

# The First Step Act

OVERVIEW AND PRACTICE ADVISORY

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

JANUARY 29, 2019

SENTENCING RESOURCE COUNSEL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS

# Overview

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



# Changes to Drug Mandatory Minimums (Section 401)

## 21 USC § 841(b)(1)(A)

- ▶ 10 years to life for 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 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**" + 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 death/SBI
- ▶ Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent**

# Changes to Drug Mandatory Minimums (Section 401)

## 21 USC § 960(b)(1)

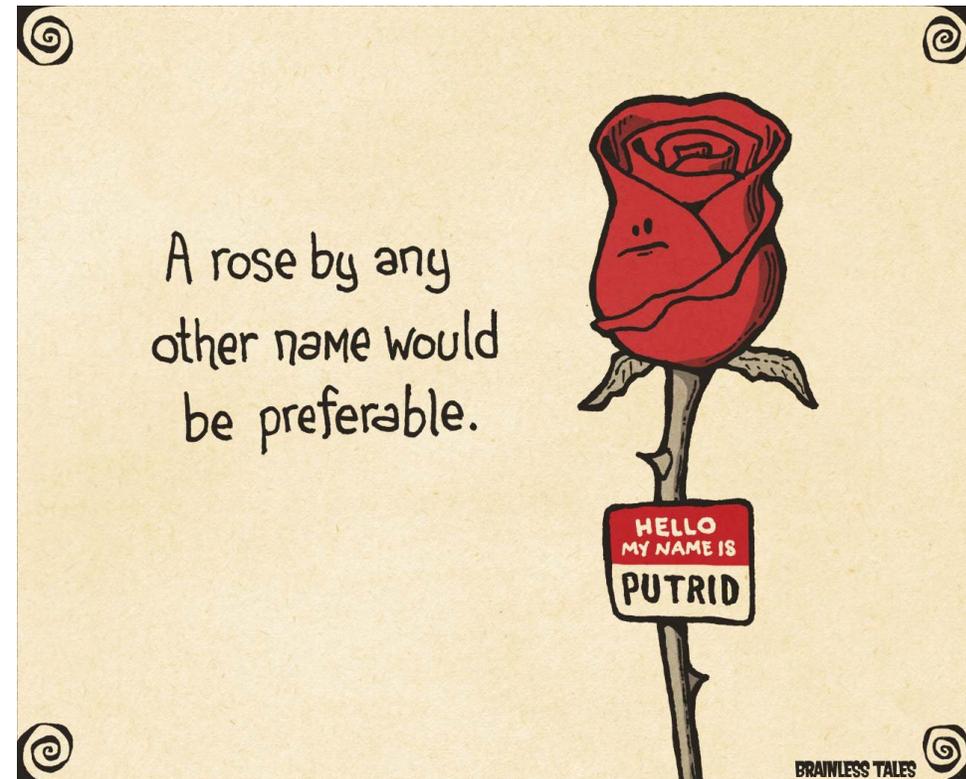
- ▶ 10 years to life for drug type and quantity
- ▶ **15 years to life** if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**"
- ▶ 20 years to life if death/SBI
- ▶ Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" + 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 death/SBI
- ▶ Life if any prior final conviction(s) for "**serious drug felony**" or "**serious violent felony**" + death/SBI

# Narrows definition of prior drug conviction (851)

- “felony drug offense”
- “serious drug felony”



# New definition of prior drug conviction (851)

## “felony drug offense,” 21 USC 802(44)

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

## “serious drug felony,” 21 USC 802(57)

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

# Serious Drug Felony – stat max 10 years or more?

- ▶ **Many** state drug offenses, a few federal, have a statutory maximum of **less than 10 years**.
- ▶ **If lower**, argue maximum term of imprisonment is **the one in effect at the time of the prior conviction**. *U.S. v. Elder*, 840 F.3d 455, 461 (7th Cir. 2016).
- ▶ The maximum term of imprisonment is **the maximum *this* defendant could have received under a jurisdiction’s binding or presumptive sentencing rules, not the statutory maximum a hypothetical defendant could have received**.
  - ▶ *Simmons v. US*, 649 F.3d 237 (4th Cir. 2011) (en banc) (North Carolina); *US v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011) (Kansas); *US v. Brooks*, 751 F.3d 1204 (10th Cir. 2014) (Kansas); *US v. Newbold*, 791 F.3d 455 (4th Cir. 2015); *US v. Romero-Leon*, 622 Fed. Appx. 712 (10th Cir. 2015) (New Mexico); *US v. Valencia-Mendoza*, \_\_ F.3d \_\_, 2019 WL 149827 (9th Cir. Jan. 10, 2019) (Washington, Oregon).
  - ▶ Other possibilities: US mandatory guidelines (before Jan. 12, 2005); Alabama (guidelines, beginning in 2013, drug and certain property offenses); Arizona (statutory); California (statutory); Colorado (statutory); Florida (former guidelines - before 1998, GL system not materially different from Oregon); Massachusetts (statutory); Michigan (guidelines); Minnesota (guidelines); Ohio (statutory); Pennsylvania (guidelines); Tennessee (statutory, 1989-2005)

# Serious Drug Felony – does the offense otherwise satisfy the definitions in 924(e)(2)(A)?

- ▶ **Not all drug offenses satisfy these definitions.**
- ▶ See, e.g., *US v. Townsend*, 897 F.3d 66 (2d Cir. 2018) (New York statute overbroad because it lists HCG, not a controlled substance under the CSA); *US v. Barrow*, 230 F. Supp. 3d 116, 124 (E.D.N.Y. 2017) (same); *US v. Epps*, 2018 WL 2958442 (D. Conn. June 13, 2018) (offense under Conn. Gen. Stat. § 21a-277(a) is overbroad because it lists two drugs that are not controlled substances under the CSA).
- ▶ *US v. Franklin*, 904 F.3d 793 (9th Cir. 2018) (Washington’s accomplice liability statute by criminalizing a lesser mens rea renders its drug trafficking law broader than generic federal drug trafficking laws and is thus not a “serious drug offense” under 924(e)(2)(A)(ii)).



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

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

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

- ▶ Defines six “felony violations.” See 18 U.S.C. § 113(a)(1)-(3), (6)-(8).
- ▶ The violations defined in § 113(a)(4) (“assault by striking, beating or wounding”) and 113(a)(5) (“simple assault”) are not felony violations and therefore not SVFs.

# offense described in section 3559(c)(2)(F)(i)

- ▶ **3559(c)(2)(F)(i)**: “the term ‘serious violent felony means” a list of enumerated “Federal or State offense, by whatever designation and wherever committed.”
- ▶ Generic definitions for some: 3559(c)(2)(A) (assault with intent to commit rape), (B) (arson), (C) (extortion), (D) (firearms use), and (E) (kidnapping).
- ▶ Generic definitions for others by citation to a federal statute.
- ▶ Here's the (f)(i) list:
- ▶ “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); carjacking (as described in section 2119); extortion **[defined in 3559(c)(2)(C)]**; arson **[defined in 3559(c)(2)(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”

# offense described in section 3559(c)(2)(F)(ii)

- ▶ **3559(c)(2)(F)(ii)**: “the term ‘serious violent felony’ also “means”
- ▶ any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another ~~or that, by its nature, involves a substantial risk that physical force against the person of a nother may be used in the course of committing the offense.~~
- ▶ Residual clause of § 3559(c)(2)(F)(ii) is void for vagueness. See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).
- ▶ Is the offense “punishable” by 10 years or more? See Slide 7 above.

## offenses described in section 3559(c)(2)(F)(i) and (ii)

- ▶ To determine whether the defendant's prior offense satisfies these definitions, the “**categorical approach**” applies:
- ▶ Does the offense as defined by its elements, *not* the particular facts:
  - ▶ Reach more conduct than the generic offense enumerated in (F)(i)? If so, it doesn't count.
  - ▶ Necessarily have as an element force against the person of another under (F)(ii)? If not, doesn't count.
- ▶ See, e.g., *US v. Leaverton*, 895 F.3d 1251 (10th Cir. 2018); *US v. Hardin*, 108 Fed. Appx. 74, 78 (4th Cir. 2004) (unpublished); *US v. Fulford*, 267 F.3d 1241, 1251 (11th Cir. 2001); *US v. Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998).

# Nonqualifying offenses under 3559(c)(3)

Certain offenses are “nonqualifying offenses” if the defendant proves the following by clear and convincing evidence under 3559(c)(3):

- ▶ (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.
- (B) **Arson in certain cases.--**Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--
  - (i) the offense posed no threat to human life; and
  - (ii) the defendant reasonably believed the offense posed no threat to human life.

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

# Other Litigation Issues

- ▶ **Know the law regarding 851s including as relates to Sec. 401.** See Preventing and Challenging an Enhanced Sentence Under Section 851 (Jan. 21, 2019).
- ▶ **Factfinding beyond the mere fact of conviction:** Any fact that raises the statutory maximum, the mandatory minimum, or both “constitutes an element of a separate, aggravated offense,” which must be charged in an indictment and proved to a jury beyond a reasonable doubt. The fact that the statutory maximum based on the jury’s verdict exceeds a mandatory minimum based on judicial factfinding is “beside the point.” *Alleyne v. United States*, 570 U.S. 99, 114-15 (2013).
- ▶ If *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998)--“the fact of an earlier conviction is not an element of the present crime”-- survives *Alleyne*, Sec. 401 requires factfinding beyond the mere “fact of an earlier conviction”— whether D served more than 12 months in prison (for both “serious drug felony” and “serious violent felony”), and whether D was released within 15 years of commencement of instant offense (for “serious drug felony”)
- ▶ **Don’t forget:** Death or serious bodily injury is also an element that must be charged in an indictment and proved to a jury beyond a reasonable doubt, and use of the drug must be proved BRD to have been the but-for cause, not just a contributing cause. *Burrage v. United States*, 134 S. Ct. 881 (2014).

# When does Section 401 take effect?

“This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not yet been imposed.” Sec. 401(c).

- ▶ The reduced MMs and narrowed definition of drug priors apply in any case in which sentence has not yet been imposed.



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

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

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

Govt did not file any 851 before trial or before entry of a guilty plea

- ▶ Govt cannot now file 851 notice on any basis. See 21 USC 851(a)(1).

Govt filed 851 for “felony drug offense” before trial or before entry of a guilty plea

- ▶ Govt cannot now file 851 based on a *different drug* conviction, e.g., where the prior was not SDF but a different one is. Too late. See 851(a)(1).
- ▶ Govt cannot now file 851 based on a “serious violent felony.”
  - ▶ Too late. See 851(a)(1).
  - ▶ + Ex post facto if instant offense committed before 12/21/18.

# “Old” Safety Valve, 18 USC 3582(f)

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

# “New” Safety Valve, as amended by Sec. 402

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

# “New” Safety Valve

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

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

- ▶ Career offenders who do not have a disqualifying number or kind of points do qualify for the safety valve. Regardless of points, COs are automatically placed in CHC VI. USSG § 4B1.1-4B1.2.
- ▶ Any 2 points for committing the instant offense while under a criminal justice sentence, see § 4A1.1(d), that “result[] from a 1-point offense” do not count under 3553(f)(1)(A).
- ▶ If 2 points are added because the defendant was under a criminal justice sentence for a 1-point offense, the offense is still a 1-point offense, not a 3-point offense under 3553(f)(1)(B).
- ▶ Do points added because the defendant was under a criminal justice sentence for a 2-point offense count under 3553(f)(1)(A)?
  - ▶ The statute refers to 1, 2, and 3-point “offenses,” defined in 4A1.1(a)-(c) by the maximum sentence imposed, not status points.
  - ▶ The only disqualifying 2-point offense is a “2-point violent offense.”

# When does Section 402 take effect?

“The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.” Sec. 402(b).

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

- ▶ Date “conviction entered” is date judgment of conviction is entered.
- ▶ If necessary: If pled guilty, court may vacate acceptance of plea and reaccept it, or allow D to withdraw plea for “fair and just reason.” Fed. R. Crim. P. 11(d)(2)(B).

## Two-level decrease in guideline range?

- ▶ USSG § 2D1.1(b)(18) recommends a two-level decrease if the defendant meets the “old” safety valve criteria set out in § 5C1.2.
- ▶ Commission will likely fix next amendment cycle.
- ▶ Meanwhile, the court may grant a variance under 3553(a).

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



# 942(c)(1)(C) as amended

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

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

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

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

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

“Notwithstanding any other provision of law--

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

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

# Then and Now

## Then:

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

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

## Now:

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

- ▶ 15 years (5+5+5) – rather than 55 years
- ▶ 30 years if all three firearms discharged (10+10+10) – rather than 60 years

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

# When does Section 403 take effect?

“This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not yet been imposed.” Sec. 403(b).

## Sec. 404, “Application of Fair Sentencing Act”

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

# Sec. 404, First Step Act

- ▶ Any person convicted of a “violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010,” is eligible. Sec. 404(a). **(freestanding remedy, not subject to 3582(c)(2) or 1B1.10)**
- ▶ Only two circumstances in which the court “shall [not] entertain” an eligible person’s motion:
  - ▶ sentence was “previously imposed or reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010” **(denial or partial reduction under 3582(c)(2)/1B1.10 does not count)** or
  - ▶ a “previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.” Sec. 404(c). **(one chance under Section 404 if denied after complete review on the merits)**
- ▶ Upon motion of the defendant, BOP, the government, or the court, the court may “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect at the time the covered offense was committed.” Sec. 404(b).
- ▶ Court has discretion to deny the motion: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Sec. 404(c).

# What to do?

- ▶ Contact Section 404 point person in your district: at least one in each FPD office, CJA rep in SD GA and ED KY, before any action.
- ▶ FPD will represent unless conflict or former lawyer wants to represent.
- ▶ Point persons have reliable up-to-date litigation guidance. Do not proceed without it.
- ▶ Do not credit “guidance” or summaries from other sources.
- ▶ Advise clients not to file *pro se*.
- ▶ If you see a motion filed *pro se* for a former client (or co-defendant), advise Section 404 point person.

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

## Good news:

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

## Bad news:

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

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

Congressional fix? Uncertain

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

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

## For Some, Earned Time Credits → Prerelease Custody

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

# Important Litigation/Client Relations Issue

- ▶ 70 categories of people are *not* eligible to “receive” earned time credits (even though they earn them by participating in programming) based on instant offense
- ▶ Rough estimate: 43% ineligible
- ▶ **Look at pp. 5-10 of law (in your materials) before entering into a plea bargain or considering your sentencing strategy.** Client may be able to plead to something else.
- ▶ Certain drug offenses are excluded only if there is a role enhancement.
- ▶ If possible, prevent judicial finding that even though the conviction is for trafficking in some other drug, it involved a detectable amount of fentanyl.
- ▶ Warn clients they cannot receive time credits unless the law changes not to exclude them.

# Exclusions – *Partial* List

## ***Drug offenses***

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

# Partial List, cont'd

## *Immigration*

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

## *Some others*

- ▶ **fraud** and related activity in connection with **computers**, 18 USC 1030(a)
- ▶ All **924(c)**; all **Kidnapping** offenses in chapter 55; **Bank robbery resulting in death**, 18 USC 2113(e); **Robberies and burglaries involving controlled substances**, 18 USC 2118(c); all **Carjacking** under 2119(1), (2) or (3)
- ▶ Loads of **sex and child porn** crimes, including **failure to register**
- ▶ An offense described in **3559(c)(2)(F) if D** “was sentenced” to a term of imprisonment of **more than 1 year, and if** has a previous federal or state conviction for a list of offenses and for which “was sentenced” to a term of imprisonment of **more than 1 year**
- ▶ Those subject to the **criminal street gangs** provision at 18 USC 521

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



# Compassionate Release

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

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

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

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

# FSA improvements

- ▶ The **defendant** can file the motion after fully exhausting administrative remedies or 30 days from receipt of request by warden, whichever is earlier.
- ▶ Defines “terminally ill” as “a disease or condition with an end-of-life trajectory.” 18 U.S.C. § 3582(d)(1).
- ▶ BOP shall, “not later than 72 hours after the diagnosis” of terminal illness “notify the defendant’s attorney, partner, and family members that they may prepare and submit on the defendant’s behalf a request for a sentence reduction pursuant to [18 USC 3582(c)(1)(A)]”
- ▶ BOP shall provide family and extended family opportunity for visitation within 7 days of diagnosis.

# FSA improvements

- ▶ BOP shall upon request of D, his attorney, partner or family ensure BOP employees assist D in preparing and submitting request to BOP.
- ▶ BOP shall process the request not later than 14 days of receipt of request.
- ▶ If D is physically or mentally unable to submit a request to BOP, BOP shall
  - ▶ Inform D's attorney, partner, and family that they may prepare and submit request to BOP, accept and process that request, or
  - ▶ Upon request of D, his attorney, partner or family ensure BOP employees assist D in preparing and submitting request to BOP
- ▶ Visibly post new procedures at all BOP facilities.

# Practical considerations

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

# What to Do?

- ▶ First stop: Contact FPD in your district
- ▶ If for some reason this does not result in needed representation, contact FAMM
- ▶ For further information, see *Compassionate Release Basics for Federal Defenders*,  
[http://or.fd.org/system/files/case\\_docs/Compassionate%20Release%20Basics\\_2019-01-02.pdf](http://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_2019-01-02.pdf)

# Questions on Sections Other than Compassionate Release?

If questions after reading the statute, contact FPD in your district.