First Step Act: What Does It Actually Say and What Do You Need To Do?

Brooklyn Federal Courthouse, July 16, 2019

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Defense Handout and additional materials available from me, Peggy or Deirdre.

Training for Defense Lawyers this Fall – notice coming soon

Read the Words

- Don’t characterize the words.

- Don’t accept anybody else’s characterization of the words.

Safety Valve – Section 402

- **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."

- "violent offense" means a "crime of violence, as defined in section 16 that is punishable by imprisonment." 18 USC 3553(g).
  - means only an offense that has "as an element the use, threatened use, or attempted use of force against the person or property of another," 16(a)
  - Supreme Court held the residual clause, 16(b), void for vagueness. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

New safety valve can apply to a career offender

For a variety of reasons, including:

1) Career offenders automatically assigned to CHC VI regardless of points, so don't necessarily have more than 4 points, a 3-point offense, or a 2-point violent offense.

2) Don't assume a 2-point "crime of violence" under 4B1.2 is a "violent offense" under the safety valve. Both determined under the categorical approach.

To be a "violent offense" under SV, the offense must necessarily have an element of force against the person or property of another.

4B1.2(a)(2) lists offenses that need not have an element of force; the elements need only be the same as, or narrower than, the elements of the generic offense, or as defined in the commentary (extortion and forcible sex offenses).

- Some of these listed offenses don't have an element of force against the person or property of another, e.g., kidnapping, federal arson, unlawful possession of a firearm or explosives, some sex offenses, some extortion offenses.

Sec. 402(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."
- Applies whenever judgment is entered on or after Dec. 21, 2018, including when a jury verdict was returned or a guilty plea was entered before that date.
  - Law: A conviction is entered when the judgment of conviction and sentence are entered on the district court docket. *See* Fed. R. Crim. P. 32(k)(1); Fed. R. App. P. 4(b)(6); *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 330 (2d Cir. 2007) (rejecting construction of "conviction" to mean acceptance of guilty plea alone).
  - DOJ: "In United States practice, conviction means a finding of guilt (i.e., a jury verdict or finding of fact by the judge) *and* imposition of sentence." United States Attorneys Manual § 609 ("Evidence of Conviction") (emphasis added).
  - "[P]rosecutors should take the position that the expanded safety valve … applies to defendants who were found guilty pre-Act, but against whom judgment was or will be entered on or after December 21, 2018."
  - FPD survey: Courts are applying the new safety valve as long as judgment not yet entered.
- If judgment was entered before 12/21/18, counsel may have been ineffective for failing to seek a continuance. See, e.g., *United States v. Abney*, 812 F.3d 1079 (D.C. Cir. 2016).

Applicability

Like any other current law, new safety valve applies when defendant is resentenced after the conviction or sentence has been reversed or vacated on direct appeal or collateral review, regardless of when judgment entered.

See *United States v. Hinds*, 713 F.3d 1303, 1305 (11th Cir. 2013) ("[T]here is no meaningful difference between an initial sentence and a resentencing," a change in law applies "in both cases."); *Krieger v. United States*, 842 F.3d 490, 505-06 (7th Cir. 2016) (when a sentence is vacated, the district court resentences the defendant "on a clean slate"); *United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir.1992) ("[T]he effect of a vacation is to nullify the previously-imposed sentence" and "the district court will be writing on a clean slate.").

When the original safety valve was enacted, courts held it applied at a resentencing.

- *See, e.g.*, *United States v. Flanagan*, 80 F.3d 143, 144 (5th Cir. 1996) (safety valve statute, enacted after defendant was first sentenced, applied at resentencing after direct appeal); *United States v. Polanco*, 53 F.3d 893, 898 (8th Cir. 1995) (directing district court to apply new safety valve statute on remand after direct appeal)
- Sixth Circuit applied the new safety valve as a standalone ground on direct appeal. *Clark v. United States*, 110 F.3d 15 (6th Cir. 1997).

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Two levels off guideline offense level

- § 2D1.1(b)(18) advises 2-level decrease if defendant meets "old" safety valve criteria at § 5C1.2

- Variance
  - USSC newsletter: "Of course, the court has authority under 18 U.S.C. § 3553(a) to grant a similar 2-level reduction to the newly eligible safety valve offenders not meeting the guideline criteria [as] a variance from the guidelines."

- Govt's position as reported by FPDs: same

Other Safety Valve Changes

- **New re (f)(5)**: "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" as defined in 16(a).

- **New**: expressly applies to offenses under title 46 USC §§ 70503, 70506 – reverses Ninth and Eleventh Circuits

- Other important issues addressed in Defense Handout.

Section 401. Reduce and Restrict Sentencing for Prior Drug Felonies.

- Reduces 3 mandatory minimums enhanced by priors
  - 841(b)(1)(A) if one prior: from 20-life to 15-life
  - 841(b)(1)(A) if more than one: from life to 25-life
  - 960(b)(1) if any prior(s): from 20-life to 15-life

- Replaces "felony drug offense" with
  - narrower "serious drug felony"
  - new "serious violent felony"

Serious Drug Felony

"felony drug offense," 21 USC 802(44)

- *any* offense "relating to" narcotic drugs, marihuana, anabolic steroids, depressant or stimulant substances
- simple possession
- punishable by imprisonment for more than one year
- misdemeanors in some states
- regardless of sentence imposed or served
- regardless of age of conviction

"serious drug felony," 21 USC 802(57)

- Offense "described in" 924(e)(2)
  - **Federal:** offense "under" 21 U.S.C. 801 et seq., 21 U.S.C. 951 et seq., or chapter 705 of title 46
  - **State:** offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 U.S.C. 802])"
- "for which"
  - "a maximum term of imprisonment of ten years or more is prescribed by law"
  - defendant "served a term of imprisonment of more than 12 months"
  - defendant was released "within 15 years of commencement of the instant offense"

Serious Violent Felony, 21 USC 802(58)

- offense "described in" 18 USC § 3559(c)(2)

- "any offense that would be a felony violation of" 18 USC § 113 if "committed in the special maritime and territorial jurisdiction" of US

- And "for which" the defendant "served a term of imprisonment of more than 12 months"
  - No staleness limit

Government's Burden to Prove Sec. 401 Facts

- defendant "served a term of imprisonment of more than 12 months"
- defendant was released "within 15 years of commencement of instant offense"

- 21 U.S.C. § 851(c)(1) -- govt must prove any issue of fact BRD
- *Apprendi*, *Alleyne* apply to facts beyond the mere fact of conviction
  - Another reason the date of "commencement of the instant offense" is that alleged in the indictment, not some earlier date based on "relevant conduct"

Statutory Maximum 10 years or more

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) - clarified *US v. Rodriguez,* 553 U.S. 377 (2008)

- QP -- whether Carachuri had been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year" (and thus was an "aggravated felony")
- He was convicted in 2004 under Texas law for possessing less than two ounces of marijuana (a misdemeanor), then in 2005 for possessing a Xanax tablet without a prescription.
- Under Texas law in effect at the time he was convicted in 2005, he could have received an enhanced recidivist sentence of more than 12 months for the Xanax conviction only if the state proved the fact of the 2004 marijuana conviction.
- The record of the 2005 conviction contained no finding of fact concerning the 2004 marijuana conviction, so Carachuri could not have received a sentence in excess of one year for the 2005 conviction.
- Supreme Court emphasized that the question was whether Carachuri was "actually convicted of a crime that is itself punishable as a felony" as reflected in the "record of conviction," not whether a hypothetical person could have received a sentence exceeding one year.

Statutory Maximum 10 years or more

The maximum term of imprisonment is the maximum this defendant could have received, as established by the record of conviction, not the statutory maximum a hypothetical defendant could receive.

- US v. Simmons (4th Cir. 2011) (en banc) (NC) (felony drug offense)
- US v. Haltiwanger (8th Cir. 2011) (KS) (felony drug offense)
- US v. Brooks (10th Cir. 2014) (KS) (4B1.2)
- US v. Lockett (7th Cir. 2015) (IL) (ACCA)
- US v. Rockymore (6th Cir. 2018) (TN) (ACCA)
- US v. Valencia-Mendoza (9th Cir. 2019) (WA & OR) (former 2L1.2)
- US v. Romero-Leon (10th Cir. 2015) (unpub'd) (NM) (ACCA)
- US v. Martinez (5th Cir. 2015) (unpub'd gov't concession) (OR) (4B1.2)
- US v. Ireland (9th Cir. 2019) (unpub'd gov't concession) (OR) (922(n))

- Applies to statutory sentencing schemes, mandatory and presumptive guideline schemes.
- Check sentencing scheme in effect when D was convicted and the record of conviction.
- What was the maximum *the particular defendant* could receive?

Example – Tennessee – it's not complicated

(1) Judge determines the felony class for the crime of conviction, e.g. Class C = 3-15 years

(2) Judge then determines the defendant's criminal record category. For Class C, Standard Offender Range = 3-6 years, Multiple Offender Range = 6-10 years, Persistent Offender Range = 10-15 years.

Under TN's statutory notice and burden requirements, prosecutor must file advance notice and court must find beyond a reasonable doubt that a greater criminal record category than Standard applies.

(3) Judge applies these findings to arrive at a "sentencing range" on a grid. (And it only has 5 columns and 5 rows. Compare USSG's 6 columns, 43 rows.)

(4) Judge "shall impose" a sentence within that "sentencing range."

(5) Judge may impose a sentence outside that "sentencing range" only if the parties agree.

Judge checks a box on the judgment identifying the range for the class of felony and the criminal record category.

In *Rockymore*, for each of the two prior convictions at issue, the record of conviction established that they were Class C felonies and that the defendant was a "Standard Offender."

The maximum for each was therefore 6 years, not 10 or 15 years for a hypothetical Class C offender.

The offenses therefore did not qualify as "serious drug offenses" under ACCA.

Serious Drug Felony – Does the offense satisfy the definition of SDF, using the categorical approach?

Do the elements criminalize more conduct than the generic offense?

- Does the statute criminalize trafficking in a substance not controlled by CSA? If so, doesn't count.

- Does it criminalize less serious conduct than generic drug trafficking? If so, doesn't count.

- For more information, see Defense Handout.

Serious Violent Felony "means" offense "described in" 3559(c)(2)

3559(c)(2)(F)(i): enumerated offenses "by whatever designation and wherever committed"

- Elements for some specifically defined in 3559(c)(2)(A)-(E) – generally narrow.
- Elements for others defined "as described in" a federal statute.

3559(c)(2)(F)(ii): force clause ~~and residual clause~~

- "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another ~~or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.~~"

- Residual clause is void for vagueness, materially indistinguishable from other residual clauses held void for vagueness. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *U.S. v. Davis*, 139 S. Ct. 2319 (2019).

- Must necessarily have element of force against *the person* of another; force against property not enough.

- Is the offense "punishable" by 10 years or more? *See* above.

Also means “any offense that would be a felony violation” of 18 USC 113 (assault) if committed in federal jurisdiction

- Six “felony violations.” *See* 18 U.S.C. § 113(a)(1)-(3), (6)-(8).

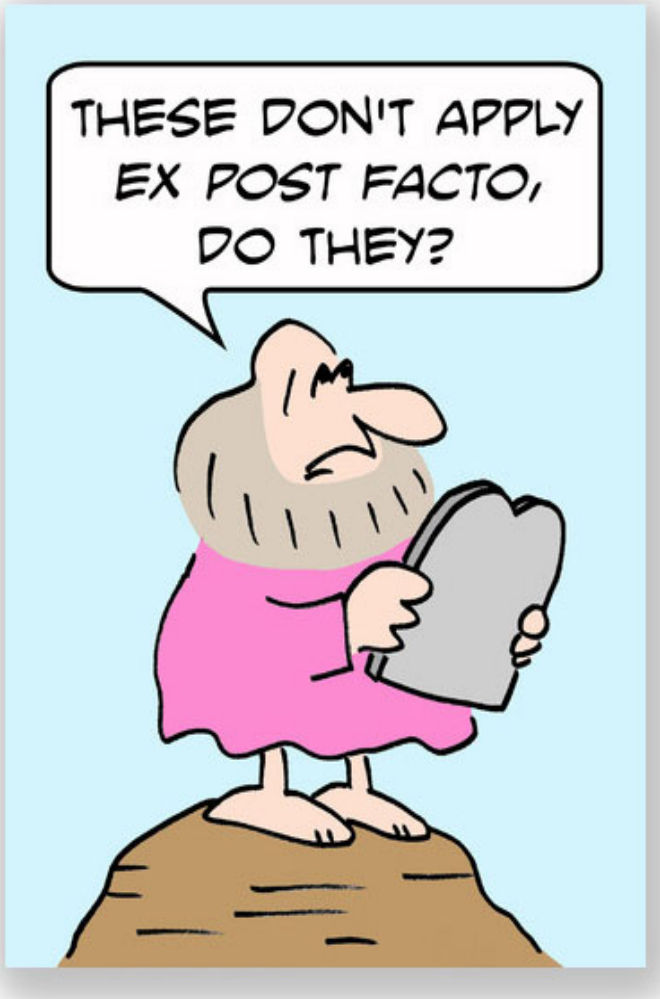
- Not “assault by striking, beating or wounding,” § 113(a)(4), or “simple assault,” § 113(a)(5) — punishable by not more than one year

Categorical approach applies to determine whether an offense satisfies any definition in 3559(c)(2)(F)(i)-(ii), or 113

- Does the offense as defined by its elements:
  - Reach more conduct than the generic offense enumerated in 3559(c)(2)(F)(i) or 113? If so, doesn't count.
  - Necessarily have as an element force against the person of another under (F)(ii)? If not, doesn't count.

- Nonqualifying felonies under 3559(c)(3)
  - robbery, arson, and any offense under 3559(c)(2)(F)(ii)
  - do not qualify if the defendant proves certain facts by clear and convincing evidence
  - categorical approach does not apply under (c)(3)

- For more information, see Defense Handout.



- Would violate *Ex Post Facto* Clause to rely on a "serious violent felony" to enhance statutory range for instant offense committed before 12/21/18. *Peugh v. U.S.*, 569 U.S. 530, 532–33 (2013).

- And the government must file and serve 851 information "stating in writing the previous convictions to be relied upon" "before trial, or before entry of a plea of guilty." 21 U.S.C. § 851(a)(1).

Section 403. "Clarification of Section 924(c)"

Amends 924(c)(1)(C): "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."

Stacking remains – 924(c)(1)(D) – 15 instead of 55 for three convictions charged in same indictment

Effective Date for 401, 403?

"Applicability to Pending Cases.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not yet been imposed as of" Dec. 21, 2018. Sec. 401(c), 403(b).

- Like any current law, Secs. 401/403 apply at resentencing after conviction or sentence has been vacated/reversed on direct appeal or on collateral review.
- Counsel may have been ineffective in failing to seek a continuance.
- Can Sec. 401/403 be raised as standalone ground for resentencing on direct appeal?
  - There is a presumption that when a new law is enacted after judgment and before the decision of the court of appeals, the court of appeals must apply it.
  - Cases have been GVR'd, pending in courts of appeals.
- Constitutional grounds
- Check USSG 1B1.13; see also US v. Cantu-Rivera, 2019 WL 2578272, at *2 n.1 (S.D. Tex. June 14, 2019)
- For further information, see Defense Handout.

Section 404. Application of Fair Sentencing Act

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means 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 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if 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. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841 note).

Section 404

- Any defendant is eligible if the statutory penalties for the statute of conviction were modified by section 2 or 3 of the FSA. Sec. 404(a). In other words, every defendant sentenced for a crack offense before the FSA is eligible for individualized consideration. *See* S. Comm. on the Judiciary, 115th Cong., Fact Sheet, The First Step Act of 2018 (S.3649) – as introduced 2 (Nov. 15, 2018); 164 Cong. Rec. S7020, S7021, 2018 WL 6004155 (Nov. 15, 2018) (statement of Senator Durbin).
  - The quantity in the particular defendant's case is not a condition of eligibility, whether charged in the indictment, found by a jury beyond a reasonable doubt, admitted by the defendant as an element in a guilty plea, included in a presentence report, or recited in a plea agreement.
- The court then considers whether and to what extent to impose a reduced sentence, see Sec. 404(b), taking into account the statutory range, the guideline range, the 3553(a) purposes and factors, the need to avoid unwarranted disparities under 3553(a)(6), and post-sentencing conduct.
  - The quantity, if any, found by a jury as an element beyond a reasonable doubt or admitted by the defendant as an element in a guilty plea applies in determining the defendant's statutory range "as if" section 2 of the FSA were in effect. Sec. 404(b).
- Quantities in a PSR are, at best, found by a judge by a "preponderance" of the "information without regard to its admissibility under the rules of evidence applicable at trial." *See* USSG § 6A1.3. Under Sec. 404, PSR quantities are used only to determine the base offense level under § 2D1.1(c) (if it applies). The same goes for quantities recited in a plea agreement, not as an element, but for purposes of relevant conduct or factual basis.

Section 404(c)

- Two limitations:
  - "the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the [FSA]"
    - does not mean people who received retroactive guideline reductions in accordance with section 8 of the FSA
  - "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"
    - denial based on a legal error is not "on the merits"

- People who received a retroactive guideline reduction are eligible.
- People whose sentences were commuted by President Obama are eligible.

Section 404

- *Booker*, *Apprendi* and *Alleyne* apply.
- Section 3582(c)(2) and 1B1.10 do not apply.
- A lower guideline range is not required, including for career offenders.
- Other than any MM that may apply under sec. 2 of the FSA, Sec. 404(b) places no limit on the extent to which the court may reduce a sentence, and places no restriction on what a court may consider in imposing a reduced sentence.
- Envisions a "complete review of the motion on the merits." Sec. 404(c).
- Courts impose reduced sentences below the guideline range—whether it changed or not—in consideration of relevant factors, including the purposes of sentencing, 3553(a)(2), the need to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 3553(a)(6), post-sentencing conduct.

Section 404

Is it a "plenary" resentencing?

- Section 404 is a "resentencing," not a narrow adjustment as under 3582(c)(2).
- Courts apply *Booker*, *Apprendi*, *Alleyne*, and the 3553(a) factors regardless of whether it is called a "plenary" resentencing.
- A "plenary" resentencing might be defined to require application of non-retroactive changes in the guidelines, circuit law, or statutory law. *E.g., Rose*, 379 F.Supp.3d at 232.
- Courts often find it unnecessary to decide whether it is a "plenary" resentencing
- Courts routinely impose reduced sentences below the GLR based on what the sentence would be today – e.g., under the current career offender guideline, changes in circuit law regarding what counts as a COV, or changes in statutory law such as Sec. 401 -- to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 3553(a)(6).
- A court within the Second Circuit recently held that a Section 404 proceeding is a plenary resentencing. *See* Ruling at 9-12, *United States v. Medina*, No. 3:05-cr-00058 (D. Conn. July 17, 2019), ECF No. 1466

Section 404

Does the defendant have a right to be present?

- Rule 43(b)(4), entitled "Sentence Correction," provides that a defendant "need not be present" when "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." The advisory committee note states that Rule 43(b)(4) applies to "resentencing hearings conducted under" § 3582(c)(2) "as a result of retroactive changes to the Sentencing Guidelines by the United States Sentencing Commission," or § 3582(c)(1)(A) "as a result of a motion by the Bureau of Prisons to reduce a sentence based on 'extraordinary and compelling reasons.'" Fed. R. Crim. P. 43, Advisory Committee Note (1998).
- A Sec. 404 proceeding is not a § 3582(c)(2) or a § 3582(c)(1)(A) proceeding and requires the exercise of discretion. Nonetheless, courts have held that a defendant has no right to be present. Others have held that the defendant has a right to be present. Others have not decided but allowed the defendant to be present, and valued their presence to assist the court in exercising its discretion.
- *See United States v. Rose*, 379 F.Supp.3d 223, 233 n.7 (S.D.N.Y. May 24, 2019); *United States v. Powell*, 360 F. Supp. 3d 134, 135 (N.D. N.Y. 2019); Transcript at 2, 15, 22-28, *United States v. Leon*, No. 93-199 (D. Conn. May 20, 2019); Memorandum at 2, *United States v. Martinez,* No. 4-48 (S.D.N.Y. June 11, 2019); Resentencing Proceedings Transcript, *United States v. Potts*, No. 98-14010 (S.D. Fla. Apr. 26, 2019); *United States v. Payton, Rice*, 2019 WL 2775530 (E.D. Mich. July 2, 2019); Notice to Appear, *United States v. Rice*, No. 2:07-CR-20498-AJT-PJK (E.D. Mich. June 20, 2019), ECF No. 147; Notice to Appear, *United States v. Payton*, No. 2:07-CR-20498-AJT-PJK (E.D. Mich. June 20, 2019), ECF No. 146; Order, *United States v. Rhines*, No. 4:01-CR-00310-JEJ (M.D. Penn. May 31, 2019), ECF No. 355.
- Judge Robin Rosenberg, Op-Ed., *Prison for Life. He Turned Himself Around. So I Freed Him*, N.Y. Times, July 18, 2019.

Sec. 603: Reduction in Sentence for Extraordinary and Compelling Reasons, 18 USC 3582(c)(1)(A)

- Defendant can now make the motion once 30 days have passed since warden received such request.
- Judge may reduce the term of imprisonment if finds a reduction in sentence is "warranted"—
  - after considering the 3553(a) factors to the extent that they are applicable, and
  - if "consistent with" USSG p.s. 1B1.13, i.e., any of the following combinations of facts is present:
    - Terminal illness, defined in new 3582(d)(1) as "a disease or condition with an end-of-life trajectory"
    - Suffering from a serious medical or physical condition, from which not expected to recover, that substantially diminishes ability to provide self-care in a correctional environment
    - Suffering from a serious functional or cognitive impairment, from which not expected to recover, that substantially diminishes ability to provide self-care in a correctional environment
    - Experiencing deteriorating physical or mental health because of the aging process, from which not expected to recover, that substantially diminishes ability to provide self-care in a correctional environment
    - At least 65 years old, is experiencing serious deterioration in physical or mental health because of the aging process, and has served at least 10 years or 75% of term of imprisonment whichever is less
    - Death or incapacitation of caregiver of D's minor child or children
    - D would be the only available caregiver for incapacitated spouse or "registered partner"

Defines “other reasons” as “an extraordinary and compelling reason other than, or in combination with, the reasons described” above “as determined by” BOP. 1B1.13, note 1(D).

a) 70 or older, served 30 years or more

b) 65 or older

+ chronic or serious medical condition for which conventional treatment promises no substantial improvement

+ “deteriorating mental or physical health” related to the aging process that substantially diminishes ability to function in a correctional facility

+ has served 50% of sentence

c) 65 or older + served greater of 10 years or 75% of sentence imposed

BOP Prog. Stmt. 5050.50 ¶ 4 (1/17/19).

Resources

- Steve Sady and Liz Dailey, Compassionate Release Basics for Federal Defenders, https://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_REVISED_2templates.pdf

- Peter Goldberger, Criteria for Early Release Under the First Step Act, http://justiceadvocacygroupllc.com/wp-content/uploads/2019/07/Criteria-for-Early-Release-under-First-Step-Act-Goldberger-0611191.pdf

- Obtaining Medical Records from BOP – memo available to defense counsel from Liz_Daily@fd.org

Good time fix

- 54 days per year of sentence imposed

- Should go into effect July 19, 2019
  - DOJ says 3,000 will be released
  - says it has prioritized them for prerelease programming
  - and is coordinating with US Probation

- Retroactive

Risk Needs Assessments→Programming→Earned Time Credits for Some→Prerelease Custody for Some

- **Some** inmates to receive **10 days** earned time credits per month of participation in programming; 5 days **extra if classified low or minimum risk**

- **Transfer to prerelease custody** (RRC, home confinement, supervised release) if credits equal to remainder of term of imprisonment + minimum or low "risk" according to last 2 risk assessments, or warden grants petition to waive

- Can't transfer to supervised release unless minimum or low "risk" according to last reassessment, and not to exceed 12 months.

Implementation Problems

- Independent Review Committee – “shall” be established by 1/20/19
  - IRC experts to oversee development of risk assessment tool that accounts for “dynamic” factors, avoids racial disparities, ensures “evidence-based” programming for all
  - Critical independent oversight -- AG/BOP have dismantled programming since Jan. 2017
  - NIJ selected Hudson Institute as host organization 3 months after IRC supposed to be established; HI does not have statutorily required expertise, has publicly opposed reform; HI selected 6 members some of whom do not have statutorily required expertise
- By 7/19/19, AG and IRC “shall develop and release” the “system”
  - Public statements say will meet deadline
  - Insufficient opportunity for IRC participation, likely will be problems
- By 1/15/2020, initial risk assessment of all prisoners, begin to expand evidence-based programming. By 1/15/22, BOP “shall provide” evidence-based programming to all prisoners.
  - Meanwhile, programming remains inadequate.
- Prerelease custody, new good time credit, “shall take effect” 7/19/19
  - But programming remains inadequate.

Extensive Exclusions

- 68 categories *not* eligible to "receive" earned time credits -- even though they earn them by participating in programming -- based on instant offense. See 18 USC 3632(d)(4)(D).

- Warn excluded clients they will not receive time credits unless the law changes.

- For ideas, see Defense Handout.

Partial List of Exclusions

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.

Partial List of Exclusions

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)** but not **ACCA**
- 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