

First Impressions of The First Step Act

David Patton

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Federal Defender/CJA CLE

The First Step Act

- Prison Reform
- Sentencing Reform

The First Step Act

- Prison Reform
 - Good Time Adjustment
 - Risk & Needs Assessment Scoring System
 - Credits System (with many exclusions)
 - Compassionate Release Expansion
 - Miscellaneous

Good Time Adjustment

- Amends 18 U.S.C. 3624
 - “Up to 54 days for each year of the prisoner’s sentence imposed by the court” and “credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment”
 - Supersedes BOP’s previous interpretation as upheld by SCOTUS in *Barber v. Thomas*.
 - Thus, 10 year sentence = 540 days off (not 470)
- BUT, not immediately bc of drafting error

Risk & Needs Assessment Scoring

- The AG shall “develop and release” a risk assessment system for all BOP prisoners.
- Will be central to all aspects of programming and early release credits (not including good time)
- Will classify all prisoners as minimum, low, medium, or high risk

Risk & Needs Assessment Scoring

- Presumably similar to existing systems
 - e.g., the PCRA
 - https://www.uscourts.gov/sites/default/files/overview_of_the_post_conviction_risk_assessment_0.pdf
 - Static and dynamic factors: Criminal History, Employment, Education, Social Ties, Substance Abuse...
- Big Questions and Potential Problems
 - Possible to validate for institutional setting?
 - Racial disparity (as with existing systems)?
 - Fairness of an actuarial system determining sentence?

Risk & Needs Assessment Scoring

- Will not happen immediately:
 - 210 days after enactment, AG shall release publicly
 - 180 days after public release, begin implementation by assessing all prisoners
 - 2 years after all prisoners have been assessed, provide programs for all prisoners and validate assessment tool
 - ?? time to apply scores and calculate credits

Risk & Needs Assessment Scoring

- Scores will be used in a variety of ways:
 - Determine programming and activities for all inmates
 - Priority to high and medium risk for “recidivism reduction programs”
 - Priority to low and minimum to “productive activities”
 - “Shall provide incentives and rewards” to participate in programs and activities:
 - E.g., additional phone and visitation privileges, transfer closer to home, increased commissary limits, increased email time, transfer to preferred housing units...

Credit System

- Some inmates may earn credits toward “prerelease custody” or supervised release
 - If eligible, 10 days credit per 30 days of successful participation in programming/activities
 - 15 days credit per 30, if “low or minimum” risk + no increased risk over two consecutive assessments
 - Programs already completed before system is implemented do not count

Credit System

- “Prerelease custody” = RRC or Home Confinement
- May use credits for prerelease if:
 - Credits = remainder of term of imprisonment +
 - “Demonstrated recidivism risk reduction” or “maintained a minimum or low” risk score +
 - Minimum or low last two assessments or warden approves

Credit System

- May use credits for supervised release if:
 - SR was part of sentence
 - Credits = remainder of term of imprisonment +
 - “Demonstrated recidivism risk reduction” or “maintained a minimum or low” risk score +
 - Minimum or low last assessment (with no possible warden override)
 - Max of 12 months (counts toward SR term)

Credit System

- Who is ineligible for early release credits?
 - roughly 70 categories of inmates based on their offense of conviction (excludes about 40% of the BOP prison population)
 - Anyone subject to a final order of removal (the Act also requires prompt removal proceedings for any non-citizen who tries to apply credits)

Credit System

- Sampling of Excludable Offenses
 - Certain Drug Offenses:
 - Death resulting
 - Any fentanyl conviction under (b)(1)(A) or (B)
 - Heroin or Meth if (b)(1)(A) or (B) and O,L, M, or S
 - Any drug conviction under (b)(1)(A) or (B) if a detectable amount of fentanyl and O,L, M, or S
 - THUS, Be careful with plea agreements and PSRs!

Credit System

- Sampling of Excludable Offenses
 - 924 (c)
 - Immigration -- Reentry 1326(b)(1) or (2)
 - Nearly all sex and child porn offenses, including SORNA
 - Kidnapping, robberies and burglaries involving drugs, bank robbery resulting in death, all carjacking
 - Offenses subject to gangs provision of 18 U.S.C. 521
 - Many others ...

Compassionate Release Expansion

- Amends two provisions
 - 34 U.S.C. 60541 which covers possible early release to home detention (at AG's discretion)
 - 18 U.S.C. 3582 which allows for a sentence reduction (now upon a prisoner's motion)

Compassionate Release Expansion

- 34 U.S.C. 60541 early release to home detention at AG's discretion
 - Amends 34 U.S.C. 60541 to include both elderly and terminally ill for possible home detention.
 - Reduces age floor to 60 and amount of time served from 75% to 2/3.
 - Excludes certain offenses, including crimes of violence and sex offenses
 - Permits the prisoner to petition AG

Compassionate Release Expansion

- 18 U.S.C. 3582 Sentence Reduction
 - “extraordinary and compelling reasons” or 70 years old + 30 years + not a danger
 - USSC 1B1.13 sets forth categories of “extraordinary and compelling” (via 28 U.S.C. 994t)
 - Medical
 - Age: 65+serious deterioration+10 years/75%
 - Family circumstance (child’s caregiver incapacitated)
 - Other BOP reasons

Compassionate Release Expansion

- 18 U.S.C. 3582 Sentence Reduction
 - New: Allows for prisoner to petition to Court for a reduction if exhausted BOP remedies
 - New: Adds a definition for “terminal illness” and requires that BOP notify prisoner/family/attorney of illness and sentencing reduction procedure
- This is big! Opens a whole new avenue for relief. See separate handout.

Miscellaneous Prison Reforms

- Home Confinement for Low Risk Prisoners “for the maximum amount of time permitted”
- No restraints for pregnant prisoners
- Additional funding for programs/activities
- Variety of required reports from BOP and GAO
- Evidence-based opioid treatment, including medication-assisted
- Free tampons and sanitary napkins
- No juvenile solitary confinement

The First Step Act

- Sentencing Reform
 - Safety Valve Expansion
 - 851 Narrowing and Expansion
 - 924c Narrowing
 - FSA/Crack Retroactivity

Safety Valve Expansion

- Criminal History Changes
 - No More than 4 points, excluding 1-pointers
 - Cannot have a prior 3-pointer
 - Cannot have a prior 2-point “violent offense” (uses 18 U.S.C. 16 definition of a crime of violence)
 - Thus, e.g., may have two drug crime 2-pointers, plus an infinite number of 1-pointers and still qualify
- Info disclosed in safety valve proffer may not be used to enhance a sentence unless violent
- Applies to maritime cases

Safety Valve Expansion

- Litigation Notes
 - How do the 2 points for being “under a criminal justice sentence” (probation, parole...)
 - According to the USSC, 2-points for “status” doesn’t count toward 4 point max if the 2 points result from a one-point offense, but do if 2 points are for a two or three-point offense.
 - A one-point offense, or a 2-point non-violent are still one and two-point offenses even if defendant receives status points for them.

Safety Valve Expansion

- Litigation Notes
 - Only applies to convictions after enactment
 - For cases pre-sentence/post-conviction, move to withdraw plea – *see, e.g., Traversa*
 - Does not amend the Guidelines – move separately for 2-point reduction either under the Guidelines or 18 U.S.C. 3553(a)
 - Remember *Johnson/Dimaya* arguments regarding “crimes of violence”

851 “Prior Felony” : Narrowing

- The Good news...
- Reduces mandatory minimums from 20 to 15 (for one prior) and life to 25 (for two priors)
- Narrows definition of prior drug offense to “serious drug felony”
 - ACCA definition of serious drug felony (924e) +
 - Served more than 12 months +
 - Released within 15 years of current offense

851 “Prior Felony”: Expansion

- The Bad news...
- Adds a new predicate: “serious violent felony”
 - Definition in 3559(c)(2), or any offense that “would be a felony” violation of 18 USC 113 if committed in federal or maritime jurisdiction
 - Actually served more than 12 months
 - No staleness limit

851 “Prior Felony”

- Litigation Notes
 - The Good applies to anyone not yet sentenced
 - The Bad only to offenses committed after Act – *ex post facto*
 - Whole body of case law re 3559 “serious violent felony” + *Johnson* issues
 - Lots of ways to attack 851s (see separate handout)

924c

- Requires a prior final conviction before the truly draconian stacked 25 years or life under 924(c)(1)(c).
- Does not otherwise fix stacking
 - E.g., two gunpoint robberies back to back and charged in same indictment = $7 + 7 = 14$ (but not $7 + 25 = 32$ as before)

FSA Crack Retroactivity

- Fair Sentencing Act of 2010 is made retroactive
- Does not apply 3582(c) or 1B1.10 – instead provides its own procedure
- Let us know if you know of anyone potentially eligible