

The First Step Act:

PRACTICE TIPS AND UNEXPECTED TRAPS

FEDERAL CRIMINAL DEFENSE TRAINING

MARCH 26, 2019

Overview: Sentencing & BOP Reform

- ▶ Enacted December 21, 2018
- ▶ Reduces Drug Mandatory Minimums Enhanced with Prior Convictions
- ▶ Narrows *and* Expands Enhancing Prior Convictions
- ▶ Broadens Safety Valve
- ▶ Clarifies that 924(c)(1)(C) applies only after a final prior conviction
- ▶ Makes Fair Sentencing Act of 2010 Retroactive
- ▶ Increases Good Time Credit to 54 days (as always intended)
- ▶ Adds program of “Earned” Time Credits for some
- ▶ Amends Compassionate Release

Changes to Drug Mandatory Minimums (Section 401)

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 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**

No Changes to Text of Subsection 841(b)(1)(C)

21 USC § 841(b)(1)(C)

- ▶ 0 to 20 years for unspecified quantity
- ▶ 0 to 30 years if one prior final conviction for "**felony drug offense**"
- ▶ 20 years to life if death/SBI

Changes to Import/Export 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

New definition of prior drug conviction (851) for 841(b)(1)(A) & (b)(1)(B)

“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 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
- ▶ + served term of imprisonment more than 12 months
- ▶ + released from that term within 15 years of commencement of instant offense

Old definition of “felony drug offense” in 802(44) remains for 841(b)(1)(C)

Congressional oversight that is more harsh for defendants with no mandatory minimums

- ▶ Includes simple possession
- ▶ Includes sentences of probation or served time of under 12 months
- ▶ Includes convictions of any age

Serious Drug Felony – stat max 10 years or more

- ▶ Check the statute for maximum term at time of prior conviction
See U.S. v. Elder, 840 F.3d 455, 461 (7th Cir. 2016).
- ▶ Remember the maximum term of imprisonment is the maximum *this* defendant could have received under the 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. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019) (Washington, Oregon).

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., Brock-Miller v. US, 887 F.3d 298 (7th Cir. 2018)(in 2007 the term “legend drug” under Indiana law was limited to prescription drugs)

- ▶ Categorical approach used to compare state statute with federal statute

- ▶ OVERBROAD. *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. Epps*, 2018 WL 2958442 (D. Conn. June 13, 2018) (offense under Conn. Gen. Stat. § 21a-277(a) overbroad because it lists two drugs that are not controlled substances under the CSA).

- ▶ CRIMINALIZES LESS SERIOUS CONDUCT. *See, e.g., 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)).

Added “Serious Violent Felony” as new basis for 851 at 21 USC § 802(58)

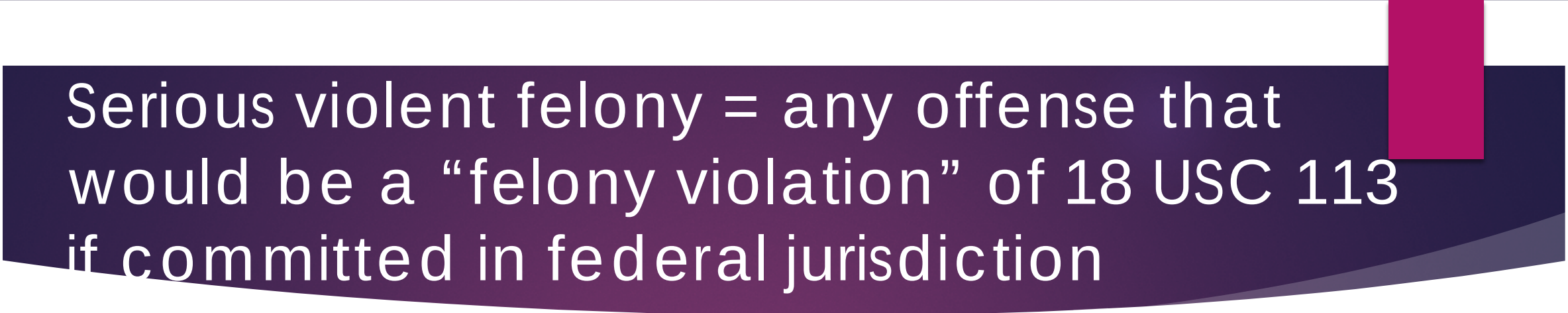
- ▶ “an offense described in section 3559(c)(2)” [three strikes] or
- ▶ “any offense that would be a felony violation of [18 USC 113] if [it] were committed in the special maritime and territorial jurisdiction of the United States”
- ▶ + “for which the offender served a term of imprisonment of more than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

offense described in section 3559(c)(2) [three strikes]

- ▶ **Enumerated offenses** with definitions: (A) assault with intent to commit rape, (B) arson, (C) extortion, (D) firearms use (924(c) & 929(a)), (E) kidnapping.
- ▶ **More Enumerated Offenses** in (F)(i) with references to federal statutes: “the term ‘serious violent felony means a Federal or State offense, by whatever designation and wherever committed consisting of” murder, manslaughter other than involuntary, assaults, sex offenses, kidnapping, robbery, carjacking, extortion, arson, firearms offense, or “conspiracy, or solicitation to commit any of the above” **But see** exceptions in 3559(c)(3) for robbery and arson
- ▶ **Elements Clause** in (F)(ii): “any other offense punishable by a maximum 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 or another
- ▶ **Residual Clause** in (F)(ii): “by its nature, involves a substantial risk that physical force against a person or another may be used in the course of committing the offense.”

Challenges to Definition in Three Strikes Statute

- ▶ Enumerated Offenses -- categorical approach to compare state statute with definitions or federal statutes & exceptions in 3559(c)(3) for robbery and arson
See Descamps v. United States, 133 S. Ct. 2276 (2013)
- ▶ Elements Clause – punishable by 10 years or more + compare elements of offenses
See Johnson v. United States, 559 U.S. 133 (2010)
- ▶ Residual Clause – void for vagueness
See United States v. Minjarez, 1:09-CR-0466, 2019 WL 1209625 (E.D. Cal. Mar. 14, 2019)



Serious violent felony = any offense that 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).
- ▶ 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 qualifying offenses

Effect on Pending Cases

Section 401(c) = applies to offenses committed before December 21, 2018 and the 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., *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.

Another Litigation Issue – Fact Finding

Fact finding beyond the mere fact of conviction

- ▶ *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”
- ▶ *Apprendi v. New Jersey*, 530 U.S. 466 (2000) & *Alleyne v. United States*, 570 U.S. 99(2013): 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
- ▶ Section 401 requires fact finding beyond the mere “fact of an earlier conviction”— whether Defendant served more than 12 months in prison (for both “serious drug felony” and “serious violent felony”), and whether Defendant was released within 15 years of commencement of instant offense (for “serious drug felony”)

Reminder – Death or SBI

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 beyond a reasonable doubt to have been the but-for cause, not just a contributing cause. *Burrage v. United States*, 134 S. Ct. 881 (2014).

Reminder – Challenges to 851 Notice

- ▶ Prior conviction must be final before the defendant committed the instant offense – 841(b)(1)(A)-(C)
- ▶ Govt must file 851 notice before trial or before entry of plea of guilty and state the previous convictions to be relied upon – 851(a)(1)
- ▶ Procedure for denial of prior conviction includes a hearing and burden on Govt beyond a reasonable doubt – 851(c) See, e.g., *United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009)

Challenges to 851 Notice Cont'd

- ▶ Challenges to **validity** of offenses that occurred within five years of the date of the information, but not offenses that are more than five years old -- 851(e)
- ▶ Challenges to the **fact** of any prior conviction: prior has been vacated, not defendant's prior conviction, not final before commission of instant offense. See e.g., *US v. McChristian*, 47 F.3d 1499 (9th Cir. 1995); *US v. Gabriel*, 559 F. App'x 407 (2d Cir. 2015)

“Old” Safety Valve – 18 USC 3553(f)

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

“New” Safety Valve (Section 402)

- ▶ **New:** Also applies to offenses under title 46 §§ 70503, 70506 (covered vessels)
- ▶ **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 (Section 402)

- ▶ “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 safety valve

- ▶ Career offenders who don't have a disqualifying number or kind of criminal history points qualify for the safety valve. Career offenders are automatically placed in CHC VI regardless of points.
- ▶ Recent DOJ guidance:
 - “a person can have an unlimited number of 1-point offenses
 - a person can have up to two prior 2-point offenses and be eligible, as long as none is for a ‘violent offense’
 - a person with a prior 3-point offense is not eligible.”
- ▶ Status points under 4A1.1(d) should never count. Congress used the terms “1-point offense,” “2-point offense,” and “3-point offense,” focusing on the seriousness of the offense as reflected in 4A1.1(a)-(c).

Effect on Pending Cases

Section 402(b) = applies only to a conviction **entered** on or after December 21, 2018

- ▶ the term “conviction” does not have the same meaning in every federal statute and may mean plea in some instances and sentencing in others. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983); *United States v. Jefferson*, 88 F.3d 240 (3d Cir. 1996)
- ▶ *United States v. Sloane*, No. 5:17-135-DCR-4, 2019 WL 982851 (E.D. Ky. Feb. 28, 2019)(date the conviction was entered was date of acknowledgement of guilt)

Two-level decrease in guideline range?

- ▶ USSG § 2D1.1(b)(18) recommends two-level decrease if defendant meets the “old” safety valve criteria set out in § 5C1.2.
- ▶ Commission may fix next amendment cycle (2020, not 2019).
- ▶ Meanwhile, the court can grant a variance under 3553(a).

Stacking in Section 924(c) (Section 403)

Limits but does not eliminate stacking



942(c)(1)(C) amended (Section 403)

~~“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)), a minimum of 5 years [or 7 or 10 years for brandish or discharge] + 50 years was required.

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

Now:

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

- ▶ 15 years (5+5+5) – 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.

Effect on Pending Cases

Section 403(b) = applies to offenses committed before December 21, 2018 and the sentence has not yet been imposed.

But see US v. Chad Marks, 6:03-CR-06033-DGL (W.D.N.Y. Mar. 14, 2019) (urging the Govt to agree to an order vacating one of defendant's 924(c) convictions to eliminate the mandatory 25-year term)

Fair Sentencing Act of 2010

- ▶ Sec. 2 reduced statutory ranges and minimum SR terms by increasing quantities of crack necessary under 841(b) and 960(b).
- ▶ Sec. 3 eliminated 5-year MM for simple possession.
- ▶ Enacted Aug. 3, 2010, not retroactive.
- ▶ Applied to all sentences after Aug. 3, 2010 including offense committed before. See *Dorsey v. US*, 567 U.S. 260 (2012); *US v. Dixon*, 648 F.3d 195 (3d Cir. 2011)

Sec. 404 Application of Fair Sentencing Act

Eligible for **imposition of a reduced sentence** if:

- ▶ convicted of a “covered offense”:
 - (1) a crack cocaine offense that was committed before August 3, 2010
 - (2) sentence was imposed when the pre-Fair Sentencing Act penalties were in effect

- ▶ No previous relief:
 - (1) sentence not previously imposed in accordance with the Fair Sentencing Act;
 - (2) sentence not previously reduced in accordance with the Fair Sentencing Act;
 - (3) motion not previously denied after 12-21-18 and a complete review on the merits

Sec. 404 Application of Fair Sentencing Act

- ▶ Freestanding remedy = motion to **impose** a reduced sentence under Section 404 by Defendant, BOP, Court or Govt
- ▶ 18 USC 3582(c)(2)/ USSG 1B1.10 do not apply
No requirement that guideline range must change
- ▶ Discretionary – “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”

Sec. 404 Resentencing Hearing

- ▶ Resentencing hearing to “**impose** a reduced sentence as if” the FSA’s reduced crack penalties “were in effect at the time the covered offense was committed.”
 - ▶ See *US v. Powell*, ___ F. Supp. 3d ___, 2019 WL 1198005 (N.D.N.Y. Mar. 14, 2019)
- ▶ Right of allocution
 - ▶ Fed. R. Crim. P. 32(i)(4)(A)(ii): “Before **imposing** sentence, the court must address the defendant personally in order to permit the defendant to speak or present any information to mitigate sentence”
 - ▶ See also *United States v. Chapman*, 915 F.3d 139 (3d Cir. 2019)(highlighting the importance of allocution to better inform the sentencing decision); *United States v. Faulks*, 201 F.3d 208 (3d Cir. 2000)(directing defendant’s presence at resentencing given that there are still significant discretionary elements in the decision)

Sec. 404 Resentencing Hearing

- ▶ Consideration of 3553(a) factors

- ▶ Post-Sentence Rehabilitation

See Pepper v. US, 131 S. Ct. 476 (2011)(permitting consideration of defendant's rehabilitation since his prior sentencing and noting that such evidence may, in appropriate cases, support a downward variance from the Guidelines); *US v. Ussery*, 1:08-CR-0059, 2019 WL 1052018 (W.D.N.C. Mar. 5, 2019)(considered educational programs and work assignments)

- ▶ Age

See US v. Tucker, ___ F. Supp. 3d ___, 2019 WL 324423 (S.D. Iowa Jan. 23, 2019)(*sua sponte* reduction to time served under 404(a) for pre-Booker career offender who is over 50, an age at which the Sentencing Comm'n has found recidivism rate begins to decline substantially)

Sec. 404 Resentencing Hearing

- ▶ Courts should not perpetuate unconstitutional practices – should apply the law at the time of resentencing
 - ▶ *US v. Peppers*, 899 F.3d 211 (3d Cir. 2018)
 - ▶ *US v. Newton*, 5:02-CR-30020, 2019 WL 1007100 (W.D. Va. Mar. 1, 2019)(Govt agreed that court should calculate advisory guidelines under current law and assess the 3553(a) factors for pre-*Booker* career offender; Court did not reach many issues because resentenced to time served)

Sec. 404 Application of Fair Sentencing Act

- ▶ Reductions to terms of supervised release
 - ▶ 841(b)(1)(A) = minimum of 5 years or 10 years with 851
 - ▶ 841(b)(1)(B) = minimum of 4 years or 8 years with 851
 - ▶ 841(b)(1)(C) = minimum of 3 years or 6 years with 851

Good Time (Sec. 102(b)(1))

Good:

- ▶ 54 days per year means 54 days per year
- ▶ 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).

Good Time (Sec. 102(b)(1))

Bad:

- ▶ BOP/DOJ position: good time reform is subject to the same effective date as the risk assessment/earned time credit provisions: the date AG “completes and releases the risk and needs assessment system ... under section 101(a),” *i.e.*, 210 days after enactment.
- ▶ Kornfeld v. Puentes, 1:19-CV-00263, 2019 WL 1004578 (E.D. Cal. Mar. 1, 2019); *Sheppard v. Quintana*, 5:19-084, 2019 WL 1103391 (E.D. Ky. Mar. 8, 2019)

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” (untested, remains to be seen)
- ▶ AG/BOP must provide **recidivism reduction programs** (priority to high and medium risk, but not prison work programs) or **productive activities** (priority to low and minimum risk).
 - ▶ AG Sessions severely cut programming, re-entry services, RRCs. Provides **some** independent oversight. Funding may be insufficient. 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 and prisoner is determined minimum or low according to last 2 risk assessments, or warden grants petition (inherently subjective).
- ▶ Can't transfer to supervised release unless classified as minimum or low pursuant to last reassessment, 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 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 excluded 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 mixture or substance containing a detectable amount of [fentanyl],” and that the defendant was an organizer, leader, manager or supervisor.
 - ▶ fentanyl finding would prevent client from being rewarded for participating in recidivism reduction programming, would undermine rehabilitation, court can decline to make such finding if not relevant to sentence the court is imposing

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**
- ▶ **Prohibited objects** under 1791

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



Compassionate Release – 18 USC 3582(c)

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 3553(a) to the extent that they are applicable if it finds that – (i) extraordinary and compelling reasons warrant such a reduction; or (ii) 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, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

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 advises what should be “extraordinary and compelling reasons” pursuant 28 USC 994(t) (directing USSC to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples,” not “shall” or “may”):

- ▶ 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, but only USSC was given authority by Congress

QUESTIONS