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## THE FIRST STEP ACT . . . ONE YEAR LATER: ANALYZING THE FIVE PROVISIONS THAT IMPACT INMATES DIRECTLY

Passed with strong bipartisan support, the *First Step Act's* chief goals were to (1) *lower the federal prison population* through strategies designed to transition inmates back into their communities; and (2) *reduce the sentences of newly convicted individuals* who are entering the federal prison system.

Having experienced the Act in action for the last year, we will take this anniversary as an opportunity to discuss how well it has been implemented so far. Specifically, this article will focus on goal number (1) above. We will talk about what the First Step Act means for inmates. Indeed, of all the portions of the First Step Act, only about five of them impact inmates directly. Let's now take a closer look at those five provisions.

### A NEW RISK AND NEEDS ASSESSMENT TOOL CALLED PATTERN

A significant part of the First Step Act involves enhancing our understanding of each person in federal prison system – as an individual and not just a number. In that vein, the First Step Act mandates that the Bureau of Prisons (BOP) identify the specific needs of each inmate, and specific risks each inmate poses.

The individualized understanding of each inmate's needs and risks will naturally allow for a mechanism to provide support for specific needs, and identify those low-risk inmates who may be eligible for early release or a sentence reduction, as well as pre-release custody, recidivism reduction, and job placement programs.

The BOP's answer to this mandate was to create the risk and needs assessment tool, titled the Prisoner Assessment Tool Targeting Estimated Risk and Needs, or "PATTERN," for short. The creation of PATTERN was announced in July 2019.

PATTERN is, in essence, a predictive tool designed to predict the likelihood of general and violent recidivism for all inmates. PATTERN contains certain *static* risk factors, such as age and offense committed; and *dynamic factors*, such as participation or lack of participation in education and drug treatment programs.

Interestingly, PATTERN was created specifically for the *federal* prison population, and those who created it state that it “achieves a higher level of predictability and surpasses what is commonly found for risk and needs assessment tools for correctional populations in the U.S.”

Given that PATTERN was only announced about six months ago, it is too soon to assess its effectiveness. That said, the announcement for the assessment tool promises a great deal.

## **§ 924C AND § 851 REFORM**

Title IV of the First Step Act is where you can find the Act’s *sentencing reform* provisions. Two specific reforms include:

- The reduction of the severity of “stacking” multiple § 924c offenses; and
- The changes to the section § 851 enhancements for repeat offenders.

With regard to § 924c, the rule prior to the First Step Act was that when multiple counts of a § 924c offense were in the same indictment, a defendant would be subject to a mandatory minimum of five years on the first count, and 25 years on each additional count. Thus, if a person was convicted of three counts under § 924c, he or she would receive a mandatory minimum sentence of *55 years* (5+25+25).

The First Step Act, however, changes that 25-year “subsequent count” number to *five years*. Accordingly, after passage of the First Step Act, a person convicted of three counts under § 924c would receive a mandatory 15 years (5+5+5), rather than 55.

As for the § 851 enhancements for repeat offenders, § 851 imposes higher mandatory minimum penalties if a defendant has a prior conviction for a “serious drug felony” or for a “serious violent felony.” The First Step Act, however, not only reduces the applicable mandatory minimums, but changes the conditions under which the minimums apply.

The applicable “serious” prior felony must be a crime for which a defendant served at least 12 months, and occurred less than 15 years ago. Further, to be “serious” the offense must be punishable by a term of 10 years or more. The changes greatly reduce the applicability of high mandatory minimums for most defendants.

## **RETROACTIVE APPLICATION OF THE FAIR SENTENCING ACT OF 2010**

Back when the “war on drugs” was in full swing, stricter penalties applied to crack cocaine compared to powder cocaine. The difference in treatment between the two forms of cocaine had the effect of imposing longer sentences on African-American defendants compared to defendants of other races.

In 2010, the sentencing disparity between powder and crack cocaine offenses was only partially rectified through the Fair Sentencing Act. The law generally required that sentences for powder and crack cocaine offenses be the same, yet the law only applied to offenders who were sentenced *after* August 3, 2010. That meant that anyone sentenced

before that date had to continue to live with the inherent unfairness of disparate sentences between crack and powder cocaine.

The First Step Act removed that unfairness. It mandates that the Fair Sentencing Act apply *retroactively*. As of mid-2019, this change has resulted in sentence reductions for **1,987 inmates** who previously could not take advantage of the Fair Sentencing Act.

## COMPASSIONATE RELEASE REFORM

The First Step Act made one major change to the Compassionate Release Program administered by the BOP – a federal inmate may now file a motion for a Reduction in Sentence ***directly with the court*** after the Bureau of Prisons denies their request or no action is taken within 30 days. That marks a major change given that prior to the First Step Act, the Compassionate Release process often began and ended with the BOP, or even with the Warden in the facility in which an inmate resided.

The Compassionate Release Program was designed to allow for the release of a federal prisoner in extraordinary circumstances involving an inmate’s health or the health of an inmate’s loved ones. However, some courts have expanded the meaning of extraordinary and compelling circumstances. We are evaluating other places where this law might extend to. If you believe that your loved one can seek relief using this please reach out to our office.

An inmate asked what the procedure for seeking relief under this provision now looked like. An inmate seeking relief under this law should reach out to the Bureau of Prisons explaining their “extraordinary and compelling circumstances” warrant release. For “belt and suspender” purposes, they can include why they are “not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)”; and why the factors in 18 U.S.C. § 3553(a) warrant release, but I do not think that those are explicitly required at this time. The inmate should document and preserve how and when they sent this request to the Bureau of Prisons and keep paper copies of those records so that they can send the same to the court if the Bureau of Prisons does not respond within thirty days. After thirty days without a response or after a denial by the Bureau of Prisons, the inmate can file a petition in the district where they were sentenced. Under the statute, there is no requirement for the inmate to seek their administrative remedies if seeking a reduction in sentence under 18 U.S.C. 3582(c)(1)(A).

## THE ELDERLY OFFENDER HOME DETENTION PROGRAM

Elderly inmates and inmates who are ill generally fit the description of individuals who present a very low risk to the community. Fortunately, those who crafted the First Step Act recognized that common-sense approach.

With an eye towards maximizing the use of home confinement as a way in which to reduce the federal prison population, the First Step Act mandates the BOP to move swiftly to implement the Elderly Offender Pilot Program.

Originally part of the Second Chance Act, the Elderly Offender Pilot Program was reauthorized and modified by the First Step Act. In fact, the First Step Act states that “The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted” by law.

Over the last year, the BOP has followed the First Step Act’s mandate to *maximize* the use of home confinement for low-risk offenders, including elderly inmates.

## **CONCLUSION**

The first year has been a good one for the First Step Act. Hopefully, the Act will continue to make positive changes in many inmates’ lives moving forward.

## **ABOUT THE LAW OFFICE OF JEREMY GORDON**

*The Law Office of Jeremy Gordon has been practicing federal criminal appeals and post-conviction law since 2012. We have had favorable outcomes in more than 70 cases in the past four years. Our entire staff is committed to providing excellent service to our clients and their families. We encourage you to contact our office today to visit with us on how we might be able to help you or your loved one get the representation they deserve.*