(c). For example, if an offender was facing one count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "Life" and another count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "5 years," the offender is reported in the "Life" category.

The figure also displays the mutually exclusive categories of mandatory minimum penalty combinations for offenders with multiple counts of conviction under 18 U.S.C. § 924(c).

102 Consistent with the methodology used in the Commission's Annual Report and Sourcebook of Sentencing Statistics, a sentence of life imprisonment is assigned a value of 470 months. However, where a sentence was any term of years, including a term of years exceeding 470 months, it was not capped at 470 months for this analysis. The longest sentence in fiscal year 2018 was 3,120 months.

103 The longest sentence in Year One was 1,260 months.

104 Figure 26 displays the average sentence length imposed (in months) for offenders who have at least one count of conviction under 18 U.S.C. § 924(c) and offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) in both fiscal year 2018 and Year One. Offenders missing information on the length of sentence were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of life were included in the sentence average computations as 470 months. Larger sentences (*e.g.*, 1,200 months) were not capped for this analysis. When sentences are expressed as "time served" on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

105 Figure 27 displays the highest mandatory minimum penalty for offenders with at least one count of conviction under 18 U.S.C. § 924(c). For example, if an offender was facing one count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "Life" and another count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "5 years" the offender is reported in the "Life" category.

106 In fiscal year 2018, a 30-year penalty applied in four (0.2%) cases and a term of life imprisonment applied in nine (0.4%) cases. In Year One, a 30-year penalty applied in seven (0.2%) cases and a term of life imprisonment applied in another seven (0.2%) cases.

107 Figure 28 displays demographic information for offenders convicted of at least one count and multiple counts under 18 U.S.C. § 924(c), in both fiscal year 2018 and Year One. Offenders with missing information on gender, race, or citizenship were excluded from that section of the table.

108 Data in this section of the report is from the Commission's drug resentencing datafile matched with data from the individual offender datafile. All data in this section is limited to offenders whose motion for a reduced sentence under section 404 of the Act was granted based on the Fair Sentencing Act being made retroactive. During the first year after passage of the First Step Act, courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act. The data in this section includes offenders who were originally sentenced between 1990 and 2013, were resentenced through December 31, 2019, and for whom court documentation was received, coded, and edited at the Commission by January 29, 2020.

109 Pub. L. No. 111–220, 124 Stat. 2372 (2010).

110 21 U.S.C. § 841(b)(1)(A) & (B) (2009); 21 U.S.C. § 960(b)(1) & (b)(2) (2009).

111 Pub. L. No. 111–220, § 2. As discussed *supra* Section 3, Section 401 of the First Step Act amended the enhancement provisions of sections 841 and 960. Not only did it reduce some of the enhanced penalties listed (from 20 to 15 years and from life to 25 years), but it also changed the prior offenses that trigger these enhanced penalties. Rather than a "felony drug offense," the defendant's prior convictions must meet the new definition of "serious drug felony" or "serious violent felony." The defendant must have served a term

of imprisonment of more than 12 months on the prior offense and, for a serious drug felony, must have been released within 15 years of the current federal offense. In addition, for any "serious drug felony" or a "serious violent felony" based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of ten years or more. These changes are not retroactive.

112 Pub. L. No. 111–220, § 3.

113 *See* Dorsey v. United States, 567 U.S. 260, 280–81 (2012) (new penalties apply to offenses committed before but sentenced after enactment).

114 On October 15, 2010, the Commission voted to promulgate Amendment 748, the emergency amendment which took effect on November 1, 2010. Among other changes, Amendment 748 made conforming changes to the guidelines to adjust the crack cocaine quantity levels in the Drug Quantity Table in §2D1.1 to the new statutory minimums, added new aggravating and mitigating factors in drug trafficking cases, and reflected the elimination of the statutory five-year mandatory minimum penalty for simple possession of crack cocaine. On April 28, 2011, the Commission submitted to Congress Amendment 750, the permanent guideline amendment implementing the Fair Sentencing Act. The three-part amendment (A, B & C) re-promulgated as permanent the temporary emergency amendment and took effect on November 1, 2011. On June 30, 2011, the Commission voted to promulgate Amendment 759 which added Parts A and C of Amendment 750 as amendments listed in §1B1.10 (Reduction in Term of Imprisonment as a Result of an Amended Guideline Range) (Policy Statement) that apply retroactively. The Commission voted to make Amendment 759 effective November 1, 2011, the same date that Amendment 750 took effect.

115 USSG §1B1.10; *see* United States v. Akers, 892 F.3d 432, 434 (D.C. Cir. 2018) ("Amendment 782, however, did not lower the offense levels applicable to career offenders. Rather, it impacted only offense levels calculated under the drug trafficking guideline, U.S.S.G. §2D1.1. Accordingly, the drug trafficking guideline 'played no role in determining' [the defendant's] sentencing range.").

116 Pub. L. No. 115–391, § 404(b) (authorizing a court to "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").

117 *Id.*

118 *Id.* § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). Section 404(c) provides only two specific limitations on the availability of a sentence reduction—that "[n]o court shall entertain a motion made under this section . . . if the sentence was previously imposed or previously reduced in accordance with . . . the Fair Sentencing Act of 2010 or if a previous motion made under this section . . . was, after the date of enactment of this Act, denied after a complete review of the motion on the merits." *Id.*

Courts have largely agreed that the proper vehicle to file such a motion is 18 U.S.C. § 3582(c)(1)(B), which provides that a "court may modify an imposed term of imprisonment *to the extent otherwise permitted by statute* or by Rule 35 of the Federal Rules of Criminal Procedure." *See*, *e.g.*, United States v. Holloway, 956 F.3d 660, 666 & n.8 (2d Cir. 2020) (concluding that motions under section 404 of the First Step Act are administered under 3582(c)(1)(B) and collecting cases for same). However, the nature of the proceedings and the rights afforded to a defendant in such proceedings are currently the subject of extensive litigation.

119 Figure 29 displays the origin of the filing of the motion for relief under the Fair Sentencing Act in Year One. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 26 cases were excluded from this analysis because the information received by the Commission prevented a determination of motion origin. Additionally, courts may cite multiple origins for a motion; consequently, the total number of origins cited generally exceeds the total number of cases. In this figure, 2,592 origins were cited for the 2,361 cases.

120 Figure 30 displays the year of the original sentence for the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act. Eleven cases were excluded from this analysis because the cases cannot be matched with an original case in the Commission's records.

121 In fiscal year 2018, the average sentence for all crack cocaine offenders was 78 months and the average sentence for all career offenders was 150 months. U.S. Sentencing Comm'n, 2018 Sourcebook of Federal Sentencing Statistics Fig. D–3 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureD3.pdf [hereinafter 2018 Sourcebook] (crack offenders); U.S. Sentencing Comm'n, Quick Facts on Career Offenders (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf. The relatively high average sentence among the offenders receiving reductions under section 404 of the First Step Act may also be a function of the large number of cases that were excluded for this analysis. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 696 were excluded from this analysis because the resulting term of imprisonment could not be determined. Another 37 cases were excluded because the court documentation provided did not specify the length of a new sentence of imprisonment but only a modification to the length of supervised release. The exclusion of these cases likely increases the average sentence length, as some of these cases likely involved resentencings to terms of shorter duration and time-served sentences.

122 *See* U.S. Sentencing Comm'n, Final Crack Retroactivity Sentencing Report Fair Sentencing Act, Tbl. 8 (Dec. 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf [hereinafter 2014 FSA Retroactivity Report].

123 Figure 31 displays the Criminal History Categories of offenders granted a retroactive sentence reduction pursuant to section 404 of the First Step Act and the Commission's 2011 retroactive guideline amendment. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 11 were excluded from this analysis because the cases could not be matched with an original case in the Commission's records. The data in this figure was also limited to the 2,276 cases with complete guideline application information.

124 USSG §4B1.1; *see also* 28 U.S.C. § 994(h) (directing that the guideline range for a career offender be at or near the statutory maximum).

125 *See* 2014 FSA Retroactivity Report, *supra* note 122, at Tbl. 6.

126 *See id.*

127 *See* 2018 Sourcebook, *supra* note 121, at Tbl. D–2.

128 *See id.* at Tbl. D–3.

129 *See id.* at Tbl. D–5.

130 Figure 32 displays the demographic information for offenders who received a retroactive sentence reduction pursuant to the First Step Act. Of the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act, cases were excluded from each section of this figure for the following reasons: missing race information (10), missing citizenship information (15), missing gender information (2), and missing age information (21).

131 Data in this section of the report is derived from the Commission's regular resentencing datafile merged with data from the Commission's individual offender datafile. In addition, a special coding project was undertaken to determine the underlying reason why the compassionate release was granted. To ensure a more complete datafile, the Commission requested information from the BOP on offenders granted compassionate release in Year One. Cases on the BOP's list that were sentenced within the one-year timeframe after the First Step Act that had not yet been received by the Commission were specifically

requested from the sentencing district. In fiscal year 2018, 24 offenders were granted a reduction in their sentence based on compassionate release; in Year One, there were 145 offenders who were granted a reduction. Whenever a variable discussed in the analysis was missing information, that offender was excluded from that analysis.

132 18 U.S.C. § 3582(c)(1)(A).

133 *See* 18 U.S.C. § 3582(c)(1)(A); *see also* 28 U.S.C. §§ 994(a)(2)(C) (stating that the Commission shall promulgate general policy statements regarding "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18"); and 994(t) (stating that the Commission, in promulgating any such policy statements, "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples").

134 28 U.S.C. § 994(t).

135 USSG §1B1.13. This section was first promulgated in 2006. USSG App. C, amend. 683 (effective Nov. 1, 2006). At the time, the policy statement tracked the statutory language, providing that only the Director of the BOP may file a motion seeking compassionate release. The Reason for Amendment explained that the policy statement "restates the statutory bases for a reduction in sentence . . . ." and "provides that in all cases there must be a determination made by the court that the defendant is not a danger to the safety of any other person or to the community." *Id.* In the Background Commentary to that amendment, the Commission explained that the policy statement was "an initial step toward implementing 28 U.S.C. § 994(t)" and that the Commission "intend[ed] to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction" pursuant to the compassionate release statute. *Id.*

The following year, 2007, the Commission further clarified some of the circumstances creating "extraordinary and compelling reasons." USSG App. C, amend. 698 (effective Nov. 1, 2007). In 2016, the Commission further amended the policy statement to broaden the eligibility criteria for compassionate release. Among other things, the Commission amended Application Note 1(A) to expand the list of circumstances that should be considered "extraordinary and compelling reasons." It restructured the list to provide for the four categories that exist in the current guideline: (A) Medical Condition of the Defendant; (B) Age of the Defendant; (C) Family Circumstances; and (D) Other Reasons. USSG App. C, amend. 799 (effective Nov. 1, 2016); USSG §1B1.13, comment. (n.1).

136 The defendant must be (i) at least 65 years old; (ii) experiencing a serious deterioration in health because of the aging process; and (iii) have served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less." USSG §1B1.13, comment. (n.1(B)).

137 Specifically, this includes the death or incapacitation of the caregiver of the defendant's minor child or minor children or the incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner. USSG §1B1.13, comment. (n.1(C)).

138 *Id.* at comment. (n.1(A)(i)). Terminal illness is defined as "a serious and advanced illness with an end of life trajectory." *Id.* The note further explains that "[a] specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia." *Id.* The Commission added this definition as part of its 2016 amendment to the Compassionate Release policy statement in order to clarify that a specific prognosis is not required (as it had been under BOP's Program Statement). USSG App. C, amend. 799 (effective Nov. 1, 2016). In the Reason for Amendment, the Commission explained, "while an end-of-life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period. For that reason, the Commission concluded that requiring a specified prognosis (such as the 18-month prognosis in the BOP's program statement) is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications." *Id.*

139 USSG §1B1.13 comment. (n.1)(A)(ii)).

140 Pub. L. No. 115–391, § 603(a). Section 603(b) further provides a set of notification requirements for "a defendant diagnosed with a terminal illness" or "a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)" at new subsection 3582(d). Pursuant to the notification requirements, the BOP must (1) inform the defendant's attorney, partner, and family members that they may prepare and submit a request on the defendant's behalf; (2) process such a request; and (3) "ensure that [BOP] employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A)." "Terminal illness" is defined as "a disease or condition with an end-of-life trajectory." Pub. L. No. 115–391, § 603(b)(3) (adding new 18 U.S.C. 3582(d)). Section 1B1.13 defines a terminal illness slightly differently, at Note 1(A)(i), as "a serious and advanced illness with an end of life trajectory." It further explains that "[a] specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. USSG §1B1.13, comment. (n.1(A)(i)).

The First Step Act also made changes to 34 U.S.C. § 60541(g), a pilot program operated by the Attorney General, in which "eligible elderly offenders" could be placed in home detention until the expiration of their term of imprisonment. In particular, it reauthorized the program for fiscal years 2019 through 2023 and expanded it from "at least one [BOP] facility" to BOP "facilities," without any specific limitation. Pub. L. No. 115–391, § 504(b). Section 603(a) of the First Step Act amended the eligibility requirements for elderly offenders both with respect to age (from 65 to 60) and duration of sentence served (from the greater of ten years or 75% to two-thirds of the term). It also extended release under the pilot program to "eligible terminally ill offenders." Finally, it provided that a request for release into home detention may be initiated by either the BOP "or an eligible elderly offender or eligible terminally ill offender." Pub. L. No. 115–391, § 603(a) (amending § 60451(g)(1)(B)). The statute authorizes the Attorney General and the BOP to operate this program. Courts do not have authority to grant home confinement or review any denials under section 60541(g). *See, e.g.*, Lewis v. Rios, No. 19-cv-1030, 2020 WL 555373, at *4 (D. Minn. Jan. 13, 2020) ("The federal courts, including this District, that have considered the recently amended 34 U.S.C. § 60541(g) have found a district court has no power to use it to grant a prisoner early release to home detention.") (collecting cases for same).

141 Figure 33 displays the origin of the motion for Year One. There were two cases missing information in Year One that were excluded from this figure.

142 *See supra* note 55.

143 This includes the 24 grants of compassionate release that occurred in fiscal year 2018 (September 1, 2017 through August 30, 2018) for which sentencing documentation was provided to the Commission. In fiscal year 2018, there were four cases in which a reduction was granted under section 3582(c)(1)(A) although the BOP did not appear to file a motion, and, instead, the court acted *sua sponte* or in response to a defendant's motion. This would not have been consistent with section 3582(c)(1)(A)'s authorization to reduce a sentence "upon motion of the Director of the Bureau of Prisons." 18 U.S.C. § 3582(c)(1)(A).

144 Figure 34 displays the average length of reduction (in months) and the average months of time served for compassionate release offenders in both fiscal year 2018 and Year One. The amount of time served is calculated based on the difference between the offender's original sentence date and the date that the compassionate release motion was granted (or the date that the offender was scheduled to be released, where different from the date granted and clear from the court's order). Sentences of probation only are included here as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. There were two cases missing information in fiscal year 2018 and six cases missing information in the Year One datafile that were excluded from this figure.

145 This analysis excludes cases in which (1) a defendant was granted a reduction in sentence that did not result in immediate or near-immediate release, (2) the reduction was granted while the defendant was

serving a term of imprisonment based on a supervised release revocation, or (3) where the length of time-served and amount of reduction otherwise could not be determined. In fiscal year 2018, there were three cases in which a defendant did not receive a time-served sentence and two additional cases where the length of reduction and time-served could not be determined. In Year One, there was one case in which an offender did not receive a time-served sentence, three cases in which a defendant was serving a term of imprisonment as a result of a revocation, and an additional eight cases where the length of reduction and time-served could not be determined. *See also supra* note 144.

146 *See supra* notes 144 and 145 for inclusion criteria.

147 In the final three cases, the basis for the grant of compassionate could not be determined from the sentencing documentation.

148 Figure 35 displays the reasons that courts cited for granting the compassionate release motions. Note that the total reasons cited may exceed the total number of offenders. Cases missing information on the reasons cited for granting compassionate release were not included in the figure.

149 In two cases, the basis for the grant of compassionate release could not be determined. These cases are not included in the analysis. In some cases, the court based the compassionate release grant on more than one reason. As a result, the number of grants reported under each reason exceeds the total number of motions granted.

150 In an additional six cases, age was mentioned in the court's order granting release, but it was not clear whether this was the basis for the court's grant of compassionate release.

151 In an additional two cases, extraordinary and compelling reasons other than those provided for in subsection (A) through (C) were referenced, but it was not clear whether this was the basis for the court's grant of compassionate release.

152 *See supra* note 122 for Commission data retroactivity reports.

Appendix

Appendix Figure 1. Primary Sentencing Guideline – 851 Filed
FY 2018 and First Step Year One

	FY 2018		*First Step Year One*	
	N	%	N	%
Primary Sentencing Guideline	1,274	100.0	1,607	100.0
§2A1.1	5	0.4%	7	0.4%
§2D1.1	1,142	89.6%	1,418	88.2%
§2D1.2	18	1.4%	24	1.5%
§2D1.5	1	0.1%	0	0.0%
§2D1.11	1	0.1%	0	0.0%
§2D2.1	1	0.1%	20	1.2%
§2K2.1	53	4.2%	86	5.4%
§2S1.1	44	3.5%	39	2.4%
All Other Guidelines	6	0.5%	12	0.7%
Missing Guideline	3	0.2%	1	0.1%

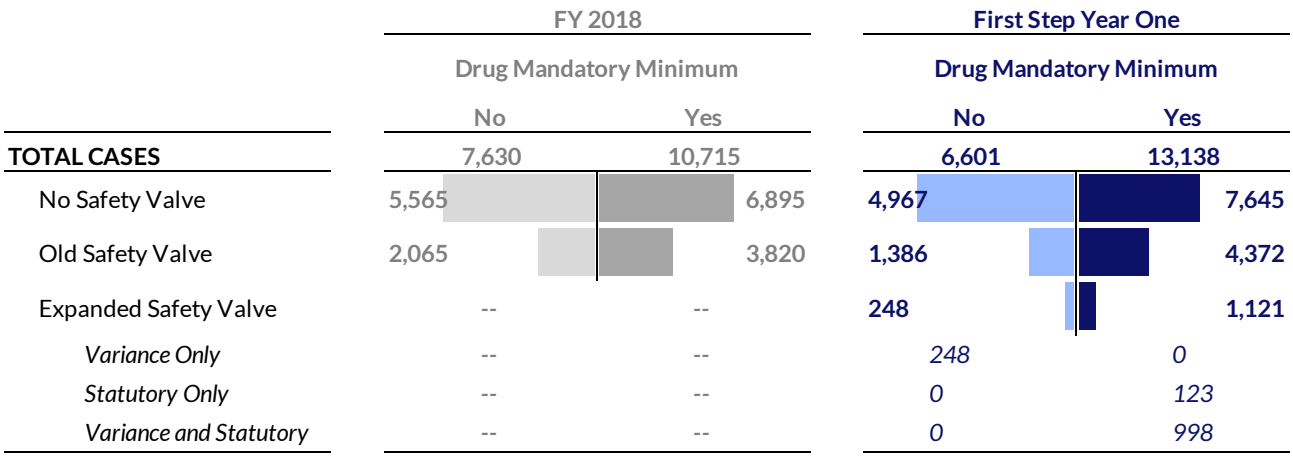
Appendix Figure 1 displays the primary sentencing guideline in cases in which an 851 enhancement was filed for both fiscal year 2018 and Year One. Cases missing the guideline information are included in the "Missing Guideline" category.

Appendix Table 1. Primary Drug Type by Primary Sentencing Guideline in Drug Trafficking Cases
First Step Year One

		§2D1.1 Drug Trafficking		§2D1.2 Protected Locations		§2D1.5 Continuing Criminal Enterprise		§2D1.6 Communication Facility		§2D1.8 Rent/Manage Drug Establishment		§2D1.10 Endangering Human Life While Manufacturing		§2D1.14 Narco-Terrorism	
Drug Type		N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	**19,738**	**19,429**	**98.4**	**285**	**1.4**	**4**	**0**	**0**	**0**	**15**	**0.1**	**5**	**0**	**0**	**0**
Powder Cocaine	3,534	3,377	95.6	145	4.3	3	0.1	0	0	2	0.1	0	0	0	0
Crack Cocaine	1,541	1,482	96.2	57	3.7	0	0	0	0	2	0.1	0	0	0	0
Heroin	2,435	2,413	99.1	20	0.9	0	0	0	0	1	0	0	0	0	0
Marijuana	1,599	1,592	99.6	3	0.2	0	0	0	0	0	0	4	0.2	0	0
Methamphetamine	8,562	8,515	99.5	37	0.4	1	0	0	0	8	0.1	0	0	0	0
Other	2,067	2,050	99.2	15	0.7	0	0	0	0	1	0	1	0	0	0

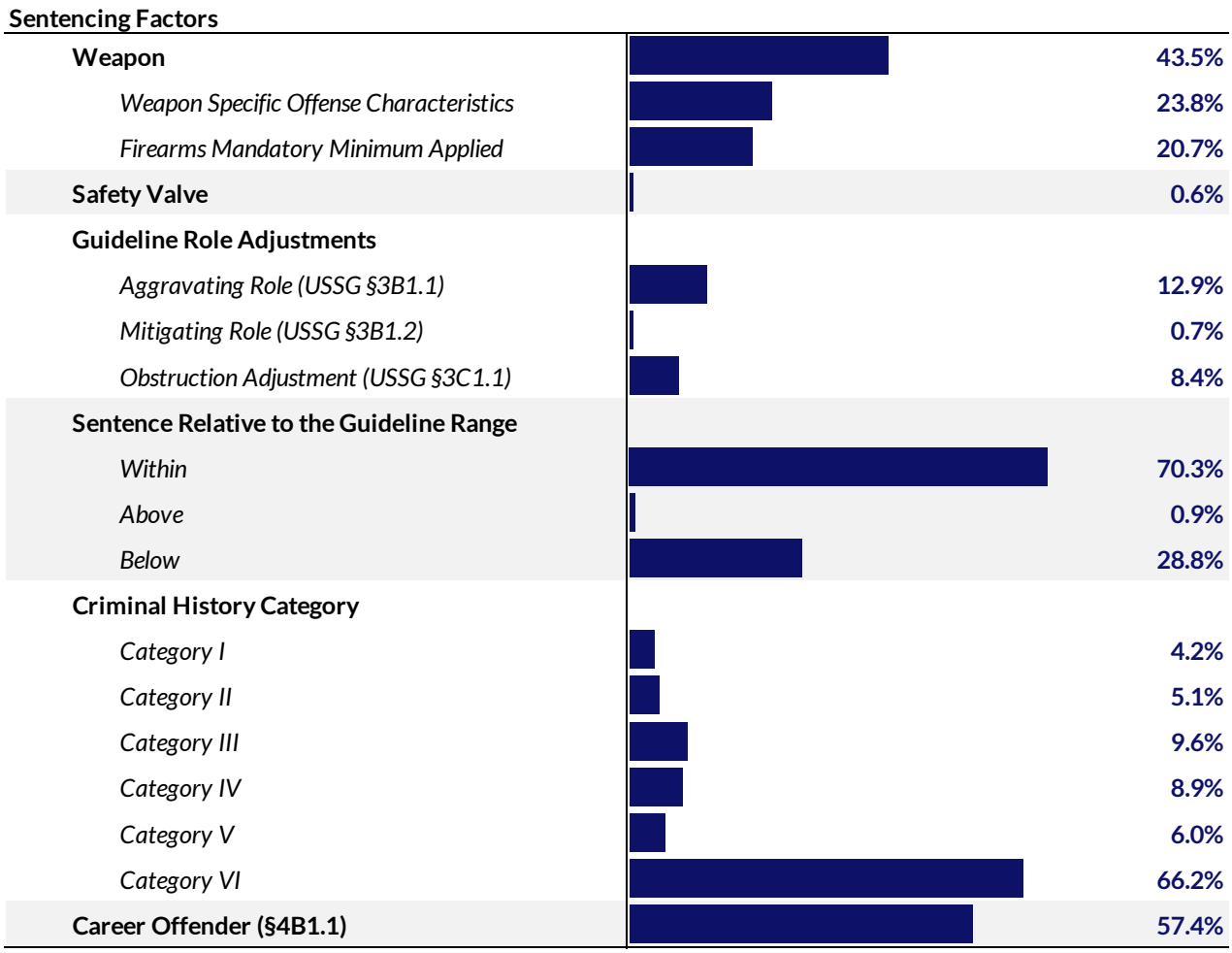
Appendix Table 1 displays the primary sentencing guideline by the primary drug type for all drug trafficking offenders in Year One. This table is limited to offenders whose primary sentencing guideline was §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life While Manufacturing), or 2D1.14 (Narco-Terrorism). In addition, only cases with complete guideline application information were included in this table.

Appendix Figure 2. Safety Valve Status by Mandatory Minimum Penalty Status in Drug Trafficking Cases
FY 2018 and First Step Year One



Appendix Figure 2 displays both the safety valve status and the mandatory minimum penalty status in drug trafficking cases for both fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category. In fiscal year 2018, four cases missing information on safety valve application (three without and one with a drug mandatory minimum) were excluded from this table.

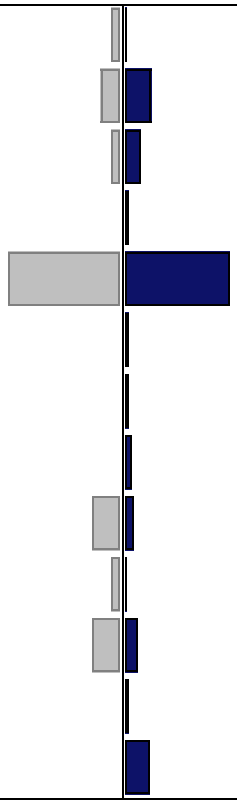
Appendix Figure 3. Selected Sentencing Factors for Offenders Receiving Sentence Reductions Pursuant to the Fair Sentencing Act Retroactivity Provision
First Step Year One



Appendix Figure 3 shows selected sentencing factors for the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act of 2018, 11 were excluded from this analysis because the cases cannot be matched with an original case in the Commission's records. The weapons, safety valve, and guideline role adjustment sections were limited to the 2,276 cases with complete guideline application information. In 22 cases, the court applied the weapon specific offense characteristic and the offender was also convicted of a firearms offense carrying a mandatory minimum penalty.

Appendix Figure 4. Primary Sentencing Guideline in Original Sentencing
First Step Year One

	FY 2018		*First Step Year One*	
	N	%	N	%
Primary Sentencing Guideline	23	100.0	142	100.0
§2A1.1	1	4.3%	1	0.7%
§2B1.1	2	8.7%	17	12.0%
§2B3.1	1	4.3%	10	7.0%
§2C1.1	0	0.0%	2	1.4%
§2D1.1	12	52.2%	70	49.3%
§2G1.3	0	0.0%	2	1.4%
§2G2.1	0	0.0%	2	1.4%
§2G2.2	0	0.0%	5	3.5%
§2K2.2	3	13.0%	6	4.2%
§2L1.1	1	4.3%	1	0.7%
§2S1.1	3	13.0%	8	5.6%
§2T1.1	0	0.0%	2	1.4%
All Other Guidelines	0	0.0%	16	11.3%



Appendix Figure 4 displays the primary sentencing guideline for the original sentencing for offenders who were granted compassionate release in either FY 2018 or in Year One. Offenders whose primary sentencing guideline was missing were excluded from this table.

United States Sentencing Commission
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Obtaining Medical Records-Compassionate Release Clearinghouse COVID-19 Project

The BOP is working to expedite release of medical records to counsel seeking them on behalf of prisoners seeking compassionate release. It has offered the following procedures to hasten release. Be aware that the agency has explained it will prioritize release of medical records for prisoners who

- meet "traditional" compassionate release criteria (terminal, debilitated, elderly with medical conditions, etc.) and who would be especially vulnerable to Covid-19 under CDC guidelines, and
- has exhausted administrative remedies or for whom the lapse of the 30-day statutory period looms.

That said, the BOP is aware that requests will be made prior to exhaustion and, we understand, will attempt to honor them.

If the prisoner is seeking compassionate release because they are **terminally ill or debilitated under P.S. 5050.50.**

- Ask the prisoner to obtain, fill out, and sign the Certification of Identity (COI) Form. Prisoner information goes on the top and the prisoner signs Certification. Your name must appear below in the section that begins "Optional" as the prisoner is authorizing release to you.
  - The prisoner should keep the original and send a copy to you.
  - You **need not wait** to receive the COI form to begin your request.
    - Send an email to the BOP legal counsel responsible for the institution where the prisoner is incarcerated. Here is a link to the list of regional counsel names and email addresses.
    - In the **subject line write:** "Medical Records (client name and register number)."
    - In the **body of the email state**:
      - That your client is either terminally ill or debilitated
      - That you are seeking medical records for X period
        - **Practice tip**: limit the amount of records to the previous one or two years if possible. They will get to you faster.
      - That you have the prisoner's permission to receive the records you are requesting.
    - **Attach**:
      - Certification of Identity form for the prisoner with as much information as you can fill in, put your name in the section called "Optional" and sign it
      - An email from the prisoner authorizing you to make the request, if you can get such an email.
        - You **need not wait** for an email from the prisoner authorizing you, but you should forward it as soon as you can after making the request.

- Next, **wait a "reasonable period of time."** This is not defined but could be as short as a week or less in cases of particularly vulnerable prisoners and longer if there is more flexibility. In the case of individuals who are in hot spot institutions, a week might be too long; in the case of individuals whose medical condition is stable and no cases of Covid-19 are reported, maybe wait a little longer.

- **If you do not receive the records in a reasonable period of time**
  - Forward the email to BOP-OGC/ExecAssistant~@BOP.gov. The BOP requests that medical record requests to the OGC email address be made for those prisoners who have exhausted their administrative remedies or who are nearing exhaustion. But the office is aware that requests will come for prisoners earlier in the process.
- **If this does not produce records**, please contact Mary Price, mprice@famm.org. She will try to run interference.

Obtaining Medical Records for all other prisoners.

- Ask the prisoner to obtain, fill out, and sign the Certification of Identity (COI) Form. Prisoner information goes on the top and the prisoner signs Certification. Your name must appear below in the section that begins "Optional" as the prisoner is authorizing release to you.
  - The prisoner should keep the original and send a copy to you.
  - You **need not wait** to receive the COI form to begin your request.

- **File a** FOIA request.
  - In the **subject line write:** "Medical Records (client name and register number)."
  - In the **body of the email state**:
    - That your client is seeking compassionate release and state the grounds and any Covid-19 underlying conditions.
    - That you are seeking medical records for X period
      - **Practice tip:** limit the amount of records to the previous one or two years if possible. They will get to you faster.
    - That you have the prisoner's permission to receive the records you are requesting.
  - **Attach**:
    - Certification of Identity form for the prisoner with as much information as you can fill in, put your name in the section called "Optional" and sign it
    - An email from the prisoner authorizing you to make the request, if you can get such an email.
      - You **need not wait** for an email from the prisoner authorizing you, but you should forward it as soon as you can after making the request.

- Next, **wait a "reasonable period of time."** This is not defined but could be as short as a week or less in cases of particularly vulnerable prisoners and longer if there is more flexibility. In the case of individuals who are in hot spot institutions, a week might be too long; in the case of individuals whose medical condition is stable and no cases of Covid-19 are reported, maybe wait a little longer.

- **If you do not receive the records in a reasonable period of time**
  - Forward the email to BOP-OGC/ExecAssistant~@BOP.gov. The BOP requests that medical record requests to the OGC email address be made for those prisoners who have exhausted their administrative remedies or who are nearing exhaustion. But the office is aware that requests will come for prisoners earlier in the process.
- **If this does not produce records**, please contact Mary Price, mprice@famm.org. She will try to run interference.

- **Other things you can try**
  - Ask the AUSA to provide you the records
  - If you are filing or already filed, ask the judge to order their release to you.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

MEMORANDUM & OPINION

-against-

93 CR 1043 (RJD)

KEVIN HAYNES,

Defendant.
----------X
DEARIE, District Judge.

Defendant Kevin Haynes, convicted after trial of several crimes relating to his involvement in four bank robberies during an eight-month period from mid-1991 through early 1992, was sentenced in 1994 to 46 years and six months' incarceration. A full 40 of those years are the mandatory consecutive terms for the two additional 18 U.S.C § 924(c) counts ("stacked" under then-current law) that the government charged in a superseding indictment only when Haynes declined a plea offer and exercised his right to trial. Haynes now moves under the First Step Act's transformative amendment of the compassionate release statute for order relieving him of the crushing penalty he paid for that choice and reducing his sentence to time served.

For the reasons to be discussed, the motion is granted.

BACKGROUND

A. Haynes's Criminal Conduct

Haynes, a recently unemployed, 23-year-old father with no criminal history, was recruited by Virgil Rivers, a much older man with a substantial criminal history, to participate with him in four bank robberies, serious criminal conduct that was deserving of serious

punishment. On July 23, 1991, Rivers entered a Queens branch of Chase Manhattan Bank carrying a handgun and locked down the lobby. Haynes then entered, also with a handgun, and acted as lookout while Rivers jumped the counter and removed money from the teller drawers. Haynes pointed his weapon at customers and, at one point, directed a bank employee to "put the phone down." A total of $5,719 was stolen. The second robbery, of a Brooklyn branch of Bowery Savings Bank on September 13, 1991, was carried out similarly. Rivers, with his weapon, entered first, followed by Haynes, who again served as an armed lookout while Rivers jumped the counter to access the teller drawers. A total of $11,250 was stolen. The third robbery occurred at a Brooklyn branch of Chemical Bank on October 21, 1991. Again, Haynes was the armed lookout while Rivers took money from the teller drawers (totaling $11,250), but this time Haynes also ordered a customer at gunpoint to open her purse and give him all her money. Finally, on February 19, 1992, Rivers and Haynes stole $5,382 from a Brooklyn branch of Chase Manhattan Bank. Although neither displayed a weapon on this occasion, Rivers told the bank employees, "give me your money or I'll blow your brains out." No one was physically injured during any of these robberies.

B. <u>District Court Proceedings: Indictment through Sentence</u>

Haynes was indicted on September 14, 1993 on six counts: conspiracy to commit bank robbery, four substantive robbery counts under 18 U.S.C. § 2113(d) and, although the government knew that guns were used in three of the four robberies, only one firearm count under 18 U.S.C. § 924(c).

By letter dated December 21, 1993, the government conveyed a plea offer to Haynes. The proposed agreement provided for Haynes to plead guilty to one substantive robbery charge

(Count Two) and the § 924(c) count (Count Six); the resulting Sentencing Guidelines offense level on Count Two, according to the government's estimate, was 20 (including the two-level adjustment for acceptance of responsibility), which corresponded to a sentencing range of 33 to 41 months. The proposed plea agreement explained that the mandatory five-year term for Count Six was to be served consecutively to whatever term the Court imposed on Count Two. Thus, the government, at that time, would have been satisfied with a sentence between 93 and 101 months (*i.e.*, between 7 years, 9 months and 8 years, 5 months).

The December 21, 1993 plea transmittal letter also stated as follows:

> This offer is conditioned upon the following: the defendant must inform the government of his intention to plead guilty on or before December 28, 1993 …. This condition will be strictly enforced. If the defendant fails to meet this condition, the government will seek to obtain a superseding indictment charging the appropriate additional counts under 18 U.S.C. § 924(c).

Haynes declined the offer, elected to exercise his right to trial, and within days the government carried out its threat: a superseding indictment returned on December 29, 1993 added a second and third § 924(c) charge as new Counts Seven and Eight. Haynes promptly moved to dismiss the two new counts on the ground that the prosecutorial decision to bring them in retaliation for his decision to go to trial violated due process. This Court, bound by the Supreme Court's decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978), denied Haynes's motion. See Dkt. No. 25 (Order dated January 13, 1994).[1]

The late Judge Douglas Hillman of the Western District of Michigan, then visiting in this

[1] As framed by Justice Stewart's opinion in Bordenkircher, "The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." 434 U.S. at 358. The Court's holding answered that question in the negative. Id. at 365.

district, presided over Haynes's trial, where a jury returned a verdict of guilty on all counts. On June 6, 1994, Judge Hillman sentenced Haynes to a total of 558 months' incarceration.[2] Terms of 18 months were imposed for robbery conspiracy and each of the four substantive robbery counts, to be served concurrently; and mandatory consecutive terms on the three Section 924(c) counts as follows: 60 months on the first (Count Six) and 240 months (20 years) each on the second and third (Counts Seven and Eight). As noted at the outset of this opinion, forty additional years in prison were imposed for the two charges that the government brought in direct retaliation for Haynes's decision to go to trial.[3]

Haynes has served almost 27 of the 46 ½ years to which he was sentenced. To put that in context, he has served *more than three times* the length of the high end of the sentence he would have received had he pled guilty (101 months, or 8 years and five months). And he still has an additional 13 years to serve.[4]

The contrast between Haynes's fate and that of his codefendant Virgil Rivers is striking. As noted, it was Rivers, a much older man, with a substantial criminal history including four prior robbery convictions, who recruited Haynes. See generally United States v. Rivers, 50 F.3d 1126, 1127 (2d Cir. 1995). Rivers, however, accepted an offer to plead to a single robbery count and a single § 924(c) count. This Court initially imposed a sentence totaling 17 years and 7

[2] The transcript of the sentencing proceeding apparently does not exist. It is not part of the record assembled as part of Haynes's appeal to the Second Circuit; through inquiries to the Clerk of Court and others, the Court has learned that the court reporter who handled the sentencing is deceased and that his notes are not available, deemed either lost or destroyed in a flood.

[3] The Second Circuit affirmed Haynes's conviction. United States v. Haynes, No. 94-1109 (2d Cir. Dec. 19, 1994). This Court denied Haynes's first motion to vacate his conviction pursuant to 28 U.S.C. § 2255 by Memorandum and Order dated November 29, 2004. Dkt. No. 35.

[4] Haynes is scheduled to be released June 9, 2033. See Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/. (Haynes is inmate no. 43015-053).

months; after the matter was remanded for clarification of certain sentencing factors, see Rivers, 50 F.3d at 1132-33, Rivers was re-sentenced to a total of ten years in prison (consecutive five year sentences on each of the single robbery count and single 924(c) count to which he pled guilty). See United States v. Rivers, 92-CR-327, Dkt. No. 50 (Amended Judgment) (E.D.N.Y. June 20, 1995). After his release from prison, Rivers quickly returned to a life of crime: he was indicted in October 2003 and convicted at a 2004 trial of bank robbery and related charges. United States v. Rivers, 03-CR-1120-FB-2 (E.D.N.Y. Sept. 29, 2004) (verdict). On February 28, 2006 Judge Frederic Block sentenced Rivers to 25 years plus one day. Id., Dkt. no. 210. *Despite all this*: Rivers is scheduled to be released *more than eight years earlier* than Haynes.[5]

Equally striking are the contrasts between Haynes's sentence of 46 ½ years and the average sentences imposed on defendants convicted of robbery and other crimes. Statistics compiled by the United States Sentencing Commission, for example, show that for fiscal year 2019, the average national sentence imposed for the crime of robbery is 109 months (9 years plus 1 month); for murder, 255 months (21 years, 4 months); for child pornography, 103 months (8 years, 7 month); and for "Extortion/Racketeering," 32 months (2 years, 8 months).[6] For a category labelled "National Defense," which according to the Commission's Sourcebook includes the crimes of "treason, sabotage, espionage, evasion of military service, prohibited financial transactions and exports, providing material support to designated foreign terrorist organizations, nuclear, biological, and chemical weapons, and weapons of mass destruction," the

[5] Rivers is scheduled to be released December 31, 2025. See Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/. (Rivers is inmate no. 81378-158).

[6] See Table 15, "Sentence Imposed by Type of Crime," https://www.ussc.gov/2019-Annual-Report-and-Sourcebook ("2019 Sourcebook")

average sentence is 42 months (3 years, 6 months).[7]

C. Haynes's Requests for *Holloway* Relief

In a comprehensive submission dated January 9, 2017 to the Honorable Robert L. Capers, then United States Attorney for the Eastern District of New York, Haynes implored Mr. Capers to consider what has come to be known as Holloway relief: a motion by the government to vacate one of his § 924(c) convictions that, in turn, would authorize the Court to resentence him. See generally United States v. Holloway, 68 F. Supp. 3d 310 (E.D.N.Y. 2014). The Holloway decision reflects a consensus understanding that injustice in sentencing can occur even with defendants who have committed serious crimes, and that even when there is no technical defect in a conviction that has resulted in such an unjust sentence, a United States Attorney "can do justice by the simple act of going back into court and agreeing that justice should be done." Holloway, 68 F. Supp.3d at 311.

In his Holloway application to Mr. Capers, Haynes addressed the origin and extent of § 924(c)'s excessive severity, including the Sentencing Commission's report showing that stacked § 924(c) sentences had been disproportionately imposed on Black men like him. Haynes also discussed the then-growing condemnation of the stacking practice (which would culminate in the First Step Act's elimination of the practice) among members of the United States Sentencing Commission, the Judicial Conference of the United States, the Senate Judiciary Committee and the Department of Justice. See Dkt. No. 99-3 at 6-9. Haynes also laid out the basic facts of his case as set forth above and asked Mr. Capers to agree to vacate one of his § 924(c) counts so that he could be resentenced—and finally relieved of the crushing penalty he

[7] See 2019 Sourcebook at Appendix A, p. 213.

paid for going to trial.

Mr. Capers declined the request. According to subsequent correspondence from Haynes's counsel, however, it appears that Mr. Capers was sympathetic. See Dkt. No. 99-3 at 16, 18-21. That letter—dated May 17, 2018 from Haynes's counsel to the Honorable Richard P. Donoghue, appointed interim United States Attorney for this district in 2018—renews the request for Holloway relief. The letter reported to Mr. Donoghue that Mr. Capers "appreciated the unfairness of the sentence" but "expressed concerns… including a concern about whether a United States Attorney has the authority to approve the relief" Haynes requested, and sought to address those concerns. The letter also reported that Mr. Capers believed that the only recourse for Haynes (and which Mr. Capers was inclined to support) was a petition to the President for clemency.

Several months after the renewed Holloway request to Mr. Donoghue, on December 13, 2018, the government and Haynes's counsel appeared before this Court for a conference. The Assistant United States Attorney expressed the government's doubts about the viability of Rule 48 as a vehicle for post-conviction relief, referenced Haynes's pending application in the Second Circuit Court of Appeals for leave to file a successive § 2255 motion as a reason to defer consideration of compassionate relief, and spoke of the possibility of executive clemency.[10] In response to the Court's inquiry, the AUSA stated, "Yes. It is *the position of the Office* that this is not something we should be doing, particularly when there are significant questions about the

[10] Pending before the Second Circuit is Haynes's application for leave to file a successive § 2255 petition seeking relief under Johnson v. United States,135 S. Ct. 2551 (2015) and its progeny. As the government is aware, Haynes is unlikely to prevail because, as the government argued in opposition, bank robbery is a crime of violence under the relevant post-Johnson caselaw. See United States v. Hendricks, 921 F.3d 320 (2d Cir. 2019). It is disingenuous of the government, therefore, to point to that application as possibly affording Haynes relief or as a reason to defer consideration of the present motion. (Footnote numbers 8 and 9 intentionally skipped).

lawful basis of what the defendant is asking us to do" (Tr. at 10, emphasis added). These remarks are a matter of record despite the past involvement of the Office in Holloway relief on more than one occasion, including the Holloway matter itself and the Tamil Tiger prosecution before the undersigned.

The Court did not disguise its view of the situation, advising the government that "if there's some sense that this sentence is woefully excessive then there's got to be a way to resolve it" and that the Court was "profoundly disappointed in [the government's] reaction to this." (Tr. at 10, 11). The Court remarked that it found the government's position "astounding" and that "this is a problem that has to be corrected." (Tr. at 11). The Court also asked whether there was at least "a recognition that the sentence imposed is greater than necessary given the legitimate and recognized purposes of sentencing," and the government replied as follows:

> I'm not taking a position one way or the other on the substance of the claim…whether a similar decision would be made now that was made back in 1993…I think it is unlikely that a similar charging decision could be made now, but it is not the position I am in [sic] to reconsider the exercise of prosecutorial discretion made 25 years ago by Assistants and the United States Attorney at the time. (Tr. at 13).

Counsel for Haynes, however, reiterated the position stated in his Holloway letter to Mr. Donoghue. He conveyed that based on a conversation he had with the then-Chief of the Criminal Division in response to his letter to Mr. Capers, there *was* some recognition on the part of the government that the sentence exceeded the bounds of justice; the disagreement was limited to the question of what the appropriate procedural mechanism for relief might be. (Tr. at 14).

D. The Passage of the First Step Act ("FSA")

The approaching enactment of the First Step Act was of course "in the air" during the December 13, 2018 conference; President Trump signed it into law only eight days later, on

December 21, 2018. See Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018). Relevant here, Section 403 of that legislation took the extraordinary step of outlawing the draconian practice of "stacking" § 924(c) convictions for sentencing purposes in a single prosecution. See FSA § 403(a), Pub. L. 115-391, 132 Stat. at 5221-22, codified at 18 U.S.C. § 924(c)(1)(C).[11] The Court repeats: it was an extraordinary development in American criminal jurisprudence. A modern-day dark ages—a period of prosecutorial § 924(c) windfall courts themselves were powerless to prevent—had come to an end. (Thus, when the government stated only eight days earlier that it is "unlikely that a similar charging decision *could* be made now" it was speaking the literal truth; it remains unclear whether the government was also suggesting that, were the weaponry still available, it would in fact elect to exercise its charging discretion less aggressively now than 25 years ago).

The First Step Act of course did not make this critical change to § 924(c) retroactive. See FSA § 403(b), Pub. L. 115-391, 132 Stat. at 5222 ("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 the date of such enactment").[12] Nevertheless, Congress did label the relevant section of the legislation "*Clarification* of §924(c)." Id., 132 Stat. at 5521 (emphasis added). The legal matter of retroactivity aside, the

[11] Congress amended § 924(c)(1)(C) in Section 403(a) of the First Step Act "by striking 'second or subsequent conviction under this subsection' and inserting 'violation of this subsection that occurs after a prior conviction under this subsection has become final.'" Pub. L. 115-391, § 403(a), 132 Stat. at 5221-22.

[12] The non-retroactivity is not disputed. Indeed, as the government correctly notes, in the very next section of the First Step Act, Congress did make *other* changes to sentencing provisions retroactive. See id. § 404(b), 132 Stat. at 5222 (authorizing courts to "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" on motion of defendant).

clear message to an individual in Haynes's situation is that *Congress never intended that the brutal sentence he is serving be imposed.*

E. The Rule 48 and Compassionate Relief Motions

On January 7, 2019, Haynes formally moved under Rule 48 of the Federal Rules of Criminal Procedure for an order (i) granting leave for the government to move to dismiss Count 8 of the superseding indictment and (ii) urging the government to exercise its discretion to do so. Haynes argued, in essence, that 28 U.S.C. § 3231's broad grant of original subject matter jurisdiction over criminal offenses vests this Court with some residual jurisdiction to dismiss a final conviction, and that the government may, under Rule 48, move to dismiss counts in an underlying indictment even after a conviction has become final because any implicit time limit in Rule 48(a) is not jurisdictional and thus waivable. The government staunchly opposed. Without taking a formal position on the scope of its discretion under Rule 48(a) the government simply dug in its heels, stubbornly and inexplicably refusing to exercise that discretion in the interest of remedying the injustice in this case.

At a post-briefing conference on April 26, 2019, the government clung to its hardline position, stating only that "the Office has not filed the Rule 48 dismissal that would trigger the Court's ability to opine on whether it was lawful to do so." (Tr. at 3). Again, this Court did not mince words, advising the government during that conference that the Court "consider[s] [this] to be a pressing question of fundamental justice. And to hear this morning that the Office has not filed a motion…just blows me away." (Tr. at 4). The only concession voiced was that "[i]t is true that other individuals have had Rule 48 dismissals filed by the government in other cases." (Tr. at 5). The Court voiced that it was "gravely disappointed" in the government's refusal to

act. (Tr. at 5).[13]

With the government persisting in its position that it would not consent to any form of relief in this case, Haynes then advised the Court by letter dated August 6, 2019 of his intention to seek relief under the FSA-amended compassionate release statute. Dkt. No. 97. On August 14, 2019, as a preliminary step and consistent with the requirements of 28 C.F.R. § 571.61, Haynes filed a petition with the warden of his facility formally asking that the Bureau of Prisons ("BOP") move this Court on his behalf for compassionate relief pursuant to 18 U.S.C. § 3582(c)(1)(A) on the grounds set forth in his Holloway correspondence to the government and in his Rule 48 motion, attaching copies of those materials to his petition.[14] BOP's receipt of this request is not disputed.[15]

On the subject of his plans upon release, Haynes referenced his Nurses' Aide Certificate (which he completed while incarcerated) and his then-current enrollment in the Black Stone Career Institute where he was training to become a paralegal. He noted that, in addition to the possibilities of health care and paralegal work, he could support himself financially in several other ways, including carpentry, construction work, and trucking.

A Summary Reentry Plan Progress Report dated August 13, 2019 and signed by his prison case manager, which was also part of his release petition, documents Haynes's work

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[13] The Court's grant today of the motion for compassionate relief renders the still pending motion for relief under Rule 48 unnecessary; that motion is therefore denied without prejudice.

[14] 28 C.F.R. § 571.61 provides, in pertinent part, that an inmate initiate his request for a motion on his behalf under Section 3582(c) by filing the request, in writing, with the Warden of his facility, and that the request state the circumstances the inmate considers extraordinary and his proposed release plans. The government does not dispute the adequacy of petitioner's filing with BOP.

[15] According to Haynes's brief, apparently because of the retirement of the Warden, BOP returned his petition to him. In an abundance of caution he resubmitted it on September 4, 2019.

assignments, education history, discipline, and other particulars of his long years in prison. The "Work Assignment Summary" notes that Haynes "has maintained his work assignment as a Unit Orderly since April 2010" and that "[h]e receives outstanding work performance ratings from his detail supervisor." According to the Report, Haynes took classes in financial planning; microcomputer applications; Microsoft Word, Access and Excel; communications; keyboarding; legal research (twice); movie guide writing; basic mathematics; conversational Spanish; basic Arabic; African-American History; and a course entitled "Initial Prerelease Class."

The section of the Progress Report entitled "Discipline Reports" contains five entries. Three occurred during Haynes' first two years of incarceration, a fourth occurred fifteen years later, and a fifth, five years after that. They are as follows: February 9, 1994: "interfering with taking count" and "being insolent to staff member;" July 24, 1995: "lying or falsifying statement" and "being in unauthorized area;" December 18, 1995: "encouraging refusal of work;" March 29, 2010: "possessing a dangerous weapon;" and July 9, 2015: "unauthorized physical contact."

After the passage of time required to establish this Court's jurisdiction,[16] on October 3, 2019, without any response from the Warden or BOP, Haynes formally moved this Court for relief under the FSA-amended compassionate relief statute. Accompanying materials include a letter from the Federal Defenders of New York detailing the support its social work department, experienced with re-orienting released prisoners, would provide Haynes. According to the letter, upon release Haynes would initially enter the New York City Department of Homeless Services' Men's Intake Shelter in midtown Manhattan and, after intake, would be assigned a permanent shelter. Initial essentials such as clothing, food, and MetroCards would be provided. The

[16] See note 18, *infra*.

Defenders' social work team would further assist Haynes in the wide range of steps required to begin his new life—from dealing with the Department of Motor Vehicles and Social Security to bona fide job placement assistance. As the Defenders' letter notes, other local organizations—such as The Osborne Association with an office in downtown Brooklyn—are also committed to assisting individuals re-orient upon release from long prison terms.

When briefing on the motion for compassionate relief complete, the Court offered the government an additional opportunity to reconsider its position, issuing the following order on November 13, 2019:

> Before the Court addresses the issues now thoroughly briefed by the parties, it seems most appropriate that I once again offer the government the opportunity to choose the Holloway path to relief in this case. *See United States v. Holloway*, 68 F.Supp.3d 310 (E.D.N.Y. 2014). I especially urge the government to weigh the circumstances of the case in light of the significant changes in the law detailed in the briefs.

By letter dated February 13, 2020, counsel for Haynes advised the Court that "[a]fter contacting [the government] on February 12, 2020, we understand that the government will not consent to Holloway relief in this case." Ten days later, by letter-brief dated February 22, 2020, the government confirmed the report from Haynes's counsel. The letter advised this Court that:

> The United States Attorney has been provided a copy of the Court's November 13, 2019 Order, has reviewed the briefing in this litigation, and has determined that the briefing has revealed no new facts or law that would change the government's position with regard to Haynes's request to dismiss one of his § 924(c)(1) counts of conviction.

The government's February 22, 2020 letter addressed two additional pieces of business. First, the letter reported that, a full ten weeks earlier, the BOP issued a decision on Haynes's petition for compassionate relief. To the surprise of no one, BOP's action, signed by the facility warden and dated December 6, 2019, was to deny that request. The government's letter attaches copies of the memorandum prepared by Haynes's Unit Manager for the Warden to consider as

part of Haynes's petition and certain BOP records concerning Haynes, including his BOP inmate profile, sentencing data, and his disciplinary history. These materials are partially redacted.[17]

The Unit Manager's memorandum references "Program Statement 5050.50, Compassionate Release/Reduction in Sentence," noting that it "provides provisions [sic] for requests based on extraordinary and compelling circumstances," and that what Haynes offered (in his petition) as such circumstances was that "the mandatory minimum sentencing guidelines used to sentence him by the court was [sic] unjust." The memorandum continues: "Based upon his supporting documentation he is not eligible for a [r]eduction in [s]entence at this time. No extraordinary or compelling circumstances was [sic] presented…" Handwritten comments follow these remarks, stating only as follows: "Does not meet criteria" and "no chronic medical conditions that cause difficulty performing activities of daily living." Length of sentence was not addressed.

The disciplinary record that is part of this package—which was *not* cited by the Warden as grounds for denying Haynes's request for relief—contains the same five disciplinary events listed in the Summary Reentry Plan Progress Report included in Haynes's petition to the Warden with slightly more detail. The three disciplinary events that occurred in the period 1994-1995 hardly warrant attention; the possession of a dangerous weapon in 2010 and the unauthorized

[17] According to the government, the redactions were made "to protect the names of BOP employees from public disclosure, to protect Haynes's personally identifiable information and healthcare information pursuant to Fed. R. Crim. P. 49.1, and to protect certain sensitive information relating to the security and management of BOP correctional institutions." Counsel for Haynes reports that they asked the government for unredacted copies of these materials and the government refused. Although they have also asked this Court to direct the government to furnish unredacted materials, that request is denied at this time, without prejudice, as it is not clear that removing the redactions would materially amplify the relevant portion of the factual record or materially influence the Court's discussion of whether Haynes would pose a danger to society. See *infra* at pp. 33 et seq.

physical contact in 2015, however, form the basis of the government's argument in its February 22, 2020 letter that Haynes would present a continuing danger to the community upon release.

In response, in a letter dated March 12, 2020, counsel for Haynes briefly addresses the 2015 incident. The letter asserts that Haynes restrained a fellow inmate in order to break up a fight among several prisoners, and that facility rules required that he be written up for unauthorized physical contact regardless of the reason. No record materials are included in support of counsel's assertions; as corroboration of sorts, however, the letter emphasizes—as plainly appears on the face of the BOP disciplinary record—that all components of the sanction imposed for this infraction (loss of commissary, phone and visitation privileges) were suspended; counsel asserts that this was because Haynes in fact assisted in minimizing the harm the fight might have caused.

As a "record" on this disciplinary incident, the Court, of course, has before it only the three items just reviewed (the government's February 22, 2020 letter, the redacted BOP disciplinary record, and Haynes's March 12, 2020 letter) and so makes no formal factual findings on the matter. The Court does note, however, that despite the government's hardline position in this matter, it has *not* disputed Haynes's characterization of the 2015 incident.

The other agenda item in the government's February 22, 2020 letter was a citation to the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"). This important statute is hardly new legislation (it became effective in 2004, see Pub. L. No. 108-405, 118 Stat. 2260), and if the government was being genuine one might well wonder why it did not mention CVRA concerns earlier: as noted, Haynes first advised the Court of its intent to move for compassionate relief back in August 2019 and first sought Holloway relief more than three years earlier, in January 2017.

Taking the government at its word, however, the Court understands the letter as alerting the Court that, in the event a hearing were held on Haynes's current motion, the government would seek to locate and notify the victims of Haynes' crimes of their rights under the CVRA to appear. Ostensibly to facilitate following through on this pledge, the government also asks in this letter for 90-days' advance notice of any such hearing. As this memorandum reflects, however, the Court's decision is based on the written submissions, so the CVRA is not implicated.

DISCUSSION

No reasonable observer could dispute the unfairness and excessiveness of the sentence Haynes is serving. Its length (in absolute and comparative terms, as reviewed above) and the principal reason for that length—the exercise of prosecutorial charging discretion in an oppressive and openly retaliatory manner—speak for themselves. The only relevant legal inquiry has been whether there exists a procedural vehicle *not* dependent on the consent of the government, as in the Rule 48 or Holloway context, through which the Court could lawfully grant Haynes the relief that justice demands. Plainly, as the substantial body of new First Step Act jurisprudence overwhelmingly establishes, that vehicle exists: it is the FSA-amended compassionate release statute.

A. The Compassionate Release Framework

Title 18, United States Code, Section 3582(c)(1)(A)(i), as amended by the First Step Act on December 21, 2018, now provides in pertinent part:

> (c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—

> (A) the court, upon motion of the Director of the Bureau of Prisons, *or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier*, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction
> . . .
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

18 U.S.C. § 3582(c)(1)(A)(i) (emphasis added to reflect amendment).

Thus, as is now well understood, before the First Step Act amended the compassionate release statute, a motion for reduction in sentence based on "extraordinary and compelling reasons" could only be presented to the Court by the BOP on a prisoner's behalf, whereas now, under the amended statute, a prisoner may bring the motion himself, provided the statutory exhaustion or lapse-of-thirty-day requirement is satisfied.[18]

The important legal question presented by Haynes's motion arises from the fact that the First Step Act amended *only* the compassionate release statute and *only* in the manner just noted—*i.e.*, allowing a prisoner, rather than requiring BOP, to be the movant—but did not amend *any other* language in § 3582(c) or *any other* component of the overall compassionate release legal framework as it existed before the First Step Act became law. That framework, of

[18] The Court's jurisdiction over Haynes's motion is not disputed or in question. As detailed above, he first filed a request with BOP on August 14, 2019 and filed his motion with this Court on October 3, 2019. BOP's receipt of that request is not disputed. Nevertheless, in an abundance of caution, after his request was returned (necessarily proof that it was received)—which occurred, he surmises, because the Warden retired—he resubmitted the request on September 4, 2019 and restarted his own waiting period before filing here on October 3, 2019.

course, includes a matrix of statutory and other enactments forging a relationship among the Court, the Sentencing Commission, and BOP.

That framework includes, first, the pre-FSA statute by which Congress delegated to the Sentencing Commission the authority to determine which circumstances are sufficiently "extraordinary and compelling" to warrant a reduction in sentence under § 3582(c)(1)(A). See 28 U.S.C. § 994(t). That section provides, in relevant part:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.[19]

The Sentencing Commission's policy statement implementing these statutory directives appears in Sentencing Guideline § 1B1.13 (titled, "Reduction in Term of Imprisonment Under 18 U.S.C § 3582(c)(1)(A) (Policy Statement)"). That pre-FSA guideline provides as follows:

> *Upon motion of the Director of the Bureau of Prisons* under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
>
> (1) (A) extraordinary and compelling reasons warrant the reduction; or

[19] Indeed, this delegation is a specific instance of the broader delegation of authority set forth in 28 U.S.C. § 994(a)(c)(2), which provides that the Sentencing Commission "shall promulgate…general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, *including the appropriate use of . . . the sentence modification provisions set forth in … section[ ].. 3582(c)* of title 18." 28 U.S.C. § 994(a)(2)(C) (emphasis added)

> (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned.
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

U.S.S.G § 1B1.13 (emphasis added).

The "Commentary" to this Guideline includes five "Application Notes." Application Note 1 lists circumstances that qualify as "extraordinary and compelling." Subdivisions (A) though (C) of that Note list the defendant's medical condition, age and family circumstances. Subdivision (D), however, titled "Other Reasons," provides as follows: "*As determined by the Director of the Bureau of Prisons*, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." U.S.S.G. §1B1.13 App. Note 1 (emphasis added).

Application Notes 2 and 3 (part of the same Commentary) address other substantive standards, providing that "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing" in order to qualify (Note 2), and that rehabilitation of the defendant standing alone, does not qualify as extraordinary and compelling (Note 3). Application Notes 4 and 5, however, both speak plainly to the BOP's exclusive gate-keeping authority pre-FSA. Note 4 states that, "A reduction under this policy statement may be granted *only upon motion by the Director of the [BOP]* pursuant to 18 U.S.C. § 3582(c)(1)(A),"[20] and Note 5 provides that "Any reduction made pursuant to a motion by the Director of the Bureau of

[20] Application Note 4 further states that it "encourages" BOP to file a § 3582 motion move if the required circumstances are present and notes that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction…" U.S.S.G. § 1B1.13 App. Note 4.

Prisons for the reasons set forth in [Application Notes] (1) and (2) is consistent with this policy statement."

Circling back to § 3582(c) itself—as quoted above, although the FSA amended the statute to allow prisoners to seek relief without BOP's blessing, it continues to provide that a court may grant a sentence reduction "if it finds that … extraordinary and compelling reasons warrant such a reduction … *and that* such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i) (emphasis added). The heart of the matter before the Court is that many of these policy statements, as just described, not only pre-date the FSA amendment of § 3582(c) but also continue to reference expressly BOP's *pre*-FSA role as exclusive gatekeeper, which of course the FSA eliminated. See, e.g. U.S.S.G. § 1B.131 ("Upon motion of the Director of [BOP]…); App. Note 1 par. D ("Other Reasons… [a]s determined by the Director of [BOP]").

B. The Parties' Positions

Haynes asks this Court to find that, on the facts presented, the FSA's dramatic amending of § 924(c), though not formally retroactive, is nevertheless an "extraordinary and compelling" circumstance for purposes of relief under the FSA-amended compassionate release statute, 18 U.S.C. § 3582(c). On the subject of the authority to make this finding, Haynes urges the Court both to follow some of the language in the pre-FSA compassionate release framework and to disregard other language as no longer binding in the face of the FSA's elimination of BOP's gatekeeper role and the Congressional objective of increasing the availability of such relief that the statutory change reflects.

Thus, pointing to Application Note 1 to Guideline § 1B1.13, Haynes argues that the Sentencing Commission, in exercising its Congressionally-delegated authority to expound upon "extraordinary and compelling" by specifically listing age, health and family circumstances ((A) through (C)), also chose to include a catch-all fourth category, "Other Reasons" (Subdivision (D))—which could include *either* reasons "in combination with" *or* "other than" age, health and family. "Other reasons," he says, can include the reasons he advances here.

But, with respect to the language in the same Application Note that vests *BOP* with the authority to determine which "other reasons" qualify, Haynes says that language is inconsistent with the First Step Act's elimination of BOP's gatekeeper role and thus not binding on this Court. To be sure, Haynes's position would be susceptible to the attack that it smacks of a kind of cherry-picking of pre-First Step Act law, or that it is unduly inventive, even reckless, were his position not supported by a substantial body of recent district court decisions (to be discussed momentarily) inaugurating a new jurisprudence of compassionate release. Haynes is not so reckless, however, as to quarrel with the express mandate in § 3582(c)—which the FSA did not amend—that requires, as a component of any order granting a sentencing reduction, that this Court "find[ ] that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." His argument appears to be (although he has not framed it in exactly these terms) that the First Step Act's elimination of BOP as gatekeeper necessarily renders certain of the policy statements still on the books no longer "applicable."

The government's position, naturally, is that the First Step Act merely enacted a procedural change—*i.e.*, identifying who may be the movant under § 3582(c)—but did not alter the substantive standards for what qualifies as extraordinary and compelling, and that Guideline § 1B1.13 and its Application Notes, as written, are binding on this Court unless and until

repealed or declared to be in violation of a federal statute or the Constitution. Thus, the government says that *BOP—but not this Court*—has the authority to decide whether the change in § 924(c) law under the circumstances here is "extraordinary and compelling" for § 3582(c) purposes. Additionally, the government argues, even if the Court did have such authority, an exercise of that authority in Haynes's favor would amount to an impermissible run-around Congress's decision not to make the change in § 924(c) law retroactive.

C. Analysis

1. The Court's Authority to Determine What Qualifies As "Extraordinary and Compelling"

Haynes's position is hardly as radical as it first sounds. As a threshold matter, independent of the apparent conflict between a federal statute (§ 3582(c)) and Guideline commentary exposed here, and conspicuously absent from the government's discussion, there is, as a sort of elephant in the middle of the jurisprudential room, United States v. Booker, 543 U.S. 220 (2005). Booker establishes that the Guidelines and their commentary are unquestionably *not binding* on the Courts.[21]

[21] Indeed, even in former days, when "Sentencing Commission commentary that interprets or explains a provision of the Guidelines" was considered "analogous to an administrative agency's interpretation of its own regulations, and [therefore] entitled to controlling weight from the courts unless it violates the Constitution or a federal statute," United States v. Chen, 127 F.3d 286, 290-91 (2d Cir. 1997) (citing, Stinson v. United States, 508 U.S. 36, 45 (1993)), the Second Circuit recognized that "[t]he effect of this rule…is somewhat less certain where the commentary at issue relates to a Guidelines section that mirrors the language of a statute because the Sentencing Commission is not necessarily considered an authoritative source for the interpretation of federal sentencing statutes" id. at 291.

As for the specific issues presented here, the Court enters new jurisprudential territory, to be sure, albeit territory surprisingly well charted. One of the first decisions studying the relationship between the amended compassionate release statute and the unamended compassionate release policy statements is United States v. Cantu, 423 F. Supp. 3d 345 , 347-48 (S.D. Tex. June 17, 2019) (The "policy statement [in the Guideline commentary] has not been amended since the First Step Act, and some of it now clearly contradicts 18 U.S.C. [§] 3582(c)(1)(A).").[22] Although the defendant in Cantu did not tender the same circumstances offered here as "extraordinary and compelling," the legal issue presented was essentially the same that Haynes's motion presents: "whether the Court, as opposed to the Director of the BOP, can determine that 'there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)' [of Application Note 1] and grant relief on that basis." Id. at 350 (quoting, U.S.S.G. §1B1.13 cmt. n.1(D)). The Court's reasoning warrants restatement here:

> Although Congress empowered the Commission to issue policy statements regarding the appropriate use of the sentence-modification provisions under § 3582, 28 U.S.C. § 994(a)(2)(C), Congress may override the Commission's policy statements by statute. Because the Commission's statutory authority is limited to explaining the appropriate use of sentence-modification provisions under the current statute, 28 U.S.C. § 994(a)(2)(C), an amendment to the statute may cause some provisions of a policy statement to no longer fall under that authority, as they no longer explain an "appropriate use" under the amended statute. For example, at least one provision of the Commission's previously promulgated policy statement is clearly contradicted by the First Step Act's amendments to

[22] Not only has the policy statement not been amended, the Court continued, but "it is also unlikely that there will be a 2019 Guideline manual propagated, as the Commission currently only has two voting Commissioners and requires four voting Commissioners to vote in favor of adoption of a proposed amendment." Id. at n. 1 (internal quotation and citation omitted). Other courts have made the same observation. See, e.g., United States v. Webster, 2020 WL 618828, *4 n. 3 (E.D. Va. Feb. 10, 2020). This Court's own research confirms these facts and that as of the date of this decision, there are no nominations pending.

> § 3582: The unamended policy statement still advises that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." … Yet § 3582 allows the Court to grant a motion for extraordinary and compelling reasons upon a motion by the Director of the Bureau of Prisons or by the defendant. … The mandate that the Director of the BOP determine additional extraordinary or compelling reasons likewise fails to explain an "appropriate use" under the newly amended § 3582.[23]
>
> Where two statutes are in conflict, it is nearly axiomatic that the latter enacted is given preference over the former. . . . That principle has especially strong force here where the Commission derives its power to promulgate the policy statement from Congress. Statutory construction, however, is a holistic endeavor that must consider the entire statutory scheme. … The Court's role is to make sense rather than nonsense out of the corpus juris….The corpus juris here consists of the statute (18 U.S.C. § 3582(c)), the relevant policy statement (U.S.S.G. § 1B1.13), and the statute granting the Commission authority to promulgate that policy statement (28 U.S.C. § 994).
>
> Before the First Step Act's amendments to § 3582, it made sense that the BOP would have to determine any extraordinary and compelling reasons—only the BOP could bring a motion for a reduction of sentence under § 3582(c)(1)(A). But defendants no longer need the blessing of the BOP to bring such motions. The BOP in fact may never weigh in or provide guidance when a § 3582(c) motion is brought by a defendant. . . . Given the changes to the statute, the policy-statement provision that was previously applicable to 18 U.S.C. § 3582(c)(1)(A) no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of sentence-modification provisions under § 3582.
>
> The title of the First Step Act section that amends 18 U.S.C. § 3582(c)(1)(A) … is "Increasing the Use and Transparency of Compassionate Release." … That title supports the reading that U.S.S.G § 1B1.13 cmt. n.1(D) is not applicable when a defendant requests relief under § 3582(c)(1)(A) as amended because it no longer explains an appropriate use of that statute. *For if the Director of the BOP were still the sole determiner of what constitutes an extraordinary and compelling reason, the amendment's allowance of defendants' own § 3582(c)(1)(A) motions for reduction of sentence would be to no avail. Such a reading would contravene the explicit purpose of the new amendments.*

Cantu, 423 F. Supp. 3d at 350-51(internal citations and quotations omitted) (emphases added).

The Court concluded:

[23] "Appropriate use" is the language used in 28 U.S.C. § 994(a)(2)(C), set forth at note 19, *supra*.

> Thus, the correct interpretation of § 3582(c)(1)(A)—based on the text, statutory history and structure, and consideration of Congress's ability to override any of the Commission's policy statements "at any time"—is that when a defendant brings a motion for a sentence reduction under the amended provision, the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C) warrant granting relief.

Id. at 352 (quoting, Mistretta v. United States, 488 U.S. 361, 394 (1989)).

In following the reasoning of Cantu—as many cases (about to be discussed) have done—this Court emphasizes, as Cantu expressed, that this is an "holistic endeavor that must consider the entire statutory scheme," that the Court's role is "to make sense rather than nonsense out of the corpus juris," and that the *latest* enacted statute and its express purpose must be the keystone.

Since Cantu was issued in June 2019, at least twelve other federal district courts of which this Court is aware have considered the relationship between the FSA-amended compassionate release statute and Application Note 1(D) and have reached essentially the same conclusion as Cantu. See United States v. Brown, 411 F. Supp. 3d 446, 450 (S.D. Iowa Oct. 8, 2019) ("the Court concludes [that] the Cantu, Fox, and Beck courts' reading of § 3582 better comports with the FSA's purpose, congressional intent with amending § 3582(c), and the most natural reading of the statutory scheme");[24] United States v. Urkevich, 2019 WL 6037391, at *3 (D. Neb. Nov.

[24] Beck and Fox were issued shortly after Cantu. See United States v. Beck, 2019 WL 2716505, at *5 (M.D.N.C. June 28, 2019) ("There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act."); United States v. Fox, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.").

Brown also engaged in its own plenary reasoning, concluding: "If the FSA is to increase the use of compassionate release, the most natural reading of the amended § 3582(c) and § 994(t) is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it. Unqualified deference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role….Thus, the Director's prior interpretation of 'extraordinary and compelling' reasons is informative, but not dispositive." 411 F. Supp. 3d at 451 (internal quotations and citations omitted).

14, 2019), app. docketed, No. 20-1603 (Mar. 23, 2020) ("[T]this Court may use Application Note 1(D) as a basis for finding extraordinary and compelling reasons to reduce a sentence," citing Beck, Fox, Cantu[25] and Brown); United States v. Ebbers, __ F. Supp. 3d __, 2020 WL 91399, at *4 & n. 6 (S.D.N.Y. Jan 8, 2020) (observing, first, that "U.S.S.G. § 1B1.13's descriptions of 'extraordinary and compelling reasons' remain current, even if references to the identity of the moving party are not," and then holding in a footnote, "On the other hand, because no statute directs the Court to consult the BOP's rules or guidelines…the Court finds the BOP Guidelines to be inapposite" and that "'[T]he terms of the First Step Act give courts independent authority to grant motions for compassionate release and says nothing about deference to BOP, thus establishing that Congress wants courts to take a *de novo* look at compassionate release motions'") (quoting Beck, 2019 WL 2716505 at *12)[26]; United States v. Schmitt, 2020 WL

[25] Ironic in hindsight is the Cantu court's observation, in closing, that "[t]he Court's determination in this case is narrow and unlikely to have far-reaching implications, as Government non-opposition is both the touchstone of the determination and rare." 423 F. Supp. 3d at 353 n.9. The comment is perhaps also inexact: the government did *not* agree with the Court's analysis of the relationship between the First Step Act amendment to §3582(c) and Application Note 1(D) to Guideline 1b1.13: indeed, the government argued that the prisoner's motion should not even be treated as arising under 3582(c). Instead, the government did not oppose his release as "an eligible elderly offender who qualifies for the Family Reunification Program." Id.

[26] Especially important to the Court in Ebbers was the Congressional objective in amending §3582(c): in the Court's words, "Congress has made the legislative judgment to increase the use of compassionate release. The section's title … unambiguously states as much."). Id., 2020 WL 91399, at *3. Ebbers further notes that "Congress passed the compassionate release amendments amid sustained critique of the BOP's program and failed attempts to reform it," and that, until 2013, "on average, only 24 inmates were released each year through the BOP program from a federal prison population of approximately 220,000." Id. (internal quotations and citations omitted). Following an Inspector General report in 2013, "the BOP reformed its policies, and instances of compassionate release increased to eighty-three inmates between August 2013 and September 2014. . . . But because Congress still amended the program following this increase, one can infer Congress thought eighty-three was still insufficient." Id. (internal quotations and citations omitted).

96904, at *3 (N.D. Iowa Jan. 8, 2020) (lodging agreement with Cantu, Beck, Fox, Brown, and Urkevich); United States v. Maumau, 2020 WL 806121, at *4 (D. Utah Feb. 18, 2020) ("[T]his court joins the majority of other district courts . . . in concluding that. . . [u]nder the First Step Act, it is for the court, not the Director of [BOP], to determine whether there is an 'extraordinary and compelling reason' to reduce a sentence");[27] United States v. O'Bryan, 2020 WL 869475, at *2 (D. Kansas Feb. 21, 2020) ("In the wake of the First Step Act, numerous courts have recognized [that] the court can determine whether extraordinary and compelling reasons exist to modify a sentence—and may do so under the 'catch all' provision similar to that recognized in [Application Note 1(D)]"); United States v. Young, 2020 WL 1047815 at *6 (M.D. Tenn. Mar. 4, 2020) ("a majority of the district courts that have considered the issue have likewise held, based on the First Step Act, that they have the authority to reduce a prisoner's sentence upon the court's independent finding of extraordinary or compelling reasons");[28] United States v. Redd, 2020 WL 1248493, at * 7 (E.D. Va. Mar. 16, 2020) (concluding that "[a]pplication Note 1(D)'s

[27] In a footnote, the Court in Maumau "briefly notes that, in reaching this conclusion, its reasoning is slightly different from some of the other district courts cited above. A few of those cases frame the First Step Act as shifting discretion from the Bureau of Prisons Director to the district courts…. But in this court's view, the district courts have always had the discretion to determine what counts as compelling and extraordinary. The courts have never been a rubber stamp for compassionate release decisions made by the Bureau of Prisons. … The key change made by the First Step Act is not a redistribution of discretion, but the removal of the Director's role as a gatekeeper. Before the First Step Act, the Director's role limited the number of cases the courts saw and, by extension, limited the number of instances in which the courts exercised their discretion to determine what counted as an extraordinary and compelling reason to modify a sentence. Because prisoners may now file motions directly, courts will address this issue more frequently. But this is not a new grant of discretion; it is merely an increased opportunity to exercise that discretion." Id. at n. 5.

[28] Apparently in Young, unlike here, the government conceded that Guideline 1B1.13 and its commentary are no longer binding. See id. 2020 WL 1047815, at *6 ("The government also concedes that, because the Sentencing Commission's policy statement 'has not been amended to reflect [the changes made by the First Step Act],' the statement provides 'helpful guidance' but ... is not ultimately conclusive given the statutory change.'").

prefatory language, which requires a determination by the BOP Director, is, in substance, part and parcel of the eliminated requirement that relief must be sought by the BOP Director in the first instance" and therefore "joins other courts in concluding that a court may find, independent of any motion, determination or recommendation by the BOP Director, that extraordinary and compelling reasons exist based on facts and circumstances other than those set forth in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C)"); United States v. Owens, 97 CR-2546, ECF No. 93 at *4 (S.D. Cal. Mar. 23, 2020) (following "numerous courts [that] have recognized the court can determine whether extraordinary and compelling reasons exist to modify a sentence—and may do so under the 'catch-all' provision"); United States v. Decator, 2020 WL 1676219, at *2-3 (D. Md. Apr. 6, 2020) (following, *inter alia*, Beck, Young, and Redd, concludes that, "[w]hile Sentencing Commission and BOP criteria remain helpful guidance, the amended § 3582(c)(1)(A)(i) vests courts with independent discretion to determine whether there are 'extraordinary and compelling reasons' to reduce a sentence same").[29]

These decisions reflect, to borrow a term, the right side of history on the crucial legal questions they consider, which Haynes's motion also presents, and so today this Court joins them in concluding that it, too, has the authority to grant the relief sought in this case—namely, to determine what "Other Reasons" (as that term is used in Application Note 1(D)) qualify as

[29] The principle outlier of which this Court is aware, and the sole authority relied on by the government here, is United States v. Lynn, 2019 WL 3805349 (S.D. Ala. Oct. 8, 2019). There, the Court concluded that as long as 28 U.S.C. § 994 continued to instruct the Sentencing Commission to promulgate policy statements defining "extraordinary and compelling," the most recent policy continued to govern. The court reasoned that "[i]f the policy statement needs tweaking ..., that tweaking must be accomplished by the Commission, not by the courts." Id. at *4. Brown and Maumau, among others of the cases cited above, critique Lynn and decline to follow it principally because it conflicts with the Congressional goal of increasing the use and transparency of compassionate release.

"extraordinary and compelling" regardless of BOP's view on the matter and without having to await a someday-updating by the Commission of its unquestionably outdated policy statement.

2. The Extraordinary and Compelling Circumstances Here Warranting a Reduction in Sentence

The Court readily concludes, on the facts as detailed above—including the brutal impact of Haynes's original sentence, its drastic severity as compared to codefendant Rivers's ten-year term, its harshness as compared to the sentences imposed on similar and even more severe criminal conduct today, and the extent to which that brutal sentence was a penalty for Haynes's exercise of his constitutional right to trial—that the FSA' elimination of the § 924(c) sentencing weaponry that prosecutors employed to require that sentence is an extraordinary and compelling circumstance warranting relief under § 3582(c). For an individual like Haynes, with three pre-amended § 924(c) counts in a single indictment, the change spells the difference between thirty years in or out of prison.

Indeed, several of the reported decisions just catalogued have made precisely that finding with respect to similarly situated defendants, holding that this sea change in § 924(c) law, coupled with the brutal impact of the original sentence, is an extraordinary and compelling circumstance warranting a reduction in sentence under the compassionate release statute. A recent example is Redd, from the Eastern District of Virginia, which involved a § 924(c) bank robbery defendant sentenced to just over 50 years, 45 of which were for his three stacked § 924(c) convictions. The Court concluded:

> There is no doubt that there is gross disparity between the sentence Mr. Redd received and the sentence he would have received after the First Step Act….That disparity is primarily the result of Congress'[sic] conclusion that [stacked] sentences are unfair and unnecessary, in effect a legislative rejection of the need to impose sentences under § 924(c) as originally enacted, as well as a legislative declaration of what level of punishment is adequate … These are, the Court finds,

> extraordinary and compelling developments that constitute extraordinary and compelling reasons that warrant a reduction to [the defendant's] sentence.

Redd, 2020 WL 1248493, at *6.[30] Incorporating its analysis of the effect of the FSA-amended statute on the existing Guideline commentary, the Redd Court further found that "the [circumstances] that it has determined … [to be] extraordinary and compelling reasons warranting a sentence reduction satisfy any requirement for consistency with any *applicable* policy statement." Id. (emphasis added).

Other cases reaching the same result before Redd include Urkevich, 2019 WL 6037391, at *4 ("A reduction in … sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed");[31] Maumau, 2020 WL 806121, at *7 ("Like the Urkevich court, this court concludes that the changes in how § 924(c) sentences are calculated is a compelling and extraordinary reason to provide relief on the facts present here," which also included "[the defendant's] young age at the time of the sentence [and] the incredible length of the mandatory sentence imposed");[32] and O'Bryan, 2020 WL 869475, at *2 (framing the legal

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[30] At the time the defendant in Redd moved for compassionate release he had served more than 23 years; the Court reduced his sentence to allow for his immediate release.

[31] The defendant in Urkevich was convicted after trial of several drug trafficking crimes and three § 924(c) counts and sentenced, in 2004, to 235 months on the drug count and to a total of 55 years on the three §924(c) counts (5, 25 and 25).

[32] Maumau also squarely rejects another principal objection raised by the government in opposition in these cases, namely, that, even accounting for the presence of the catch-all "other reasons" in Application Note 1(D), traditionally compassionate release is a remedy for physical limitations due to age or medical condition and the like, *not* sentence length—for which the law provides other vehicles of relief.

As Maumau documents, however, there are explicit indicators to the contrary in the legislative history of the statute that first created compassionate relief and made BOP its gatekeeper. See Pub. L. No. 98-473, 98 Stat. 1837 (Comprehensive Crime Control Act of 1984, eff. Oct. 12, 1984) In the Senate Report accompanying that Act, Congress expressed its belief that §3582(c)

question as, "[d]oes the FSA's modification of the § 924(c) sentencing regime constitute an 'extraordinary and compelling reason' for a sentencing reduction?", the court follows Maumau and Urkevich, answers in the affirmative). See also Brown, 411 F. Supp. 3d at 453 ("district court assessing a compassionate release motion may still consider the resulting sentencing disparity" caused by the First Step Act's changes to § 924(c); denying motion, however, because the requested sentence reduction would not have resulted in prisoner's immediate release; court urged Holloway relief instead).[33]

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modifications would be appropriate in "cases of severe illness" as well as two situations relating to sentence length: "cases in which *other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*," and "cases in which the *sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment*." S. Rep. No. 98-225, at 55-56 (1984) (emphases added).

Maumau further observes: "Despite this intent, a 2013 Inspector General's report by the Department of Justice found that 'although the BOP's regulations and Program Statement permit non-medical circumstances to be considered as a basis for compassionate release, the BOP routinely rejects such requests and did not approve a single nonmedical request during the 6-year period of our review.'" Maumau, 2020 WL 806121, at *5 (citing the Department of Justice's April 2013 report, *The Federal Bureau of Prisons' Compassionate Release Program*, at ii).

The Court in Maumau concludes:

> In other words Congress indicated [35] years ago that it would be appropriate to provide compassionate releases when sentences are "unusually long" but the [BOP] consistently declined to seek relief in those situations. Congress responded by eliminating the [BOP]'s gatekeeping function over compassionate releases. Accordingly, the fact that the phrase "extraordinary and compelling reason" has not historically been interpreted to include exceedingly long sentences is an unpersuasive reason to exclude such an interpretation today.

Id.

[33] Since Redd, at least two more decisions of which this Court is aware have granted motions for compassionate release on these same grounds. See Owens, 97 CR-2546, ECF No. 93 at *5 (agreeing with "[n]umerous district courts [that] have considered the exact argument and held that the First Step Act's change in how sentences should be calculated when multiple §924(c) charges are included in the same indictment constitutes extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A)"); Decator, 2020 WL 1676219, at *4 ("the court finds that [the defendant's] continued incarceration under a sentencing scheme that has since been substantially

Of final note, the O'Bryan decision, among others, specifically addresses the other principal objection raised by the government here and in other § 924(c) compassionate-release cases, namely, that granting relief because of the transformative change in the § 924(c) sentencing scheme ushered in by the First Step Act would run counter to Congress's decision not to make that change retroactive. The Court reasoned:

> Notably, the only rationale offered by the government for opposing the relief sought is the contention that Congress did not specify that Section 403 of the FSA [amending 18 U.S.C. § 924(c)] should apply retroactively. … However, this simply establishes that a defendant sentenced before the FSA is not automatically entitled to resentencing; it does not mean that the court may not or should not consider the effect of a radically changed sentence for purposes of applying § 3582(c)(1)(A). That is, the fact that the FSA changes in § 924(c) were not explicitly retroactive is "relevant [but] ultimately has little bearing" on whether the court is empowered to act under Section 3582, because "[i]t is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis."

O'Bryan, 2020 WL 869475, at *1 (quoting, Maumau, 2020 WL 806121, at *7).

Indeed, this Court would add: the Congressional decision not to make the § 924(c) change retroactive spares the courts an avalanche of applications and inevitable re-sentencings, no doubt in many cases that do not feature the same grave characteristics presented here.

In sum, in the context of the prosecution of Haynes detailed above, the Congressional decision to outlaw the very weapon prosecutors used to punish Haynes with 30 additional years in prison for electing to go to trial—and to reiterate: as documented in the plea offer letter, the quid pro quo was explicit—is an "extraordinary and compelling" circumstance warranting a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i). It also bears repeating: although the

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amended is a permissible "extraordinary and compelling" reason to consider him for compassionate release").

First Step Act's amendment of 18 U.S.C. § 924(c) was not made retroactive, the amendment was titled "Clarification of Section 924(c)." What happened to Mr. Haynes is something Congress has now made clear should never have occurred.

3. 18 U.S.C. § 3553(a) and 3142(g) Considerations

Only two steps remain. First, to comply with the applicable policy statement found at Guideline § 1B1.13(2), the Court must be satisfied that Haynes "is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(2). If the Court so finds, it must then "consider[] the factors set forth in section 3553(a) to the extent they are applicable," 18 U.S.C. § 3582(c)(1)(A), to determine the appropriate sentence.

The government insists that Haynes would pose a danger to the community if released now, and therefore should serve the remaining 13 years of his sentence, because (a) the crimes he committed in 1992 were crimes of violence, and, (b) as detailed above, he was disciplined on March 29, 2010, for "possessing a dangerous weapon," and again on July 9, 2015, for "unauthorized physical contact."

The Court strongly disagrees. Indeed, refuting the government's recidivism argument is, again, the fact that the Congress has now decided that Haynes has served more than the appropriate sentence for his crimes. Whatever speculative risks of recidivism exist here are no greater than for any defendant who has served the time the legislature has decreed for the crimes committed.

Beyond that, despite how the government might seek to characterize Haynes's prison records, the BOP Summary Reentry Report described above plainly shows that Haynes has been

a good prisoner and then some, having completed hundreds of hours of coursework and having discharged his job duties impressively. The 2010 and 2015 disciplinary incidents highlighted by the government are simply not proof that Haynes would be a danger to society. In any event, with respect to the most recent incident of unauthorized contact in 2015, the explanation Haynes has offered—which the government has not refuted—establishes the very opposite of dangerousness. It shows altruism, even heroism, certainly qualities society could use more of, not less.[34]

Section 3553(a) requires little additional discussion. The Congressional declaration of what is now considered adequate punishment for violations of 18 U.S.C. § 924(c) necessarily satisfies the Section 3553(a) mandate to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)," which in turn requires that a sentence "reflect the seriousness of the offense" and "provide just punishment for the offense." Congress had made clear that what Haynes has already served fully discharges these critical sentencing objectives. The only point of arguable contention concerns § 3553(a)(2)(C)—the need "to protect the public from further crimes of the defendant"—which is duplicative of the question of dangerousness for purposes of Section 3142(g) just discussed.

CONCLUSION

To conclude, one might well begin with the words of Haynes's counsel, who are to be commended for their persistence and for the remarkably high quality of their submissions.

[34] As for the 2010 incident, the Court has no information as to the circumstances. In any event, the fact that Haynes admitted having a knife in his cell a full decade ago simply does not speak to the question of future dangerousness. Finally, the government argues that Haynes's motion should be denied because his plans upon release are too vague. This argument is frivolous in light of the detailed submission from the Federal Defenders social work team described above.

> The sentence in this case shames us all. It was the result of an unjust and retaliatory sentence enhancement that has now been eliminated because of its excessive harshness and its history of disproportionate use against Black men like Mr. Haynes. Mr. Haynes has already served nearly two decades in prison solely for exercising his constitutional right to trial by jury. The relief requested here is urgent.

As this order is signed, Haynes will have been in federal custody for almost 27 years as a result of his only foray into serious criminal behavior. Those years, as discussed, are far beyond what the United States Attorney determined was a suitable sentencing range when offering Haynes a plea, far beyond what Congress ever intended, as its recent clarification makes clear, and far beyond what the law now permits. And all because Haynes chose a trial over a plea and the prosecution retaliated, an action that the United States Attorney concedes could not be taken today.

The insistence of this first-time offender on a trial was no doubt ill-advised, more likely foolish in light of the available evidence and the government's distinct advantage in trying four robberies in a single trial. But it was his decision, and a choice firmly guaranteed by the Constitution. Although the government cannot be faulted for Haynes's poor judgment in making that election, the prosecution's plainly retaliatory reaction reflects patently flawed judgment and insensitive abuse, on its part, of the powers with which it is vested.

Congress has spoken. Loudly. It has clarified its intended deployment of § 924(c) and expressly outlawed the stacking option responsible for Haynes's incarceration today. The government, however, remains disturbingly comfortable in its position and unaccountably indifferent to the impact of the now banned practice on Haynes's life. Sadly, it resists exercising its power to correct this obvious wrong and grave injustice. So the Court must.

For all of the foregoing reasons, defendant Kevin Haynes' motion for a reduction in sentence is granted, and the sentence is reduced to time-served. The pending motion for relief under Fed. R. Crim. P. 48 is denied without prejudice.

The Clerk of the Court is directed to prepare the appropriate amended judgement.

SO ORDERED.

Dated: Brooklyn, New York
April 22, 2020

/S/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR ONLINE PUBLICATION

UNITED STATES OF AMERICA

- versus -

FRANCOIS HOLLOWAY,

Defendant.

95-CR-78 (JG)

MEMORANDUM REGARDING THE VACATUR OF TWO CONVICTIONS UNDER 18 U.S.C § 924(c)

FRANCOIS HOLLOWAY,

Petitioner,

- versus -

UNITED STATES OF AMERICA,

Respondent.

01-CV-1017 (JG)

JOHN GLEESON, United States District Judge:

A. *Preliminary Statement*

There are injustices in our criminal justice system, including in this district, and they often result from the misuse of prosecutorial power. I have pointed some out in recent years in the hope that doing so might help eradicate or reduce the number of such abuses.[1] But prosecutors also use their powers to *remedy* injustices. In the spirit of fairness – and with the hope of inspiring other United States Attorneys to show similar wisdom and courage – I write to applaud the admirable use of prosecutorial power in this case.

[1] *See United States v. Kupa*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013) (criticizing the use of recidivism-based enhancements of the drug offense mandatory minimum sentences to coerce guilty pleas and to punish those who refuse to plead guilty); *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012) (criticizing the routine use of drug offense mandatory minimums, which Congress intended for leaders and managers of drug trafficking operations, against low-level drug traffickers); *United States v. Vasquez*, No. 09-CR-259, 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010) (same); *see also United States v. Diaz*, No. 11-CR-821-2, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (calling on the United States Sentencing Commission to "de-link" the drug trafficking ranges set forth in its Guidelines Manual from the mandatory minimums); *United States v. Ovid*, No. 09-CR-216, 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010) (responding to the Justice Department's criticism of judges who sentence below the Guidelines ranges in fraud cases).

The power United States Attorney Loretta Lynch has put to use in Francois Holloway's case inheres in our adversarial system. It is the power to seek justice even after all appeals and collateral attacks have been exhausted and there is neither a claim of innocence nor any defect in the conviction or sentence. Even in those circumstances, a prosecutor can do justice by the simple act of going back into court and agreeing that justice should be done. After careful consideration of Holloway's crimes, the views of his victims, and his conduct during the two decades he has been imprisoned as a result of this case, the government has decided that it need not stand by silently while Holloway serves three more decades of an unjust sentence. Specifically, it has agreed to an order vacating two of Holloway's counts of conviction and to a resentencing of him on the remaining counts. Even people who are indisputably guilty of violent crimes deserve justice, and now Holloway will get it.[2]

B. *Holloway's Offenses and Sentence*

Along with an accomplice, Holloway stole three cars at gunpoint during a two-day span in October 1994. The government brought separate counts for each carjacking, and each carjacking count was accompanied by its own so-called "§ 924(c) count." The latter counts were brought under 18 U.S.C. § 924(c), which makes it a crime to, among other things, use a firearm during a crime of violence.

[2] The prosecutorial power at issue here has been exercised in other cases. For example, in *United States v. Mayo*, the government agreed to an order vacating the sentence of a defendant whom no one (not even the defendant herself) knew was pregnant at the original sentencing. The government's agreement allowed me to resentence the defendant to a shorter prison term so the baby would not be placed in foster care. *United States v. Mayo*, No. 05-CR-43 (E.D.N.Y.), Order, April 11, 2007, at 1, ECF No. 304 ("The government … may wish to consider joining in an application to vacate sentence under 28 U.S.C. § 2255 so a new sentencing proceeding can occur."); Letter dated May 21, 2007 from AUSA Lee J. Freedman to the Court, ECF No. 309 ("[T]he government consents to the application envisioned by the Court's Order."). More recently, and again based solely on the consent of the government, I vacated the sentence of a defendant who had cooperated with the government. Modest adjustments in the prison term and fine on resentencing mitigated the immigration consequences of the conviction on the defendant. *United States v. Anandani*, No. 11-CR-763 (E.D.N.Y.), Tr. October 25, 2013, at 2-3. In both of those cases, the government refused to allow procedural impediments it had the authority to waive stand in the way of a more just sentencing.

Shortly before trial in 1995, the government offered Holloway a plea bargain. In exchange for Holloway's plea of guilty to the carjackings, it would drop two of the three § 924(c) counts, resulting in a sentencing range of 130-147 months. A sentence at the bottom of that range would have required Holloway to spend about nine years in prison.

Holloway insisted on a trial. He got one, but making that choice required him to face all three § 924(c) counts. Section 924(c) counts are a triple threat. First, they carry mandatory sentences, which by definition take a degree of judging out of sentencing. Second, they result in onerous enhancements for "second or subsequent [§ 924(c)] conviction[s]."[3] That sounds like a typical recidivism enhancement until you consider that the "second or subsequent" convictions can occur in the same trial as the first one, as they did here. Third, the mandatory sentences required by § 924(c) are also mandatorily *consecutive*, to one another and to all other sentences in the case. As a result, cases like Holloway's produce sentences that would be laughable if only there weren't real people on the receiving end of them. The United States Sentencing Commission has wisely asked Congress to reform § 924(c) to blunt the harsh impact it mandates in many cases.[4]

After Holloway was found guilty of the charges, I sentenced him. Under the then-mandatory Sentencing Guidelines, I imposed a 151-month prison term for the three carjackings. Then the § 924(c) sentences kicked in: a mandatory 5 years for the first one; a mandatory 20 for the second; another mandatory 20 for the third. The statutory requirement that those terms be consecutive to each other and to the 151 months for the carjackings produced a total prison term of 57 years and 7 months.

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[3] 18 U.S.C. § 924(c)(1)(C).

[4] *See* U.S. SENTENCING COMM'N, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("*Mandatory Minimum Report*"), at 368 (Oct. 2011) (recommending that Congress lower the mandatory prison sentences in the section, make the recidivism enhancements applicable only when the first offense was the result of a prior conviction, and allow for concurrent sentences on "stacked" § 924(c) counts), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

The difference between the sentencing outcome if a defendant accepts the government's offer of a plea bargain and the outcome if he insists on his right to trial by jury is sometimes referred to as the "trial penalty." Holloway likely would have been released in 2003 if he had pled guilty under the agreement offered by the government. But he went to trial instead, and now his projected release date is March 10, 2045. Thus, his trial penalty was 42 years in prison. To put his sentence in context, consider that in fiscal year 2013, the average sentence for defendants convicted of robbery in the federal courts was 77 months; the median sentence was 63 months.[5] Holloway got 691 months. He would likely have fared better if he had committed murder. The average sentence in federal court for murder in fiscal year 2013 was 268 months; the median was 240 months.[6] If Holloway had gotten 268 months, he'd already be out of prison. Finally, consider the sentence of Holloway's co-defendant, who engaged in the same conduct as Holloway but pled guilty and testified for the government at Holloway's trial. He was sentenced by another judge to 27 months in prison and was released in 1997.[7]

Black defendants like Holloway have been disproportionately subjected to the "stacking" of § 924(c) counts that occurred here.[8] The Sentencing Commission's Fifteen-Year Report in 2004 stated that black defendants accounted for 48% of offenders who

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[5] U.S. SENTENCING COMM'N, *2013 Sourcebook of Federal Sentencing Statistics*, Table 13 (2013), *available at* http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[6] *Id.*

[7] *United States v. Arnold*, No. 95-CR-78-1 (E.D.N.Y.), Judgment as to Teddy Arnold, July 25, 1996, ECF No. 140; FED. BUREAU OF PRISONS, *Inmate Locator*, http://www.bop.gov/inmateloc/ (indicating that Teddy Arnold was released on December 5, 1997).

[8] *See* U.S. SENTENCING COMM'N, *Mandatory Minimum Report*, at 363 (stating that black offenders are disproportionately convicted under § 924(c), subject to mandatory minimums at sentencing, and convicted of multiple § 924(c) counts).

qualified for a charge under § 924(c), but they represented 56% of those actually charged under the statute and 64% of those convicted under it.[9]

C. *The Proceedings After Holloway's Sentencing*

Holloway's conviction and sentence were affirmed by the Second Circuit in 1997[10] and the Supreme Court in 1999.[11] I denied his collateral attack pursuant to 28 U.S.C. § 2255 in 2002,[12] and the Second Circuit refused to issue a certificate of appealability.[13] An effort to file a successive petition was denied by the Second Circuit in 2010.[14]

D. *Holloway Now*

Holloway is 57 years old. He has five children between the ages of 23 and 37 and eight grandchildren. His family is fully supportive; they filled the courtroom during two recent court appearances.

Even though he was facing a half-century prison term, Holloway tried to better himself throughout his two decades of incarceration. He completed a Basic Wellness program in 2000, was recognized for his performance as a Unit Aide in 2002, completed a Parenting Program in 2002, completed a Stress Management class in 2006, completed a Parenting Skills Program Level I in 2007, received a Certificate of Achievement for officiating basketball in 2008, received a Certificate of Achievement for Song Writing instructing in 2009, completed a Preparation for Release program in 2009, received a Certification in Food Protection

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[9] U.S. SENTENCING COMM'N, *Fifteen Years of Guidelines Sentencing*, at 90 (Nov. 2004), *available at* http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/fifteen-years-guidelines-sentencing; *see also* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 1, 28-29 (2013) (even after controlling for, *inter alia*, arrest offense, district, age, criminal history category, and education level, black men are nearly twice as likely as white defendants to be charged with an offense carrying a mandatory minimum sentence).

[10] *United States v. Holloway*, 126 F.3d 82 (2d Cir. 1997).

[11] *Holloway v. United* States, 526 U.S. 1 (1999).

[12] *Holloway v. United States*, No. 01-CV-1017 (E.D.N.Y.), Order Denying § 2255 Petition, Mar. 21, 2002, ECF No. 17.

[13] *Id.*, USCA Mandate Denying Cert. of Appealability, Feb. 5, 2003, ECF No. 23.

[14] *Id.*, USCA Mandate Denying Successive Petition, Jan. 5, 2010, ECF No. 28.

Management in 2010, received a Career Diploma in Catering in 2010, completed a Culinary Arts program in 2011, completed a Basketball Officiating class in 2012, and completed all the requirements for the Challenge Program run by the facility's Psychological Services program last year.

Holloway's disciplinary record reveals five infractions. The most serious occurred in 1995, at the outset of his sentence, when he was placed in disciplinary segregation for 30 days for engaging in a group demonstration and failing to obey an order. The other four arose from minor rules violations that resulted in brief losses of commissary or telephone privileges. Only two occurred within the past 14 years, and there have been none in the past four years.

E. *The United States Attorney's Decision to Do Justice*

In late 2012, Holloway filed a motion to reopen his § 2255 proceeding under Fed. R. Civ. P. 60(b). Recognizing that there were good reasons to revisit Holloway's excessive sentence but no legal avenues or bases for vacating it, I issued an order on February 25, 2013, stating as follows: "I respectfully request that the United States Attorney consider exercising her discretion to agree to an order vacating two or more of Holloway's 18 U.S.C. § 924(c) convictions."[15]

In a letter dated July 24, 2013, the United States Attorney declined to agree to an order vacating two or more of Holloway's § 924(c) convictions. She observed that Holloway might be eligible for relief from the President through the exercise of his clemency power.[16] However, subsequent to that suggestion, the Department of Justice announced a new clemency initiative, and the criteria it set forth in describing the clemency applications it would support and

[15] *Id.*, Order, Feb. 25, 2013, ECF No. 36.
[16] *Id.*, Letter Response, July 24, 2013, ECF No. 42.

prioritize made it likely that Holloway's crimes of violence would disqualify him.[17] Thus, on May 14, 2014, I asked the United States Attorney to reconsider exercising her discretion to agree to an order vacating two or more of Holloway's § 924(c) convictions so he could face a more just resentencing.[18]

At a court appearance on July 10, 2014, Assistant United States Attorney Sam Nitze stated as follows:

> Let me say formally, the U.S. Attorney has given long and careful consideration to your Honor's . . . earlier request . . . . She did carefully consider it and that was the office's recommendation – that Mr. Holloway seek clemency or commutation of sentence. And she further reconsidered, in light of your Honor's recent order, and has agreed to proceed along the lines similar to those that you proposed. I would say that's based on several considerations, and in part based on the office's view and her view that this is both a unique case and a unique defendant in many ways. And I say unique for a number of reasons, but I will state two of them.
>
> First, this defendant's record while he's been in the custody of the Bureau of Prisons for the last two decades is extraordinary. He has the mildest of disciplinary records. There are a few infractions, but none of them are violent or involve drugs. They were minor, I believe five total in two decades. And it's also clear – we pulled the reports, and I know your Honor summarized some of this in your most recent order – but it's clear that he took advantage to better himself and to take advantage of the educational and other opportunities that the BOP provides. So, the way he has handled himself during this period of incarceration is extraordinary.
>
> Second, as your Honor mentioned, we have made an effort to be in touch with the victims in this case . . . . [W]e were able to reach three victims, and every one of them said first that they were terrified by the experience – one in fact still wrestles with the fallout from that – but also that in their view, 20 years is an awfully long time, and people deserve another chance, and to a person they all supported – well, I think one would have framed it unopposed to an earlier release, and others were more affirmatively supportive of it. That is significant to us as well. Those are two among other aspects of this case that make it, I think, more than unusual, probably unique.

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[17] *See* U.S. DEP'T OF JUSTICE, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants* (April 23, 2014) http://www.justice.gov/opa/pr/2014/April/14-dag-419.html (last visited July 24, 2014).

[18] *Holloway v. United States*, No. 01-CV-1017 (E.D.N.Y.), Order, May 14, 2014, ECF No. 54.

> I want to be clear on this point – that the United States Attorney's position in this case shouldn't be interpreted as reflecting a broader view of Section 924(c) generally or its application to other cases.
>
> In terms of how to proceed, we would propose to withdraw our opposition to the pending Rule 60(b) motion, and also to state on the record that we wouldn't oppose the granting of the underlying 2255 motion for the purpose of vesting the court with authority to vacate two of the 924(c) convictions, and to proceed to resentence, all of that without taking a position on the merits of either the Rule 60 motion or the habeas petition.[19]

After that statement, Holloway's lawyer moved to vacate his convictions on two of the three § 924(c) convictions, and the convictions on Counts Ten and Twelve were vacated without opposition from the government. I will resentence Holloway on the remaining counts on July 29, 2014.

There is important work to be done in preparation for resentencing,[20] but the significance of the government's agreement is already clear: it has authorized me to give Holloway back more than 30 years of his life.

F. *Conclusion*

It is easy to be a tough prosecutor. Prosecutors are almost never criticized for being aggressive, or for fighting hard to obtain the maximum sentence, or for saying "there's nothing we can do" about an excessive sentence after all avenues of judicial relief have been exhausted. Doing justice can be much harder. It takes time and involves work, including careful consideration of the circumstances of particular crimes, defendants, and victims – and often the relevant events occurred in the distant past. It requires a willingness to make hard decisions, including some that will be criticized.

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[19] *Id.*, Tr. of Proceedings, July 10, 2014, at 6-8.

[20] I have directed the Probation Department to conduct an investigation into, among other things, the appropriateness of halfway house placement at the conclusion of Holloway's prison term. I must keep in mind, among many other factors, the safety of the community. After 20 years in prison, Holloway will require assistance if he is to successfully re-enter that community.

This case is a perfect example. Holloway was convicted of three armed robberies. He deserved serious punishment. The judgment of conviction in his case was affirmed on direct review by the Supreme Court, and his collateral attack on that judgment failed long ago. His sentence was far more severe than necessary to reflect the seriousness of his crimes and to adequately protect the community from him, but no one would criticize the United States Attorney if she allowed it to stand by doing nothing.

By contrast, the decision she has made required considerable work. Assistant United States Attorney Nitze had to retrieve and examine a very old case file. He had to track down and interview the victims of Holloway's crimes, which were committed 20 years ago. His office no doubt considered the racial disparity in the use of § 924(c), and especially in the "stacking" of § 924(c) counts. He requested and obtained an adjournment so his office could have the time necessary to make an extremely important decision.[21] United States Attorneys' offices work with limited resources. The effort that went into deciding whether to agree to vacate a couple of Holloway's convictions could have been devoted to other cases.

Finally, the easy route – that is, the "there's nothing we can do about your sentence" response – would have eliminated any concern that Holloway might squander the opportunity to make something of the rest of his life. The United States Attorney's decision here will be criticized if Holloway commits another crime upon his early release from prison. She could have extinguished that risk by doing nothing. But she has the wisdom and courage to confront it the right way – by asking me to ensure that Holloway gets the re-entry assistance a prisoner who has spent decades in prison will need.[22]

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[21] *See Holloway v. United States*, No. 01-CV-1017 (E.D.N.Y.), Minute Entry, June 20, 2014.

[22] *Id.*, Tr. of Proceedings, July 10, 2014, at 8 (Mr. Nitze: "[R]eentry planning is obviously important in every case, and probably particularly so in a circumstance like this. So we are here to help in any way we can, but we wanted to put on the record that we hope the reentry plan will be thorough.").

This is a significant case, and not just for Francois Holloway. It demonstrates the difference between a Department of Prosecutions and a Department of *Justice*. It shows how the Department of Justice, as the government's representative in every federal criminal case, has the power to walk into courtrooms and ask judges to remedy injustices.

The use of this power poses no threat to the rule of finality, which serves important purposes in our system of justice. There are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly. But the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences, including many serving multiple decades and even life without parole for narcotics offenses that involved no physical injury to others. Even seasoned federal prosecutors will agree that many of those sentences were (and remain) unjustly severe.

The United States Attorney has shown here that justice is possible in those cases. A prosecutor who says nothing can be done about an unjust sentence because all appeals and collateral challenges have been exhausted is actually *choosing* to do nothing about the unjust sentence. Some will make a different choice, as Ms. Lynch did here.

Numerous lawyers have been joining *pro bono* movements to prepare clemency petitions for federal prisoners,[23] and indeed the Department of Justice has encouraged the bar to locate and try to help deserving inmates.[24] Those lawyers will find

[23] *See, e.g.*, The Mercy Project (an initiative of the Center on the Administration of Criminal Law at New York University School of Law), http://www.law.nyu.edu/centers/adminofcriminallaw/mercyproject (last visited July 25, 2014); Clemency Project 2014 (a working group composed of Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers), https://www.aclu.org/criminal-law-reform/clemency-project-2014-praises-justice-department-breathing-new-life-clemency (last visited July 25, 2014).

[24] *See, e.g.*, U.S. DEP'T OF JUSTICE, *Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting*, at 1, January 30, 2014 ("This is

many inmates even more deserving of belated justice than Holloway. Some will satisfy the criteria for Department of Justice support, while others will not. In any event, there's no good reason why all of them must end up in the clemency bottleneck. Some inmates will ask United States Attorneys for the kind of justice made possible in this case, that is, justice administered not by the President but by a judge, on the consent of the Department of Justice, in the same courtroom in which the inmate was sentenced. Whatever the outcome of those requests, I respectfully suggest that they should get the same careful consideration that Ms. Lynch and her assistants gave to Francois Holloway.

John Gleeson, U.S.D.J.

Dated: July 28, 2014
Brooklyn, New York

where you can help. We are looking to the New York State Bar Association and other bar associations to assist potential candidates for executive clemency."), *available at* http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-vs- ORDER

03-CR-6033

CHAD MARKS,

Defendant.

In 2004, defendant Chad Marks ("Marks") was indicted and charged with narcotics and two separate firearms offenses, pursuant to 18 U.S.C. § 924(c). Thirteen years ago, Marks, unlike his co-defendants, declined a plea offer and elected to go to trial. He was convicted.

As to the firearms offenses, he was convicted of possessing a shotgun, with a co-defendant, at a Lyell Avenue address in Rochester, New York in September 2002. He was also convicted of possessing a rifle at that same address two months later in November 2002.

On March 4, 2008, this Court sentenced Marks principally to an aggregate 40-year term. In 2008, the United States Sentencing Guidelines were significantly lower, but the sentence was required by the statutes in place at the time. Although the statute and the guidelines have been drastically changed now, at the time Marks faced a minimum 10-year sentence on the narcotics charges. As mentioned, he was also convicted of two firearms offenses in the same case and, pursuant to the statute at the time, Marks received a 5-year consecutive sentence on Count 8 and a 25-year consecutive sentence on Count 10 for an aggregate 30-year consecutive sentence. This type of sentence, under the then-terms of Section 924(c) for multiple firearms established in the

same indictment has been frequently criticized as unwarranted and excessive. The provision is often colloquially referred to as "stacking."

In part, because of this criticism, with bipartisan support, Congress, within the last several months, has recognized the inequities and harsh consequences of the stacking provisions and has eliminated it under circumstances like those facing Marks as part of the First Step Act, enacted December 21, 2018. If convicted now, Marks would not be penalized for going to trial with the possibility of a 30-year consecutive sentence.

Although the First Step Act and the Guideline changes referenced in it benefit many, it does not appear that Marks would benefit directly because the changes to Section 924(c) do not appear to be retroactive. One option now is for those in the system to say to Mr. Marks, "too bad, the changes don't apply to you and you must serve the lengthy remainder of your 40-year term, and perhaps die in jail."

Chad Marks has now filed a pro se motion (Dkt. #491) requesting this Court, in part, to request the United States Attorney for the Western District of New York, James P. Kennedy, Jr., to consent to vacating one of Marks' Section 924(c) convictions, which would, in effect, remove the draconian, mandatory 25-year consecutive sentence.

Admittedly, this is not a typical request. Marks makes this request, though, relying on several cases from other districts throughout the country where the U.S. Attorney did precisely what Marks seeks here. Marks relies principally on the case of *U.S. v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014). That thoughtful opinion is annexed to Marks' motion as Exhibit A. In the *Holloway* case, the defendant was convicted of three Section 924(c) violations for three separate car jackings over a two-day period. He received a mandatory sentence of 57 years. In *Holloway*,

District Judge John Gleeson remarked that such a stacking sentence "would be laughable if only there weren't real people on the receiving end of them."

Prosecutors spend their days seeking convictions and appropriate sentences. What is sought here is different, but in his decision in *Holloway*, Judge Gleeson praised the U.S. Attorney for the Eastern District of New York for agreeing to vacate a prior conviction in that particular and unusual case. He noted that prosecutors can and should use their vast power to remedy injustices in an appropriate case.

So, what to do? Does this defendant, Chad Marks, deserve this remedy? In my more than 30 years as a district court judge, I have never known a prisoner to do more to make changes in his life while incarcerated. Marks' acts and accomplishments while incarcerated for the last decade are truly extraordinary. Marks has obtained a college degree, participated in about 100 rehabilitative programs, has received numerous awards and citations, is engaged as a GED teacher and has mentored other inmates. Marks has recounted many of these accomplishments in his motion (Dkt. #491, page 7). The record reflects extraordinary accomplishments.

Extraordinary cases require extraordinary care and sometimes extraordinary relief. I urge all to review Judge Gleeson's thoughtful decision in the *Holloway* case. The criminal "justice" system is about justice and fairness ultimately. Chad Marks was convicted of serious crimes, but I believe that Marks is not a danger and is not now the person convicted of these charges in 2008, which involved a rather small-scale drug case. All of Marks' co-defendants have completed their sentences.

CONCLUSION

I request that the United States Attorney for the Western District of New York, James P. Kennedy, Jr., carefully consider exercising his discretion to agree to an order vacating one of Marks' two Section 924(c) convictions. This would eliminate the mandatory 25-year term that is now contrary to the present provisions of the statute. Congress has now recognized the injustice of "stacking."

To facilitate that review, I request that Marks' appointed counsel, Jillian S. Harrington, Esq. provide a filing listing in detail the many, many accomplishments, awards and other matters involving Marks while he has been incarcerated. In addition, counsel should list the scores of rehabilitative programs that Marks successfully completed. Marks has described many of his accomplishments in his pending motion, but I leave it to counsel to provide a detailed supplement to assist the U.S. Attorney's review as well as this Court's.

I urge defense counsel to make her filing within 20 days of entry of this order.

IT IS SO ORDERED.

Dated: March 14, 2019
Rochester, New York

DAVID G. LARIMER
United States District Judge

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AGENDA

1. Compassionate Release Basics and COVID-19 in the Prisons as an Extraordinary and Compelling Reason
2. CARES Act Home Confinement v. Compassionate Release
3. Compassionate Release Procedural Requirements
4. Medical Grounds for Compassionate Release
5. Non-Medical Grounds for Compassionate Release
6. The Role of Local Counsel
7. Re-entry Issues for Compassionate Release Clients
8. Dealing with Detainers

SECTION I

COMPASSIONATE RELEASE BASICS AND COVID-19 IN PRISONS AS EXTRAORDINARY AND COMPELLING

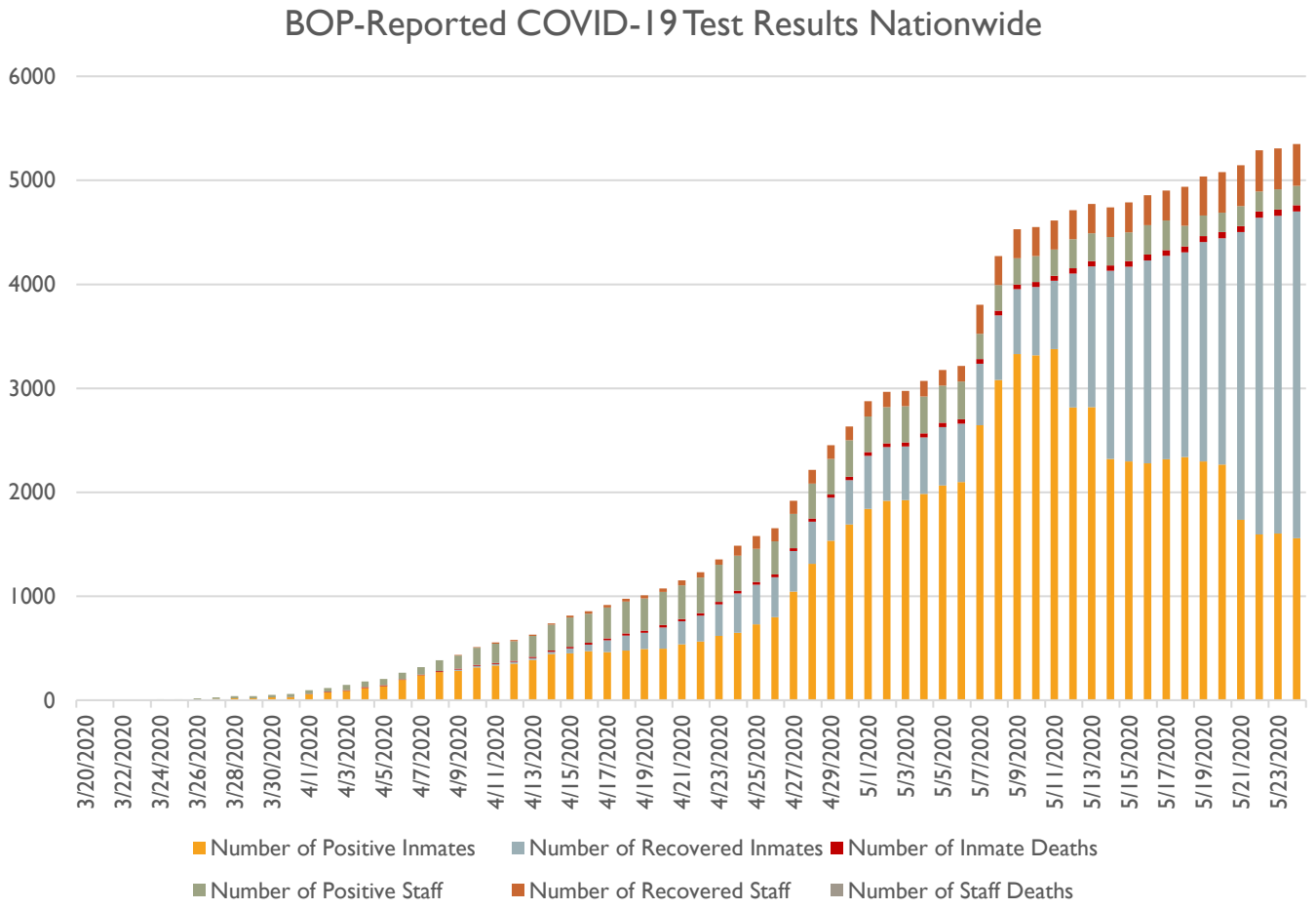
REPORTED POSITIVE TESTS IN BOP

MAY 25, 2020:

INMATES – 4700
STAFF – 589
DEATHS – 59

(COUNTING THOSE PRESENTLY INFECTED AND THOSE WHO HAVE ALREADY RECOVERED)

	BOP has an infection rate X times higher
Compared to the United States	6.411651
Compared to China	529.2683
Compared to Italy	8.666924



https://federaldefendersny.org/ (last accessed 5/25/20)

COMPASSIONATE RELEASE STATUTE 18 U.S.C. § 3582(C)(1)(A)

Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that— . . .

- the court, upon motion of the Director of the Bureau of Prisons,
- or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf
- or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment . . .
- After considering the applicable § 3553(a) sentencing factors…. IF
  - extraordinary and compelling reasons warrant such a reduction; . . .
  - and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

USSC POLICY STATEMENT §1B1.13 - REDUCTION IN TERM OF IMPRISONMENT UNDER § 3582(C)(1)(A)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . . If . .the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; . . .

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

TYPICAL CR MOTION CONTENTS

- Compliance with Procedural Requirements…Or Not.
- Extraordinary and Compelling Reasons
- Section 3553(a) Analysis
  - Including defendant is not a danger to the safety of any person or the community under 18 USC § 3142(g)
- Release Plan

WHAT IS EXTRAORDINARY AND COMPELLING? §1B1.13 COMMENT. N.1

(A) Medical Condition of the Defendant

Terminal Illness;

Serious Physical or Medical Condition/Serious Functional or Cognitive Impairment/ Deteriorating Physical or Mental Health – That Substantially Diminishes Ability to Provide Self-Care in Prison and Not Expected to Recover

(B) Age of the Defendant

65+, serious deterioration of physical/mental health b/c of aging and served at least 10 years or 75% of prison term.

(C) Family Circumstances

(D) Other Reasons (Catch-All Provision)

As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in Subdivisions (A) through (C).

TRADITIONAL "EXTRAORDINARY AND COMPELLING" FACTORS

- "Traditional Factors" USSG § 1B1.13 comment. n.1(A)-(C) USE THEM IF YOU CAN
  - If client has medical issue identified by the CDC as increasing his/her risk of becoming seriously ill due to COVID-19, see if AUSA will agree that is a Serious Physical or Medical Condition That Substantially Diminishes Ability to Provide Self-Care in Prison. § 1B1.13 comment. n.1(A)(ii)
- Catch-all Provision USSG § 1B1.13 comment. n.1(D)
  - Some courts use to find reasons outside traditional factors even though it specifies that only BOP Director can determine *See e.g., US v. Walker* (N.D. Ohio)
- Many Courts Are Saying § 1B1.13 is Outdated and Courts Can Look Beyond It

POLICY STATEMENT PROBLEMS

Sentencing Commission Defunct

Since the First Step Act was passed 12/18, Sentencing Commission has not amended §1B1.13 and no quorum currently exists for the Sentencing Commission

§ 1B1.13 Anachronisms

However, the current phrasing of § 1B1.13 still requires, in two clauses, that the BOP Director should be the one bringing the motion even though the First Step Act now allows a defendant to bring such a motion

EXTRAORDINARY AND COMPELLING CAN GO BEYOND SPECIFICALLY ENUMERATED GROUNDS IN §1B1.13

- As a result, many District Courts have held that, post-First Step Act, §1B1.13 is not binding on the Court—just helpful guidance
  - "I agree with the vast majority of district courts: I can consider whether reasons other than the inmate's medical condition, age, and family circumstances amount to an extraordinary and compelling reason to reduce that inmate's sentence." *US v. Almontes*, 2020 WL 1812713 (D. Conn. Apr. 9, 2020); *see also US v. Dunlap*, (M.D. N.C.); *US v. Fox*, (D. Me.)

- Can argue COVID-19 + _____

EXTRAORDINARY AND COMPELLING CAN GO BEYOND ENUMERATED GROUNDS IN §1B1.13

- CRITICAL: Majority of our clients do not fit the criteria in §1B1.13

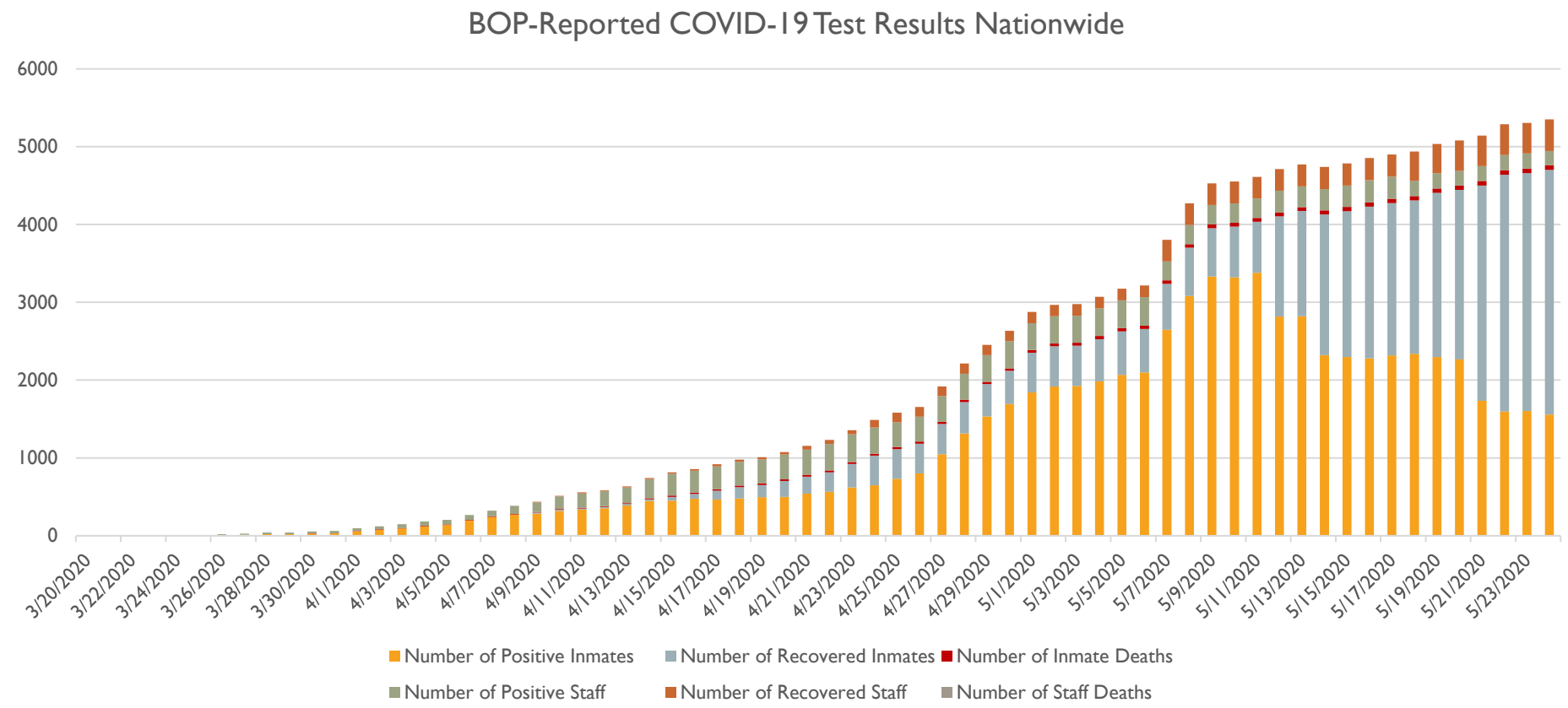
<u>COVID-19 Scenarios often include</u>

1. Client was always eligible under §1B1.13 (Traditional Factors), and COVID makes them MORE vulnerable
2. Your client was bordering on eligible and can use COVID to get them over the line
3. Your client really doesn't fit §1B1.13 but is vulnerable in light of COVID, and the Court has authority to grant CR.

COVID-19 INFO

- https://www.cdc.gov/
- crclearinghouse.org (volunteers)
- https://www.bop.gov/coronavirus/
- https://federaldefendersny.org/ (excellent charts and graphs)
- https://www.fd.org/coronavirus-disease-2019-covid-19/compassionate-release
- Habeas Motions Against Federal Prisons (Elkton, Terminal Island, Lompoc, Oakdale, Ft. Dix, etc.)
- Pacer: Backtrack from CR grants

RESPONSE THAT BOP POSITIVE CASES ARE DECREASING



RESPONSE THAT BOP POSITIVE CASES ARE DECREASING

- They Aren't Testing
  - 70% of prisoners tested are positive. BOP admits that is not full scope. As of 5/1/20, BOP has tested only 2700 out of 146,000 prisoners.
    - *https://abcnews.go.com/US/70-inmates-tested-covid-19-bureau-prisons/story?id=70454527*; *https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f*

RESPONSE THAT BOP POSITIVE CASES ARE DECREASING

- Winter is Coming
  - Second Wave of Infections Expected. https://www.nytimes.com/2020/05/08/health/coronavirus-pandemic-curve-scenarios.html
  - Dr. Fauci "has warned that he expects cases to spike in closed environments like nursing homes, prisons and factories." https://www.nytimes.com/2020/05/11/health/coronavirus-second-wave-infections.html
  - Whistleblower Dr. Bright testified before Congress that Americans could be facing "the darkest winter in modern history" https://www.nytimes.com/2020/05/14/us/politics/whistle-blower-coronavirus-trump.html?action=click&module=RelatedLinks&pgtype=Article

TYPICAL CR MOTION CONTENTS

- Compliance with Procedural Requirements…Or Not.
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  - Including defendant is not a danger to the safety of any person or the community under 18 USC § 3142(g)
- Release Plan

§ 3553(A) SECTION

- **Nature of the offense**
  - Does the offense look different now than decades ago? (E.g. Stacked 924(c)s, marijuana/crack prosecutions)
- **History & Characteristics**—full current picture, including medical condition, post-sentencing rehabilitation efforts, discipline history
- **Need to deter, punish, protect the public**
  - Does client's age/current medical situation affect ability to commit crimes/understanding purposes of punishment?
  - Have they already been punished significant including by having to "suffer" BOP taking care of medical needs?
- **Need to provide…medical care**…in the most effective manner—can that happen in BOP right now?

SECTION II

CARES ACT HOME CONFINEMENT V. COMPASSIONATE RELEASE

CARES ACT HOME CONFINEMENT VS. COMPASSIONATE RELEASE

CARES Act

- Expanded BOP's power to transfer inmates to home confinement under 18 U.S.C. § 3624
- BOP sets criteria (e.g., 50% in, good conduct, minimum Pattern score)
- Courts can recommend transfer, unclear if BOP giving any weight
- Sec. 3622 also authorizes furlough (unaffected by CARES Act). Often easier to get and can convert to CARES Act HC.

Compassionate Release

- Courts' prerogative to reduce sentence (subject to procedural requirements) under § 3582(c)(1)(A)
- If sentence reduced to time-served, client is no longer in BOP custody
  - They are under court supervision
- Court can order home confinement as condition of supervised release

"GREAT NEWS! BOP IS SENDING YOUR CLIENT HOME!"

Need I bother with compassionate release?

- a pattern: when a CR motion may have traction, BOP "grants" a transfer and argues "mootness," or at least "no need." *See* Reply in Support of Limited Remand, *United States v. Raia* (3d Cir.).
- A trap for the unwary:
  - shifting standards for BOP's discretionary transfer decisions have left clients stranded;
  - "Kafkaesque" 14-day in-custody quarantine that never ends (e.g., *Scparta*, S.D.N.Y.).

SECTION III

COMPASSIONATE RELEASE PROCEDURAL REQUIREMENTS

COMPASSIONATE RELEASE STATUTE 18 U.S.C. § 3582(c)(1)(A)

- Permits a district court to reduce a sentence on defendant's motion:
- "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf"

OR

- "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]"

PRISONER'S REQUEST TO THE WARDEN

- Prisoner Can Request
  - OR
- Attorney (or other third party) Can Request on Prisoner's Behalf
  - 28 C.F.R. 571.61; BOP Program Statement 5050.50

- Client request typically made through BOP counselor
- Attorney request best sent to facility email address (available at bop.gov)
  - *E.g.*, HER/ExecAssistant@bop.gov), and cc: the attorney for the facility (pp.53-54 of https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf).
  - Request confirmation of receipt

"DEAR WARDEN": ELEMENTS OF THE REQUEST

- Ask that BOP *file a motion* seeking reduction in sentence, under §3582(a)(1)(C).
  - Not asking BOP to "reduce sentence" or "grant compassionate release"; not requesting a "transfer," or invoking "CARES Act" or "Barr Memo," unless "in the alternative"
- Address the "extraordinary and compelling reasons," including—but ideally not limited to—the COVID-19 pandemic.
- Address release plan (residence, support, medical care).
  - 28 C.F.R. 571.61; BOP Program Statement 5050.50
- Note: DOJ has asserted "defects" in "requests" (including changed circumstances) to say clock hasn't started.

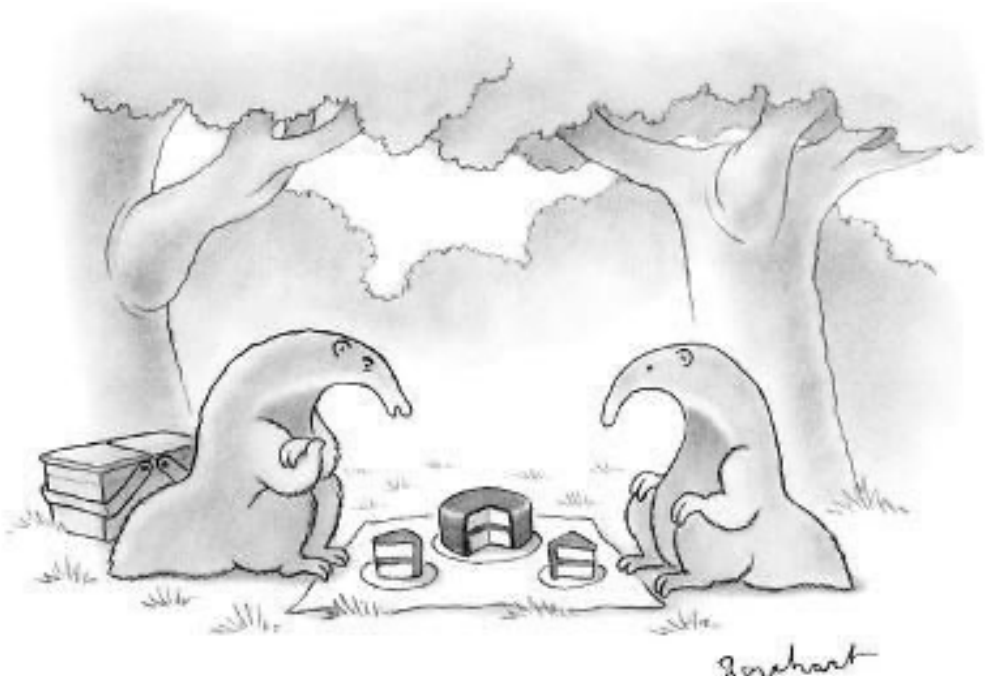
TWO PATHS TO EXHAUSTION: EXHAUST BOP REMEDIES OR WAIT 30 DAYS

PATHS TO EXHAUSTION: LAPSE OF 30 DAYS

- 30-day waiting period begins upon "receipt by the warden" of the request—but constructive receipt counts
  - Delivery to any prison official (e.g., case manager) counts. *E.g.*, *United States v. Resnick*, *S.D.N.Y.* (analogizing to Prisoner Mailbox Rule)

- *Note*: statute says court may grant relief after lapse of 30 days (*Scparta*, S.D.N.Y.); defendant may (and should!) file before lapse of 30 days
  - Some USAOs are contesting this and moving to dismiss. Don't be deterred (absent a ruling in your circuit).

PATHS TO EXHAUSTION: ALL WE CAN DO IS WAIT?



""Now, we wait."

PATHS TO EXHAUSTION:
"Come on, we're human beings."
- Judge Villardo to AUSA in *U.S. v. Bess* (W.D.N.Y.)

- But this is an emergency!!!
  - Is the court truly powerless to address it?

- In some cases, the government has agreed to waive the 30-day waiting period.
- If government won't waive, ask the district court to excuse the 30-day waiting period.

EXCUSING THE WAIT:
Forget the human beings; what should the lawyers say?

- Legal analysis:
  - 30-day waiting period is not jurisdictional. Rather, it is a non-mandatory claims-processing rule that courts have discretion to excuse when they deem fit.
    - Recommendation: Frame as question of judicial authority. Congressional intent to "let judges judge" a party's request for relief. DOJ no longer the gatekeeper.
    - *See* NACDL-FAMM amicus brief in *U.S. v. Raia* (3d Cir.), Defender briefs in *U.S. v. Millage* (9th Cir.)
- And as a practical matter:
  - The premise for the 30-day wait has broken down. No meaningful BOP review of "requests."
    - See Third Circuit Defender amicus brief in *Raia* (3d Cir.), Defender briefs in *Millage* (9th Cir.)
- "This is futile!"—great! Some courts will excuse exhaustion for futility.

(EVEN MORE) EXHAUSTING: ADMINISTRATIVE APPEALS

- "alternative" (of sorts) to 30-day wait is exhausting administrative appeals—though typically takes several months.
- Why bother?
  - Some courts have ruled that if a Warden denial happens before Day 30, client must appeal within BOP— and then complete BOP appeal process!
    - Practice tip: if client gets denial early, *tell client to file BOP appeal.*
    - Remember: do not wait to file § 3582 motion unless court says you must.

SECTION IV

MEDICAL GROUNDS FOR COMPASSIONATE RELEASE

GETTING MEDICAL RECORDS

- Will take some time, **so prioritize this process.**
- Purposes:
  - Confirmation of health conditions.
  - Report regarding current health regiment/requirements
  - Basis for a personalized medical declaration

MEDICAL ISSUES APPLICABLE FOR COVID-19 BASED CR

The CDC includes the following as those with "Higher Risk for Severe Illness"

- People 65 and older
- People with chronic lung disease or moderate to severe asthma
- People who have serious heart conditions.
- People who are immunocompromised by the following conditions:
  - Cancer treatment
  - Smoking
  - Bone marrow/organ transplantation
  - Immune deficiencies
  - HIV/AIDS
  - Prolonged use of corticosteroids and other immune system-weakening meds.
- People with severe obesity
- People with diabetes
- People with chronic kidney disease undergoing dialysis
- People with liver disease

CDC
CENTERS FOR DISEASE CONTROL AND PREVENTION

NEW PROTOCOL TO GET MEDICAL RECORDS

- For all Prisoners: Ask Prisoner to fill out and sign the Certification of Identity (COI) Form.
  - https://www.bop.gov/inmates/docs/certification_of_identity.pdf
  - Prisoner information goes on the top and the prisoner signs Certification. Your name must appear below in the section that begins "Optional" as the prisoner is authorizing release to you
  - Ask client to keep the original and send you a signed copy
- Two Tracks:
  - Track 1: Prisoners who are terminally ill or debilitated
  - Track 2: All others

TRACK ONE (TERMINALLY ILL OR DEBILITATED)

- Write an email to BOP Regional Counsel responsible for the institution in which your client is incarcerated
  - Subject Line: Medical Records (w/ Client name and Register Number)
  - Body: Explain client is terminally ill or debilitated; request records for past one year; and state that you have your client's permission to seek medical records
  - Attach: Certification of Identity Form (executed if you have it, but if not, fill out as much info about client as possible on the top, put your name on bottom and sign it)
  - Attach: Email from the prisoner authorizing you to receive medical records (don't wait if you don't have it—explain in email that it is coming and send when you have it.)

TRACK TWO (EVERYONE ELSE)

- File a FOIA Email Request
  - Subject Line: Medical Records (Client name and Registration Number)
  - Body: Explain client seeking CR; state grounds (including COVID/underlying condition; request one year of records; state you have client's permission
  - Attach: Certification of Identity Form (executed if you have it, but if not, fill out as much info about client as possible on the top, put your name on bottom and sign it)
  - Attach: Email from the prisoner authorizing you to receive medical records (don't wait if you don't have it—explain in email that it is coming and send when you have it.)

NEXT STEPS TRACK ONE AND TWO

- Wait a "reasonable period of time." Use your judgment based on YOUR client
  - Could be as short as a week if client very ill or in a prison COVID-19 hot-spot, e.g.
- On lapse of "reasonable period of time"
  - Forward request for medical records to: BOP-OGC/ExecAssistant~@BOP.gov
  - **Caveat**: Office of General Counsel advises that they will prioritize requests for prisoners who are at or near 30-day mark (so mention this if it applies to your client)
  - This procedure is new, but so far seems to be working.

INFORMAL ROUTES

- Ask your client (if incarcerated) to request his own records and then have them mailed (or faxed/scanned).
- Contact family members to see if medical records prior to incarceration exist if there were preexisting conditions/occurrences.
- Ask the government for the records (or perhaps the Court will order it).

MEDICAL DECLARATION

- Once you have the medical records…..
  - Find a doctor to review and send them the records.
  - Draft the declaration (crib from other successful filings)
  - Ensure the doctor's credentials are spelled out
- And finally…….
  - Consider the impact of the declaration/use of medical records.

SECTION V

NON-MEDICAL GROUNDS FOR COMPASSIONATE RELEASE

CAVEAT ADVOCATUS:

The sentencing court as gatekeeper of the "extraordinary and compelling" standard is filled with possibility . . .
And fraught with risk.
Make sure you consult an expert and brainstorm with your peers.

SENTENCING DISPARITY: STACKED 18 U.S.C. § 924(C) COUNTS

- **Pre-First Step Act**
  - Δ facing multiple § 924(c) charges would get 5 years on first count and consecutive 25 years on subsequent counts
- ***United States v. Holloway*, 68 F. Supp. 3d 310, 312 (E.D.N.Y. 2014)**
  - Sentences based on stacked 924(c) charges "would be laughable if only there weren't real people on the receiving end of them"
- **First Step Act, Section 403(a)**
  - Counts can only be stacked with the higher penalty if the second offense occurs after a final conviction on the first offense.

STACKED 18 U.S.C. § 924(C) COUNTS & COMPASSIONATE RELEASE

- ***United States v. Brown***, 2020 WL 2091802 (S.D. Iowa, April 29, 2020) (CR granted in part because of Δ's "draconian sentence" driven by stacked § 924(c) convictions) (collecting cases)
- ***United States v. Urkevich***, 2019 WL 6037391 (D. Neb. Nov. 14, 2019) (CR granted to redress "the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.")
- ***United States v. McPherson***, 2020 WL 1862596 (W.D. Wash. Apr. 14, 2020) ("It is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson.")

SENTENCING DISPARITY: USE OF 21 USC § 851 ENHANCEMENT

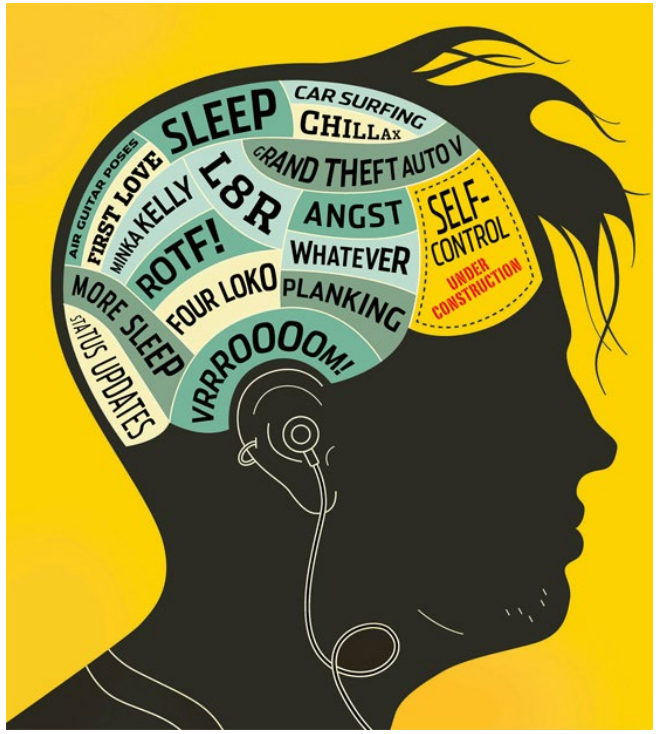
- First Step Act reduces MM penalties applicable when prosecutor files notice under 21 U.S.C. § 851
- Δ's prior convictions must meet the new definitions of "serious drug felony" or "serious violent felony"
- Δ must have served a term of imprisonment of more than 12 months on prior offense and must have been released within 15 years of current federal offense
- For any "serious drug felony" or a "serious violent felony" based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of 10 years or more

USE OF 21 USC § 851 ENHANCEMENT & COMPASSIONATE RELEASE

- *United States v. Cantu-Rivera*, 2019 WL 2578272 (S.D. Tex. June 24, 2019)
- *United States v. Mondaca*, 2020 WL 1029024 (S.D. Cal. March 3, 2020)
- *United States v. Hope*, Case No. 90-cr-06108 (S.D. Fla. 2020)
- Note also: *United States v. Hansen*, 2020 WL 1703672 (E.D. N.Y. April 8, 2020) (granting CR on medical and age grounds, but citing § 851 enhancement as § 3553 factor)

SENTENCING DISPARITY: SOME OTHER IDEAS

- Was your client sentenced before the Supreme Court's revolutionary *Miller/Roper/Graham* decisions on the youth brain?
- Did the sentencing judge consider latest research on criminogenic impact of childhood trauma and domestic abuse?
- Was your client sentenced before *Booker* (2005) or before *Booker* truly entered the sentencing landscape?
- Check out the increased sentencing departures/variances over the years in USSC sourcebooks
- Was there a post-sentencing change to your client's guidelines that was not retroactive? (e.g. mitigating role)



FAMILY CIRCUMSTANCES & COMPASSIONATE RELEASE

- **§ 1B1.13(C)**
  - Authorizes compassionate release to care for incapacitated spouse or if sole caregiver of minor children is incapacitated/dead
- **Post-First Step Act**
  - *United States v. Kesoyan*, 2020 WL 2039028 (E.D. Cal. April 28, 2020) (CR granted to mother of disabled son, aged 24, with deteriorating health)
  - *United States v. Reyes*, 2020 WL 1663129 (N.D. Ill. Apr. 03, 2020) (CR granted so Δ could care for his aunt who had stage four cancer)

REHABILITATION & COMPASSIONATE RELEASE

- **28 U.S.C. § 994(t)**
  - Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.
- **Recent Cases**
  - *United States v. Brown*, 2020 WL 2091802 (S.D. Iowa, April 29, 2020) (CR granted in part because Δ has been a model inmate)
  - *United States v. Marks*, 2020 WL 1908911,(W.D.N.Y. April 20, 2020) (collecting cases)
  - *United States v. Millan*, 2020 WL 1674058 (S.D.N.Y., April 6, 2020) (granting CR based on defendant's rehabilitation in face of life sentence)

SECTION VI

THE ROLE OF LOCAL COUNSEL IN COMPASSIONATE RELEASE EFFORTS

The Role of Local Counsel in Compassionate Release Efforts

Shazzie Naseem

Berkowitz Oliver LLP

Kansas City MO

Five Things to Keep in Mind

(1) Federal Practice

- **Federal v. State Practice**
  - The theory of criminal practice is the same, but….
    - Rules are different
    - Timelines are different
    - Decorum is different
    - Prosecuting authority and resources are different
    - **Sentencing Guidelines**
  - Any inquiry into retaining local counsel should include a discussion of their primary arena of practice.

(2) Familiarity with the Characters

- Local counsel should have familiarity with the various people involved in the District:
  - Prosecutors
    - Any insight into the way they approach a case?
  - Judges
    - What is their experience with the judge in the District?

(3) Pro Hac Vice Admission

RULE 83.5.4 APPEARANCE FOR A PARTICULAR CASE

(a) Requirements for Pro Hac Vice Admission. An attorney who is not admitted to practice in this court may be admitted for the purposes of a particular case only, if the following conditions are met:

(1) The attorney must be a member in good standing of the bar of another state or federal court;
(2) A member in good standing of the bar of this court must move for his or her admission;
(3) The motion must be in writing;
(4) The motion must be accompanied by an affidavit on the form prescribed by court rule (see form); and
(5) The attorney seeking admission must pay a registration fee of $50 per case.

An attorney's admission is subject to 28 U.S.C. §§ 515, 517, and similar provisions of the United States Code. Attorneys employed by any department or agency of the United States government are not required to pay a pro hac vice registration fee.

caseSEARCH
PACER • LOGIN

eFILING
CM/ECF • LOGIN

(4) eVoucher Opportunities

- Courts are authorized to appoint a member of the CJA Panel for compassionate release cases.
  - Talk to your FPD/CJA Resource Counsel about appointment

- Appointment in eVoucher is important
  - Provides access for the submission of motions for expert resources
  - Especially important when retaining medical experts

(5) Pro Bono Service

- These matters take time to litigate – how do you connect with someone willing to help?
  - Connection via NACDL Board service/membership in criminal defense bar
  - Reach out to local FPD about good attorneys in the area
  - Contact the CJA Panel District Representative in the District

  - Make sure to log the hours spent on a case even if you are not receiving compensation
    - Some firms recognize pro bono hours as an important part of community service
    - Some firms submit hours spent on a case to their local bar organizations

SECTION VII

REENTRY ISSUES FOR COMPASSIONATE RELEASE CLIENTS

DON'T WAIT UNTIL YOU WIN

- The BOP likes to say "reentry preparation starts on the first day of incarceration"
- We like to say "reentry preparation starts on the first day of representation"
- Goals:
  - Ensure your client has appropriate housing, medical care, and a means of financial support if released
  - Give the court confidence to sign the release order knowing your client has a safe place to go with her medical and financial needs addressed.

RELEASE PLAN IS NOT JUST A GOOD IDEA

- BOP P.S. 5050.50 requires it:
  - The inmate's [compassionate release] request shall at a minimum contain the following information: (1) The extraordinary or compelling circumstances that the inmate believes warrant consideration. (2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.
- Courts won't release without it:
  - IT IS FURTHER ORDERED that Mr. B' s release from the custody of the Federal Bureau of Prisons is effective as soon as medically appropriate transport and placement can be arranged . . . .

YOU NEVER WANT TO SEE THIS

"IT IS FURTHER ORDERED that BOP shall release Defendant immediately after holding him for a 14-day quarantine period at FCI Loretto."

SOURCES OF INFORMATION

- Your client
- Loved ones
- Agencies
- U.S. Probation

AGENCIES

- Area Agencies on the Aging "are often POWERHOUSES. They are state specific and serve as a 'hub' for everything from navigating Medicare and Medicaid applications, aligning Meals-on-Wheels, and securing low-cost durable medical equipment." – Stephanie Prost, Ph.D. – Compassionate Release Clearinghouse Reentry and Community Resources Consultant
- Centers for Medicare and Medicaid Services - https://www.cms.gov/
- U.S. Dep't of Veterans Affairs - https://benefits.va.gov/BENEFITS/Applying.asp
- Social Security - https://secure.ssa.gov/iClaim/dib
- National Hospice and Palliative Care Organization - https://www.nhpco.org/find-a-care-provider/

REACH OUT TO PROBATION

- Ordinarily, Warden will ask Probation to conduct a home visit to approve the release residence
- But, if the BOP does not support your client's compassionate release, Probation is unaware your client may be released
- We counsel giving Probation a heads up
  - The PO may be willing to assist with release planning and look at whether the terms of supervised release still make sense in terms of your client's condition
  - You may be able to avoid problem orders like this. . . .

REACH OUT TO PROBATION – OR ELSE

"Defendant is required to contact the probation office in the district where he was released within 48 hours of his release. The Probation Office has indicated that the release plan proposed by Defendant is not suitable; therefore, during the 14-day period when Defendant is placed under quarantine, the Probation Office is directed to confer with the defendant and his counsel to develop a suitable release plan."

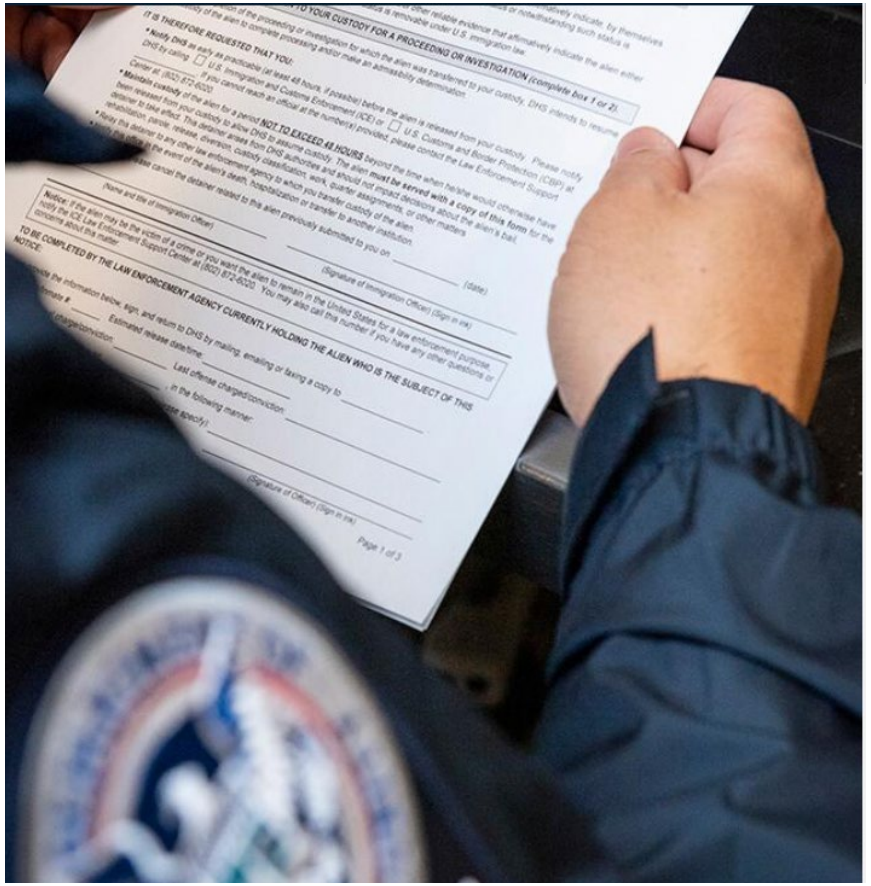
MOTION SHOULD INCLUDE

- 14-day quarantine in USPO-approved release residence and not in the BOP
- How your client will be financially supported (SS, SSI, family member income, pension, public assistance, etc.)
- Source(s) of medical insurance (Medicare, Medicaid, VA benefits, Obamacare)
  - evidence that applications have been or will me made, and
  - how any time lag in coverage will be addressed
- Any modifications to terms of supervised release

SECTION VIII

DEALING WITH DETAINERS

ICE DETAINERS

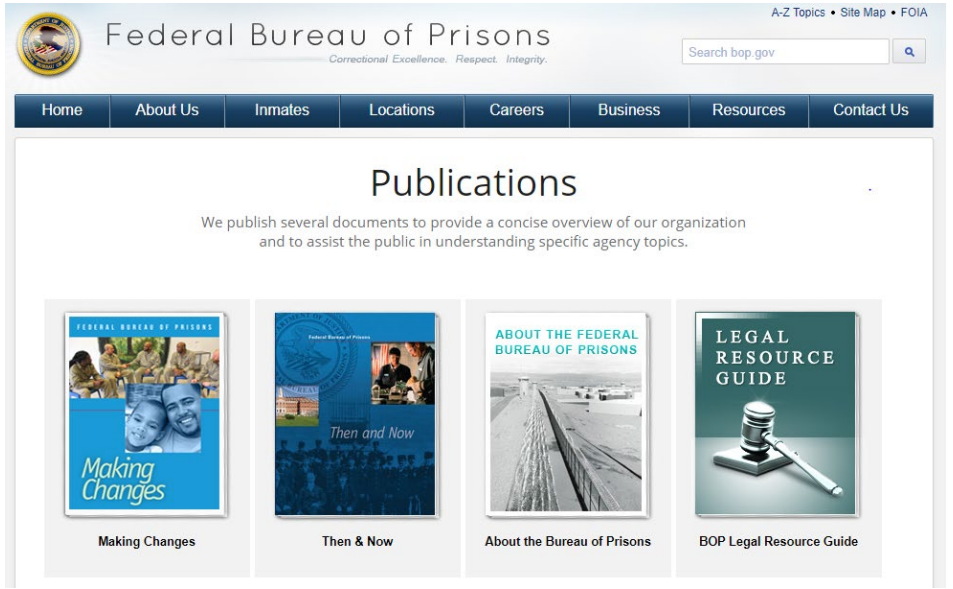


GATHER INFORMATION ON CLIENT

- Residency Status
- Alien Registration Number (A0…)

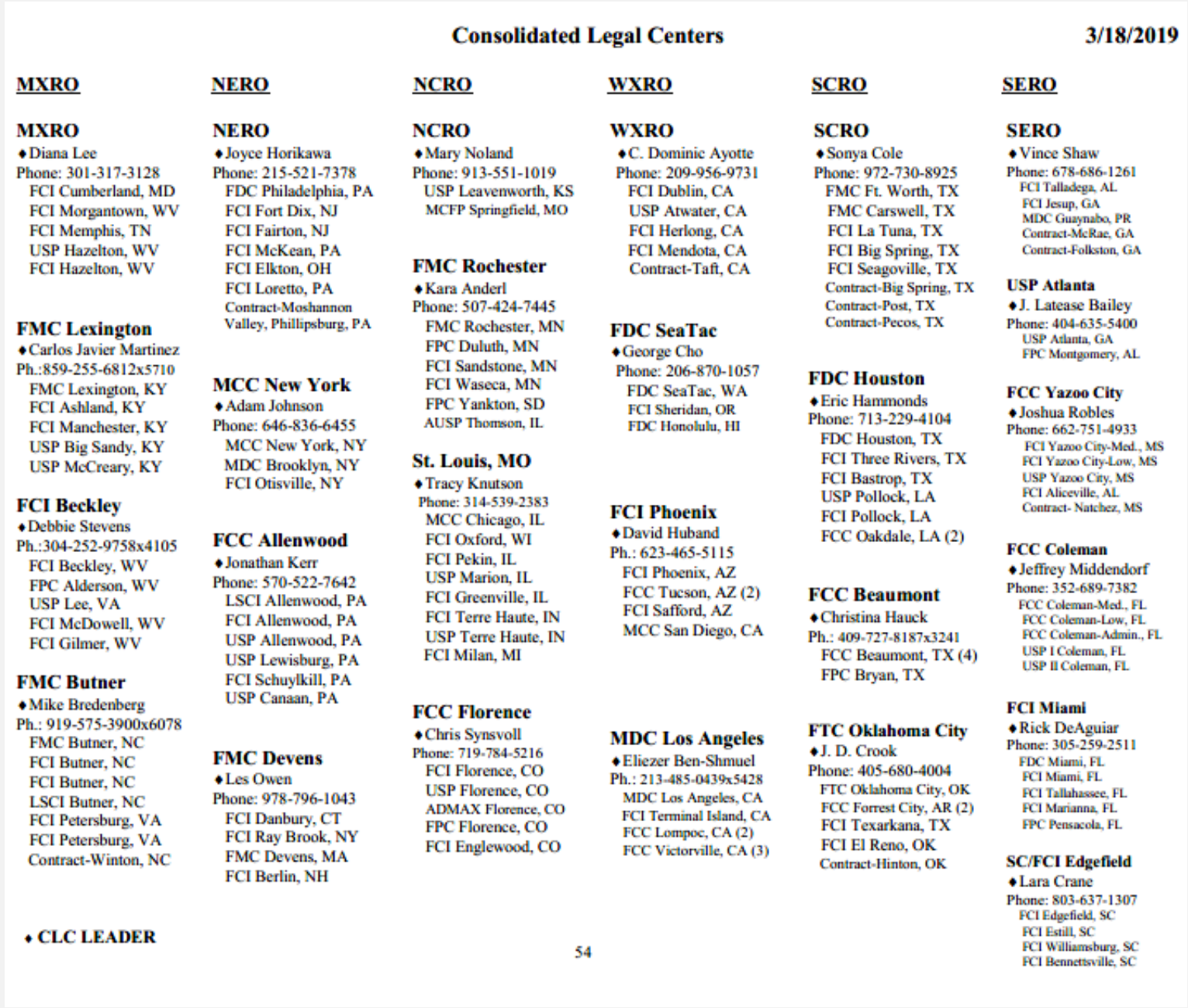
FIND OUT WHETHER CLIENT HAS AN ACTIVE DETAINER

- Ask BOP
  - Client's case manager
  - BOP legal counsel for facility
    - BOP Legal Resource Guide (p. 54)
    - https://www.bop.gov/resources/publications.jsp
  - BOP headquarters



FIND OUT WHETHER CLIENT HAS ACTIVE DETAINER:

Ask BOP



Consolidated Legal Centers **3/18/2019**

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FCI Memphis, TN
USP Hazelton, WV
FCI Hazelton, WV

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♦Carlos Javier Martinez
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FCI Ashland, KY
FCI Manchester, KY
USP Big Sandy, KY
USP McCreary, KY

FCI Beckley
♦Debbie Stevens
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FPC Alderson, WV
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FCI Gilmer, WV

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FCI Butner, NC
LSCI Butner, NC
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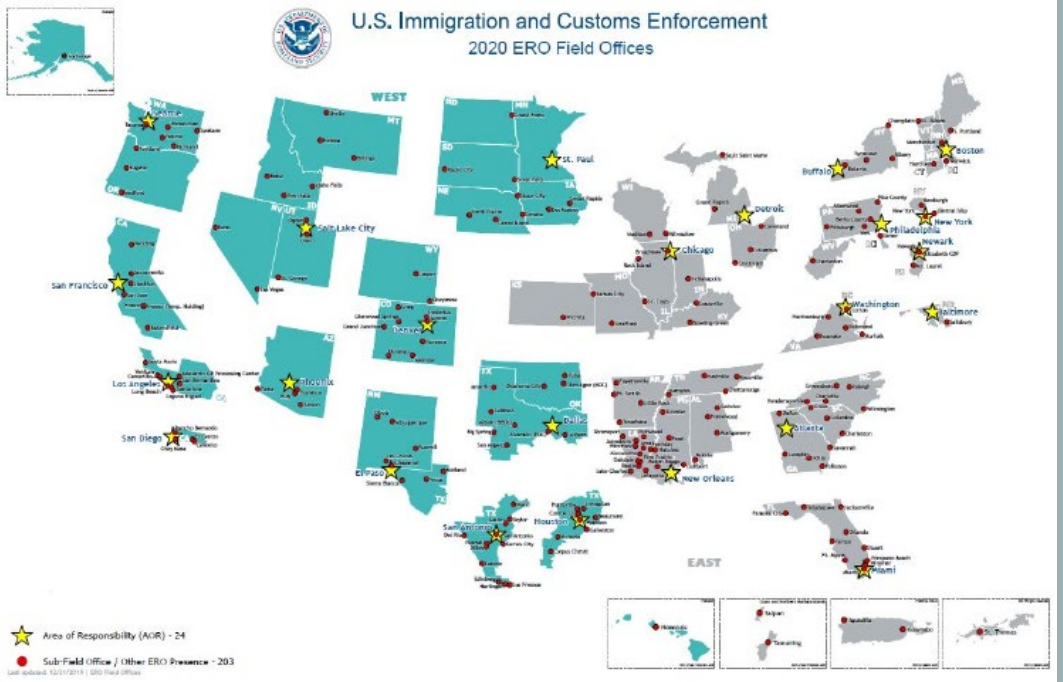
FCI Edgefield, SC
FCI Estill, SC
FCI Williamsburg, SC
FCI Bennettsville, SC

♦ **CLC LEADER**

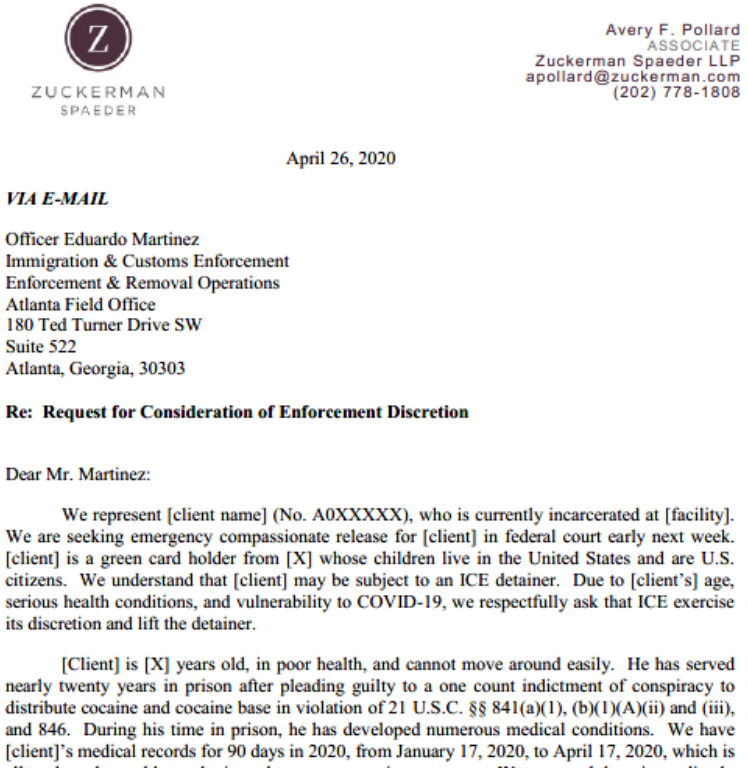
FIND OUT WHETHER CLIENT HAS ACTIVE DETAINER

- Ask ICE
  - Enforcement and Removal Operations Field Offices
    - https://www.ice.gov/contact/ero
  - Offices of the Principal Legal Advisor
    - https://www.ice.gov/contact/legal



ASK ICE TO LIFT THE DETAINER

- Prepare Advocacy Letter
- Things to Include:
  - Age, medical conditions, ability to travel, risk from COVID-19
  - Release plan
  - Letter verifying release plan
    - Extrinsic proof of address
    - Copy of identification



ZUCKERMAN SPAEDER

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April 26, 2020

VIA E-MAIL

Officer Eduardo Martinez
Immigration & Customs Enforcement
Enforcement & Removal Operations
Atlanta Field Office
180 Ted Turner Drive SW
Suite 522
Atlanta, Georgia, 30303

Re: Request for Consideration of Enforcement Discretion

Dear Mr. Martinez:

We represent [client name] (No. A0XXXXX), who is currently incarcerated at [facility]. We are seeking emergency compassionate release for [client] in federal court early next week. [client] is a green card holder from [X] whose children live in the United States and are U.S. citizens. We understand that [client] may be subject to an ICE detainer. Due to [client's] age, serious health conditions, and vulnerability to COVID-19, we respectfully ask that ICE exercise its discretion and lift the detainer.

[Client] is [X] years old, in poor health, and cannot move around easily. He has served nearly twenty years in prison after pleading guilty to a one count indictment of conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii) and (iii), and 846. During his time in prison, he has developed numerous medical conditions. We have [client]'s medical records for 90 days in 2020, from January 17, 2020, to April 17, 2020, which is

MOTION FOR COMPASSIONATE RELEASE

- Decide whether or not to mention potential ICE detainer

---

[7] Bertrand is a permanent resident of the United States; he is not a U.S. citizen. Bertrand may be subject to an active detainer from U.S. Immigration and Customs Enforcement, which is a request by ICE to law enforcement agencies to detain a prisoner for up to an additional 48 hours after release to allow the Department of Homeland Security to assume custody if it chooses to do so. *See* 8 C.F.R. § 287.7. Although existence of a detainer is not a factor in the court's consideration of a compassionate release request under 18 U.S.C. § 3582(c)(1)(A), undersigned counsel is currently in contact with ICE officials regarding lifting this detainer.

Q&A


the First Step Act

Overview

- Changes to Mandatory Minimums
- Changes to 851
- Changes to Safety Value
- Changes to 924(c) stacking
- Retroactivity of the Fair Sentencing Act
- Changes to Good Time Credit
- New “Earned” Time Credit

Changes to Mandatory Minimum (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.

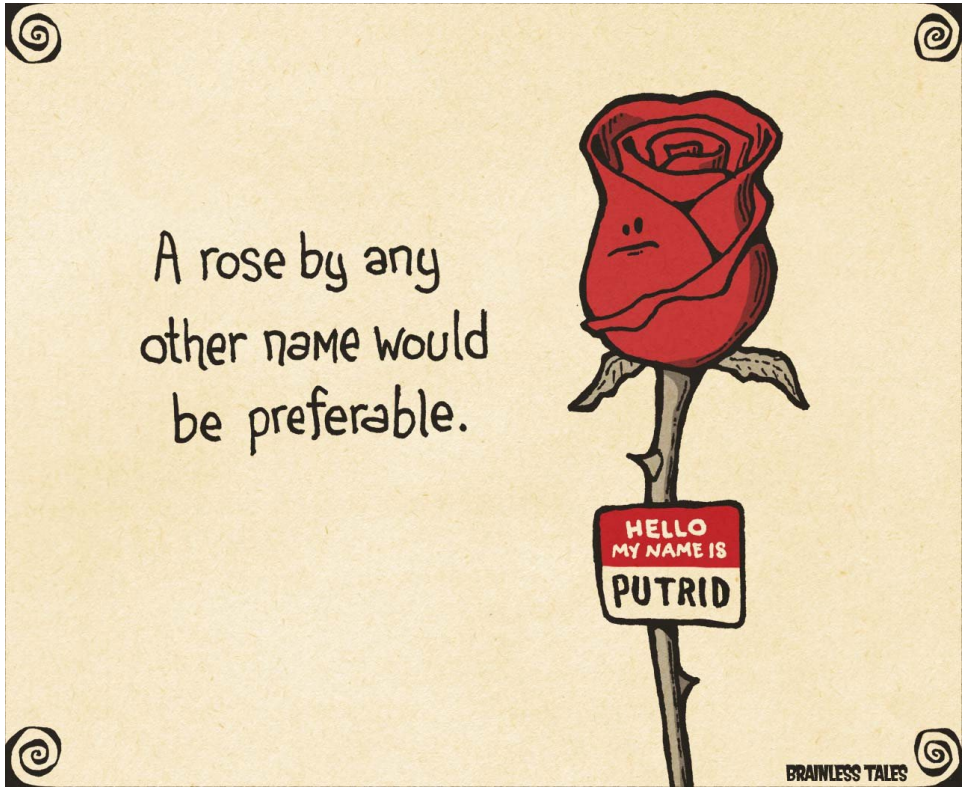
Changes to Mandatory Minimum

(c) 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.

Changes to 851

"prior conviction for felony drug offense"

= "serious drug felony"



Changes to 851

Old "prior conviction for felony drug offense"

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

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 ten years or a state offense for manufacturing, distributing, or possessing with intent for which a max term of imprisonment of ten years of more is prescribed.
  - No simple possession
  - Lots of CA drug offenses don't have a max of ten years on their face
  - Other states may be off the table too because they don't qualify as ACCA predicates (US v. Franklin, 904 F.3d 793 (9th Cir. 2018))
- Plus 12 months in custody
- Plus within 15 years


CHANGE
CHANGER

(c) 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.

FSA does not change the definition of 851 for purposes of (b)(1)(C)

The Lord: *giveth*

Me: Nice

The Lord: *taketh away*

Me: wtf

Serious Violent Felony

New 851 ground premised on prior violent conviction, as defined in the Federal Three Strikes Act

Serious Violent Felony
18 U.S.C. § 3559(c)(2)(F)

- **Any offense that has a max term of imprisonment of 10 yrs or more that has as an element the use, attempted use, or threatened use of physical force against the person of another**
  - force clause, but 10 years may knock out some state offenses
- **Any offense that has a max term of imprisonment of 10 years or more 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, should be invalid under Dimaya

Serious Violent Felony
18 U.S.C. § 3559(c)(2)(F)

- Any federal or state offense "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 113(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**
  - No 10-year requirement

Tied to federal definitions

Robbery

robbery (as described in section 2111, 2113, or 2118)

Things to consider:

- Federal robbery requires something higher than an accidental use of force
- Federal robbery requires force-clause level force. Even after Stokeling, some robbery statutes might not pass muster (CA "mere tap on the shoulder")
- Many state robbery statutes (like CA) can be premised on threats to property, whereas 2113 requires fear of bodily harm

(3) NONQUALIFYING FELONIES.—

(A) Robbery in certain cases.—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; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

Serious Violent Felony

- No wash out period.
- Still requires 12 months imprisonment

serious violent felony = the new battleground

Shouldn't apply ex post facto to offenses committed before December 21, 2018

What to do?

FSA

Mandatory minimum doesn't apply if D didn't serve 12 months in custody and if released more than fifteen years before instant offense

851

Judge should decided if enhancement should be applied

Apprendi

Jury must find facts that increase stat max, except fact of a prior conviction

Safety valve

"Old" Safety Valve

- did not have more than one criminal history point
- did not use violence or threats or possess a dangerous weapon
- not a supervisor or higher, not a CCE
- truthfully provided all information re: the course of conduct
- and offense did not result in death or serious bodily injury.

"New" Safety Valve
Section 402 of the FSA

Modifies "one point" requirement

- No more than 4 criminal history points (not including 1-point offenses)
- No 3-point offense
- No 2-point violent offense (using 18 U.S.C. § 16)

“New” Safety Valve
Section 402 of the FSA

All other criteria (gun, leader, etc.) remain the same.

"New" Safety Valve

(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

[3, 4] Federal Rule of Criminal Procedure 11(d)(2)(B) provides that a defendant may withdraw a plea of guilty prior to the imposition of sentence if he "can show a fair and just reason for requesting the withdrawal." While the defendant is not permitted to withdraw his guilty plea "simply on a lark," *United States v. Hyde*, 520 U.S. 670, 676–77, 117 S.Ct. 1630, 137 L.Ed.2d 935 (1997), the "fair and just" standard is generous and must be applied liberally. "Prior to sentencing, the proper inquiry is whether the defendant has shown a fair and just reason for withdrawing his plea even if the plea is otherwise valid." *Davis*, 428 F.3d at 806.

"New" Safety Valve

- Guidelines provide two-level decrease for individuals who satisfy the "old" safety valve provision, as set out in the guidelines.
- Commission should fix, hopefully.
- Until then, you may want to ask district courts to vary two levels, if necessary.

Tips & Tricks

"(1) the 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;"; and

Section 924(c) and Stacking

Section 924(c) and Stacking

- "Old" law
  - First 924(c), 5, 7, or 10 years consecutive to underlying
  - Second and more 924(c)s, 25 years consecutive to underlying and consecutive to each other.
  - Multiple 924(c)s "stacked" even if the 924(c)s were all charged in one case.
- "New" law
  - 25-year blow only if violation occurs after the prior 924(c) conviction is final.
  - You still get 5, 7, or 10 for each, and those still stack.

Section 924(c) and Stacking

(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.

Retroactivity of the Fair Sentencing Act

- Fair Sentencing Act changed the quantities of crack necessary to trigger a mandatory minimum.
- Passed in 2010 but was not retroactive.
- FSA fixes retroactivity for FSA
- So far, 200+ years worth of reductions in CD Cal

What do I do?

- If client calls, encourage not to file pro se.
- If you see a motion filed pro se for a former client (or co-defendant!), please forward to local FPD.
- If you don't know who to send to, ask!

Good time credit

54 days means 54 days.

"Earned" Time Credit
Section 101 of the FSA

The good:

- BOP encouraged to create more evidence-based recidivism reducing programming
- Inmates can receive up to 10 days of credit for every month of programming, plus an additional five days, if at low or minimum risk of recidivism
- "Redeemable" for pre-release custody (RRC?) or supervision

“Earned” Time Credit

The bad:

- Not retroactive to pre-enactment programming
- 70 categories of people who are not eligible for this benefit
- SRC estimates about 57% of prisoners won’t be eligible

Why does this matter to me?

“Earned” Time Credit

Some you can’t control:

- individuals subject to a final order of removal
- 924(c)
- Most CP/sex offenses

"Earned" Time Credit

Some you can:

> *"(xxiii) Section 1030(a)(1), relating to fraud and related activity in connection with computers.*

"Earned" Time Credit

Drug offenses only if:

- any drug offense resulting in accidental 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