

## INSIGHT: The First Step Act of 2018— A Significant First Step in Sentencing Reform

By Alan Ellis and Mark Allenbaugh

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*Federal criminal sentencing experts Alan Ellis and Mark Allenbaugh dissect the First Step Act of 2018, a new bipartisan federal prison reform law. In Part 1 of a three-part series, the authors focus on: the significant expansion of the “safety valve;” the reduction of mandatory minimum penalties for second and third-strike offenders; the elimination of a particular draconian form of “stacking”; and making the Fair Sentencing Act of 2010 retroactive. The authors warn the immediate impact of the changes may be minimal, given that some are not retroactive.*

The First Step Act of 2018 (the Act) has been heralded as “the most far-reaching overhaul of the criminal justice system in a generation.”

The Act represents a dramatically different and enlightened approach to fighting crime that is focused on rehabilitation, reintegration, and sentencing reduction, rather than the tough-on-crime, lock-them-up rhetoric of the past.

While not containing many reforms urged by criminal justice experts, including these authors, what is overwhelmingly clear from the legislation is that Congress recognizes not just the importance of data analysis in reducing recidivism (that will be addressed in subsequent articles), but also recognizes that long prison sentences really ought to be reserved only for the more dangerous offenders.

### **Title IV: Sentencing Reform & Mandatory Minimum Penalties**

#### *1. Broadening the Scope of the Safety Valve*

Perhaps the Act’s most far-reaching change to sentencing law is its expansion of the application of the Safety Valve—the provision of law that reduces a defendant’s offense level by two and allows judges to disregard an otherwise applicable mandatory minimum penalty if the defendant meets certain criteria. It is aimed at providing qualifying low-level, non-violent drug offenders a means of avoiding an otherwise draconian penalty. In fiscal year 2017, nearly one-third of all drug offenders were found eligible for the Safety Valve.

Until the Act, one of the criteria for the Safety Valve was that a defendant could not have more than a single criminal history point. This generally meant that a defendant with as little as a single prior misdemeanor conviction that resulted in a sentence of more than 60 days was precluded from receiving the Safety Valve.

Section 402 of the Act relaxes the criminal history point criterion to allow a defendant to have up to four criminal history points and still be eligible for the Safety Valve (provided all other criteria are met). Now, even a prior felony conviction would not per se render a defendant ineligible from receiving the Safety Valve so long as the prior felony did not result in a sentence of more than 13 months’ imprisonment.

Importantly, for purposes of the Safety Valve, prior sentences of 60 days or less, which generally result in one criminal history point, are never counted. However, any prior sentences of more than 13 months, or more than 60 days in the case of a violent offense, precludes application of the Safety Valve regardless of whether the criminal history points exceed four.

These changes to the Safety Valve criteria are *not* retroactive in any way, and only apply to convictions entered on or after the enactment of the Act. Despite this, it still is estimated that these changes to the Safety Valve will impact over 2,000 offenders annually.

#### *2. Reduction and Restriction of Mandatory Minimum Penalties for Recidivists*

Currently, defendants convicted of certain drug felonies are subject to a mandatory minimum 20 years’ imprisonment if they previously were convicted of a single drug felony. If they have two or more prior drug felonies, then the mandatory minimum becomes life imprisonment. Section 401 of the Act reduces these mandatory minimums to 15 years and 25 years respectively.

Section 401 expands the prior predicates to include serious violent felonies but limits any predicate offenses to either serious drug felonies or serious violent felonies. Furthermore, to qualify as a predicate, the defendant must have received more than 12 months’ imprisonment, and, with respect to drug offenses only, the sentence must have ended within 15 years of the commencement of the instant offense.

These amendments apply to any pending cases, except if sentencing already has occurred. Thus, they are not fully retroactive. Had they been made fully retroactive, it is estimated they would have reduced the sentences of just over 3,000 inmates. As it stands, these reduced mandatory minima are estimated to impact only 56 offenders annually.

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### 3. Eliminating 924(c) Stacking

Section 403 of the Act eliminates the so-called “stacking” of 18 U.S.C. § 924(c)(1)(A) penalties. Section 924(c) provides for various mandatory *consecutive* penalties for the possession, use, or discharge of a firearm during the commission of a felony violent or drug offense. However, for a “second or subsequent conviction” of 924(c), the mandatory consecutive penalty increases to 25 years.

Occasionally, the Government charges a defendant with multiple counts of 924(c), which results in each count being sentenced consecutive to each other as well as to the underlying predicate offense. For example, a defendant is charged with two counts of drug trafficking and two counts of 18 U.S.C. § 924(c)(1)(A)(i), which requires a consecutive 5 years’ imprisonment to the underlying offense for mere possession of a firearm during the commission of the drug offense. At sentencing, the Court imposes 40 months for the drug trafficking offenses. As a result of the first § 924(c)(1)(A)(i) conviction, the Court must impose a consecutive 60 months (5 years). But what about the second § 924(c)(1)(A)(i) conviction? In such situations, courts have been treating the second count as a “second or subsequent conviction.” As such, the 60-month consecutive sentence becomes a 300 month (25 years) consecutive sentence. In our hypothetical, then, the sentencing court would impose a total sentence of 400 months (40+60+300) inasmuch as the second 924(c) count was a “second or subsequent conviction.”

Now, under the Act, to avoid such an absurd and draconian result, Congress has clarified that the 25-year mandatory consecutive penalty only applies “after a prior conviction under this subsection has become final.” Thus, the enhanced mandatory consecutive penalty no longer can be applied to multiple counts of 924(c) violations.

This amendment is applicable only to pending cases and is not fully retroactive to cases where a sentence already has been imposed by the date of the enactment of the Act. Had this change been made fully retroactive, it is estimated it would have impacted 731 offenders. As it is, this change to the law will only impact an estimated 57 offenders annually.

### 4. Making the Fair Sentencing Act of 2010 Fully Retroactive

Finally, Section 404 of the Act makes the changes brought about by the Fair Sentencing Act of 2010 fully retroactive. As the U.S. Sentencing Commission’s “2015 Report to Congress: Impact of the Fair Sentencing Act of 2010,” explained: “*The Fair Sentencing*

*Act of 2010 (FSA), enacted August 3, 2010, reduced the statutory penalties for crack cocaine offenses to produce an 18-to-1 crack-to-powder drug quantity ratio. The FSA eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased statutory fines. It also directed the Commission to amend the U.S. Sentencing Guidelines to account for specified aggravating and mitigating circumstances in drug trafficking offenses involving any drug type.*”

While the Act now makes the FSA fully retroactive, those prisoners who already have sought a reduction under the FSA and either received one, or their application was otherwise adjudicated on the merits, are not eligible for a second bite at the apple. It is estimated that full retroactive application of the FSA will impact 2,660 offenders.

### Conclusion

The tough-on-crime/War on Drugs rhetoric that largely contributed to the incarceration crisis in this country appears to finally be turning a corner.

Reducing the severity and frequency of some draconian mandatory minimum penalties, increasing the applicability of the safety valve, and giving full retroactive effect to the FSA signals a more sane approach to sentencing, which will help address prison overpopulation, while ensuring scarce prison space is reserved only for the more dangerous offenders.

While there certainly is more that can and should be done in terms of criminal justice reform, the Act is a significant step in the right direction.

### About the Authors

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