

The First Step Act

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“A journey of 1,000 miles
begins with the first step.”
Steven L. Barth, 1992.

Sentencing Reform: ✓

Prison Reform: ✓

Other Stuff: ✓



Sentencing Reform: What does the FSA do?

- Reduces minimum mandatory penalties (for recidivist offenders only ☹️) (§ 401). 😊
- Both narrows and expands the pool of those eligible for recidivist minimum mandatory penalties (§ 401). 😊
- Expands the pool of defendants eligible for safety valve (§ 402). 😊
- Eliminates the pernicious practice of “stacking” (§ 403). 😊
- Makes the Fair Sentencing Act of 2010 retroactive (§ 404). 😊

Reduced Min/Mans for Recidivists (§ 401)

- 841(b)(1)(A)'s recidivist enhancement reduced from **20 to 15 years**.
 - Same for 21 U.S.C. 960(b) (Controlled Substances Import/Export Act)
- 841(b)(1)(A)'s 2-priors recidivist enhancement reduced from mandatory **life to 25 years**.
- No change in recidivist min/mans for (b)(1)(B) cases. ☹️
- No change in non-recidivist min/mans in (b)(1)(A) and (b)(1)(B). ☹️
- No change in death-resulting min/mans.
- No change in drug weight and quantity required to trigger (b)(1)(A) and (b)(1)(B). ☹️

Who is at risk for the 851 enhancement now?

- **THEN**: Recidivist enhancements used to apply whenever a defendant had a prior drug felony and the gov't filed an information per 21 USC 851.
- **NOW**: a mere drug felony is not enough not qualify. Must be a "Serious Drug Felony." 😊
- **THEN**: Crimes of violence used to play no role in 851 enhancements.
- **NOW**: certain "Serious Drug Felonies" do qualify. 😞
 - More closely tracks the ACCA and Three Strikes Law.

What is a “Serious Drug Felony?”

- Any offense described in § 924(e)(2):
 - Any offense under the Controlled Substances & Import/Export Acts (max penalty 10 years or more).
 - Any state offense for manufacturing, distribution, possession w/ intent (max penalty 10 years or more).
 - (MERE POSSESSION DOES NOT QUALIFY AS AN SDF!) 😊😊
- **PLUS:** Offender must have served a term of imprisonment of more than 12 months.
- **PLUS:** The defendant must have been released within 15 years of the commencement of the instant offense.

Serious Drug Felony Checklist

- Was the prior a trafficking offense: importation, distribution, manufacturing (and inchoate versions of those offenses)?
 - Anticipate that such a determination will require a categorical analysis.
- Was the prior's maximum penalty at least 10 years?
- Did your client serve more than 12 months in prison?
- Was your client released from imprisonment more than fifteen years before the commencement of the instant offense?



What is a “Serious Violent Felony?”

Part 1: § 3559(c)(2)(F)(i)—The Enumerated Clause

- (1) Murder,
- (2) Manslaughter (not involuntary)
- (3) Assault with Intent to Commit Murder
- (4) Assault With Intent to Commit Rape,
- (5) Aggravated Sexual Abuse (§ 2241)
- (6) Sexual Abuse (§ 2242)
- (7) Abusive Sexual Contact (§ 2242(a)(1) and (2))
- (8) Kidnapping
- (9) Aircraft Piracy (49 USC § 46502)
- (10) Robbery (§§ 2111, 2113, and 2118); **BUT see § 3559(c)(3)(a)**
- (11) Carjacking
- (12) Extortion
- (13) arson; **BUT see § 3559(c)(3)(B)**
- (14) Firearms Use or Firearms Possession **as defined in § 924(c)**
- Applies to Fed and State and inchoate offenses (conspiracy, attempt, solicit)

What is a “Serious Violent Felony?”

Part 2: § 3559(c)(2)(F)(ii)—the Force Clause

- Any other offense (punishable by 10 or more years) 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 commission of the offense.
 - A residual force clause? Constitutional after *Johnson*? Probably (but worth litigating). Compare *Deida v. U.S.*, 2017WL2661622 (D. Ct. 2017) (relying on *U.S. v. Hill*, 832 F.3d 135 (2d Cir. 2016) (analyzing similarly worded 924(c)(3)(B) and finding it not unconstitutionally vague) with *Haynes v. U.S.*, 237 F.Supp.3d 816 (C.D. Il. 2017) (finding § 3559(c)(2)(F)(ii)’s residual force clause unconstitutionally vague); but see *U.S. v. Barrett*, 903 F.3d 166 (2d Cir. 2016) ((924(c)(3)(B) not unconstitutionally vague because jury conducts factfinding as to the risk of force made by trial jury) (CIRCUIT SPLIT!!)
- **NOTE**: Like SDF, SVF requires the defendant to have served more than 12 months in prison.
- **BUT**: There is NO 15 year sunset provision.



Section 401 is not retroactive ☹️



- Only applies to offenses committed before the date the FSA was enacted if a sentence has not yet been imposed.



Yay! Broadening Safety-Valve (§ 402)

- Prior law: defendant could pierce the minimum mandatory in drug offenses if he/she met 5 criteria laid out in § 3553(f).
- Prior law: §3553(f)(1)—safety-valve unavailable to those with more than 1 crim. hist. point.
- FSA: changes § 3553(f)(1)—now, you are ineligible only if: (1) you have MORE than 4 crim. hist. points (excluding 1-pointers!!!); (2) a 3-pointer; or (3) a two-point violent offense (per § 16 (force and risk of force clauses)).
- Potentially Safety-Valve eligible with 7 points!
- And information disclosed in a debrief CANNOT be used to enhance the defendant's sentence (unless the info relates to a violent offense).



§ 402 is NOT Retroactive ☹️

- **NOT retroactive.** ☹️ Applies only to convictions entered on or after FSA enactment.

§ 403: NO MORE 924(c) STACKING!!! 😊



- Old Law: per 924(c) “in the case of a second or subsequent conviction under this section, the person shall be sentenced” to not less than 25 years (or life if the firearm is a machinegun).
- In *Deal v. U.S.*, 508 U.S. 129 (1993), Court held that the language did not require the prior conviction to have become final—leaving the prosecution able to stack multiple 924(c)’s in a single indictment; *i.e.*, life in prison.
- FSA: requires the prior conviction to have become final—thus, no stacking.
- NOT RETROACTIVE. F😞😞😞😞!!! Will apply to any offense committed before FSA enactment but only if a sentence has not yet been imposed.

§ 404: The Fair Sentencing Act is now RETROACTIVE.

- About 9 years too late.



Who might benefit?

- Convicted of a crack-cocaine offense committed before August 3, 2010;
- Sentenced under, or enhanced by, pre-Fair Sentencing Act (100:1) penalties
- Still serving a sentence (including *supervised release*) that is not already fully in accordance with the FSA

Rack your brain!



Who are we looking for?

- ***Anyone*** with a pre-Fair Sentencing Act involving crack cocaine
 - Who is still in custody or *on supervised release*
 - Was subject to a 100:1 statutory penalty or had sentence enhanced by the 100:1 penalty under the Guidelines/career offender



PRISON REFORM?



- Increases good time credits from 47 days per 12 months to 54 days per 12 months.
- Creates a “Risk and Needs Assessment System” or “System.”
- The System increases availability of Evidence-Based Recidivism Reduction Programs and Productive Activities
- The System incentivizes participation in the System.
- The System (appears) to be in addition to—not in place of--§ 3624(c).
- Re-starts and greatly expands the elderly prisoner release program that was part of the Second Chance Act.

Finally: 54 Days of Credit per Year!

- 3624(b) provided for up to 54 days of credit per year in custody.
- BOP interpreted this literally to mean you earn them gradually until after 365 days you've earned 54 days of good time credit.
- NOT that you received 54 days of good time credit per year of the imposed sentence..
- FSA fixes this problem created by the incarceration friendly interpretation of the BOP.

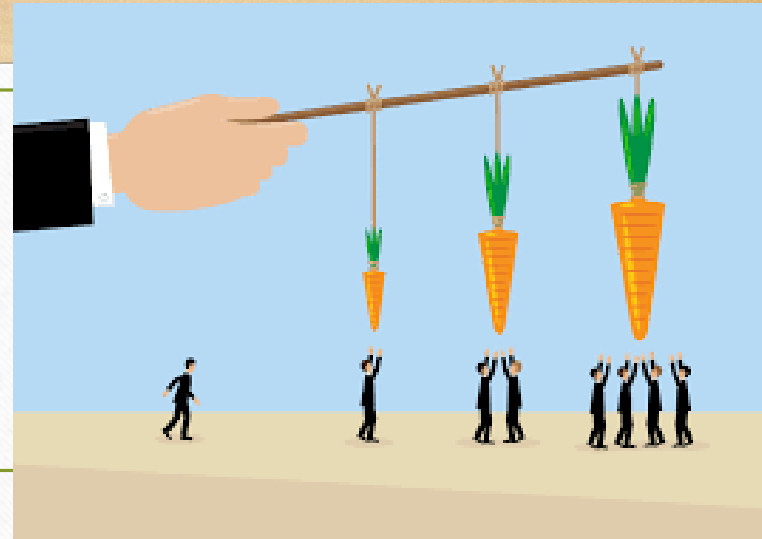




The System

- Within 210 days of enactment, the AG, in consultation with the “Independent Review Committee,” shall develop and release publicly . . . THE SYSTEM.
- The System will classify each prisoner by Risk at intake (min, low, medium, high).
- Determine what EBRRP is appropriate for each prisoner.
- Periodically Reassess and Reassign the prisoner.
- Provide Incentives to participate.

The Incentives



- Phone/Video Conference privileges of up to 30 minutes/day or 510 per month.
- Priority for transfer to facility closer to home.
- And . . . The BOP is directed to develop additional polices to provide incentives including not less than two of the following:
 - Increased commissary spending limits and product offerings.
 - Extended email access.
 - Consideration for transfer to preferred housing units (including facilities).
 - Other incentives solicited from prisoners and determined appropriate.



TIME CREDITS

- Successful completion of EBRRP or PA “SHALL” earn the participant time credits toward pre-release custody or Supervised Release.
 - 10 days of credits for every 30 days of successful participation.
 - 15 days of credits for every 30 days for those in min or low risk levels who have not increased risk level over past two assessment periods.
- Pre-release custody = RRC Placement and/or Home Confinement (with location monitoring).
- Supervised Release = Supervised Release per the Judge’s J & C.



Pre-Release Custody in the System

- **Pre-FSA**: pre-release custody was available to all prisoners per § 3624(c).
 - Up to 12 months in pre-release custody—RRC or home confinement.
 - No more than the shorter of 6 months or 10% of the term of imprisonment.
- **In the System**: No cap on PRC and early Supervised Release available!
 - Home Confinement Eligible System participants may be transferred to HC with location monitoring but must stay on HC until 85% of sentence imposed is served (unless, the restrictions are downgraded or they violate).
 - RRC: Eligible System participants may be transferred to an RRC.
 - Supervised Release: Eligible System participants may be transferred to SR up to 12 months early.

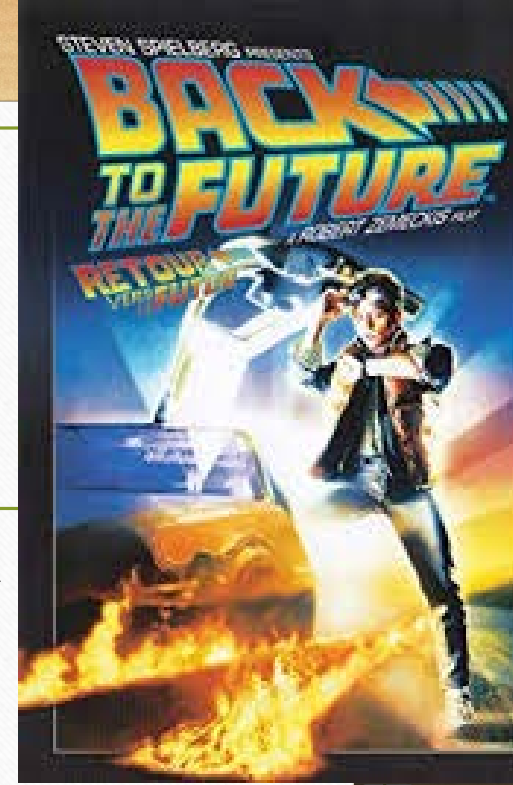
Who is Eligible for PRC and/or SR?



- Participants who have earned time credits in the System in an amount equal to their remaining term of imprisonment.
- Who have shown demonstrated risk reduction or maintained low risk levels.
- Remainder of time has been computed under applicable law.
- **And** with PRC: is minimum or low risk over last 2 assessments OR had a PRC petition approved by the warden who determines no PRC poses danger and the prisoner has made good faith efforts.
- **And** with SR: minimum or low risk over last assessment period.

Who is eligible for Time Credits?

- Prisoners are eligible to earn time credits so long as they successfully complete EBRRP or PA.
- Ineligible to earn TC prior to enactment of FSA.
- Ineligible to earn TC prior to commencement of sentence per §3585(a); *i.e.*, no credit in pre-trial custody.
- Ineligible to apply TC if participant is subject to a final order of removal.
- Ineligible to earn TC if convicted of certain offense:



What CONVICTIONS render you ineligible to earn Time Credits? There are lxxviii of them! ☹️



- Assaulting Feds w/ weapons (§ 111(b)).
- Domestic Assault (§ 117).
- Bio or chemical weapons offenses.
- Escape (§ 751).
- Distribution of explosives/destructive devices.
- Arson (§ 844(i)).
- Threats against presidents. (§ 871, 879).
- Homicide (except manslaughter) and Kidnapping.
- Bank Robbery resulting in death (§ 2113(e)).
- Robberies/Burglaries of controlled substances resulting in assault/jeopardy (§ 2118(c)).
- Fraud with Computers (§ 1030(a)(1)).
- Carjacking (§ 2119).
- Terrorism, torture, and slavery
- Recruitment of child soldiers.
- Most of the crimes in the Atomic Energy Act.
- Any offense described in 3559(c)(2)(F) if the offender has a previous
- And, of course, TREASON.

Disqualifying Convictions Common to the District of VT



- Unlawful use of firearm. (§ 924(c)).
- Failure to Register as an SO (§ 2250).
- Any Chapter 109A Offense related to sexual abuse (§§ 2241 – 2245).
- Convictions related to the sexual exploitation of children (§§ 2251, 2251A, 2252, 2252A, and 2260).
- Illegal Re-Entry Cases (8 U.S.C. §§ 1326, 1327, and 1328).
- Any 21 U.S.C. § 841(b)(1) resulting in death or serious bodily injury.
- § 841(b)(1)(A)(i) or (B)(i) (**heroin**: 5 or 10 year mins and Court finds defendant organizer/leader/supervisor/manager).
- § 841(b)(1)(A)(vi) or (B)(vi) (**fentanyl**: 5/10 year mins and organizer/leader)
- § 841(b)(1)(A)(viii) or (B)(viii) (**meth**: 5/10 year mins and organizer leader).
- Any § 841(b)(1)(A) or (B) offense (5/10 year mins) if Court finds offense involved **fentanyl** and organizer/leader.



Implementing the System

- Within 180 days of the AG's release of the System:
 - Each prisoner shall have an initial intake "risk and needs assessment."
 - Expand the effective EBRRP and PA it offers.
 - Implement the other risk and needs assessment tools necessary to implement the system over time.
- Two-Year Phase-In:
 - Provide EBRRP and PA to each inmate within 2 years after the 180 initial "risk and needs assessment."
 - Priority given to inmates based on release dates.
 - As of the date of enactment of this section (probably the 210 System development period) BOP may expand EBRRP and PA based on already existing programs.
- Time Limits in 3624(a) and (b) not applicable to System Participation.
- BOP to ensure that there is sufficient pre-release capacity for all eligible prisoners.

Odds and Ends: § 602—Home Confinement for Low Risk Offenders



- Amends 3624(c)(2) such that “the BOP shall, to the extent practicable . . . place prisoners with lower risk levels and lower needs on home confinement for the MAXIMUM amount of time permitted under this paragraph.”
- Remember: 3624(c)(2) directs that a prisoner is eligible for up to the shorter of 6 months or 10% of their term of imprisonment.
- Halfway House and Home Confinement available to inmates not eligible for time credits.
 - This amendment, together with 3624(g)(10) (providing that the time limits of 3624(a) and (b) are inapplicable to System participation and 3632(d)(6) (providing the incentives under the System “shall be in addition to any other rewards or incentives for which a prisoner may be eligible”), strongly suggest that the System is in addition to, as opposed to in place of, pre-FSA, pre-release custody.

§ 603: Prisoner Re-Entry Initiative (Home Confinement for the Elderly and Terminally Ill)

- Reenacts the Second Chance pilot program that was enacted at a single BOP facility for the years 2009 – 2010. 34 USC § 60541.
- Now: ALL BOP facilities from 2019 – 2023.
- Inmates sent to home confinement to serve out the remainder their sentence if:
 - 60 years old.
 - No history of violence, sex offenses, terrorism, espionage or escape.
 - Served 2/3 of their sentence!
 - 33% reduction.



Elderly Release Details

- Not convicted of (1) a crime of violence per §16; (2) sex offense per 34 USC § 209115 (Adam Walsh Act via Amie Zyla expansion); (3) §2332b(g)(5)(B) (related to acts of terrorism); or (4) offenses under Chapter 37 (espionage and censorship).
- Not previously convicted of such a crime in Federal or State courts.
- Determined by BOP not to have a history of violence or sex offenses.
- Never attempted to escape from a BOP Facility.
- Will save the BOP money by transferring to home confinement.
- Not a risk of endangering the public.
- Have served 2/3 of their sentence.

Terminally Ill Home Confinement Placement

- Similar to Elderly placement (no: crimes of violence, sex offense, danger to community etc.).
- Difference:
 - No age floor.
 - No requirement that 2/3 of sentence be served.
 - Approved by a BOP medical doctor to be (1) in need of care at a nursing home or (2) terminally ill.

How Good is the FSA?

