

First Step Act, Pub. L. No.115-391, Secs. 401-404 – Enacted Dec. 21, 2018
Sentencing Resource Counsel, Federal Public and Community Defenders, revised Mar. 24, 2019
For criminal defense lawyers only – do not distribute to anyone else.
(Not all litigation issues are noted in this chart.)

Old Safety Valve – 18 U.S.C. § 3553(f)	New Safety Valve, as amended by Sec. 402	Applicability/Litigation Notes
Applies to offenses under 21 USC §§ 841, 844, 846, 960, 963	Also applies to offenses under title 46 §§ 70503 or 70506	“Applicability.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.” Sec. 402(b).
<p>Criminal History: defendant does not have more than 1 criminal history point as determined under the sentencing guidelines</p>	<p>Criminal History: 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.”</p> <p>Violent Offense: “As used in this section, the term ‘violent offense’ means a crime of violence, as defined in section 16, that is punishable by imprisonment.”</p> <p>Because § 16(b) is void, a “violent offense” is “an offense that has as an element the use,</p>	<p><u>Note:</u> Means after sentencing when judgment enters, not when verdict or guilty plea entered.</p> <p>-DOJ guidance: “applies to defendants who were found guilty pre-Act, but against whom judgment was or will be entered on or after December 21, 2018.”</p> <p>-Need briefing? Contact abaronevans@gmail.com or aamra_ahmad@fd.org.</p> <p><u>Note:</u> Section 16(b) is void for vagueness. <i>See Sessions v. Dimaya</i>, 138 S. Ct. 1204 (2018).</p>

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	attempted use, or threatened use of physical force against the person or property of another,” 18 U.S.C. § 16(a), that is punishable by imprisonment.	
Violence: defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.	same	
Death/SBI: offense did not result in death or serious bodily injury to any person.	same	
Role: defendant was not an organizer, leader, manager, or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined by 21 USC 848.	same	
Proffer: not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful information or the government is already aware of the information shall not preclude the court from determining that the defendant has complied with this requirement.	New: “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.”	Note: As always, SV proffer is not “substantial assistance,” does not require govt motion (unlike 3553(e) or 5K1.1), is a determination solely for the court.

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Old 841(b)(1)(A)-(B)/960(b)(1)-(2)	New 841(b)(1)(A)-(B)/960(b)(1)-(2), as amended by Sec. 401	Applicability/Notes
<p><u>21 USC § 841(b)(1)(A)</u></p> <ul style="list-style-type: none"> • 10 years to life for drug type and quantity • 20 years to life if one prior final conviction for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if two or more prior final convictions for "felony drug offense" • Life if one prior final conviction for "felony drug offense" + drug was but/for cause of death/SBI 	<p><u>21 USC § 841(b)(1)(A)</u></p> <ul style="list-style-type: none"> • 10 years to life for drug type and quantity • 15 years to life if one prior final conviction for "serious drug felony" or "serious violent felony" • 20 years to life if drug was but/for cause of death/SBI • 25 years to life if two or more prior final convictions for "serious drug felony" or "serious violent felony" • Life if one prior final conviction for "serious drug felony" or "serious violent felony" + drug was but/for cause of death/SBI 	<p>“Applicability to Pending Cases.—This sections 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.” Sec. 401((c).</p> <p><u>Note:</u> -Would violate the <i>Ex Post Facto</i> Clause to enhance a sentence based on a “serious violent felony” for an offense committed before the date of enactment. <i>Peugh v. U.S.</i>, 569 U.S. 530, 532–33 (2013); <i>Calder v. Bull</i>, 3 Dall. 386, 390 (1798). -And government must file and serve information “before trial, or before entry of a plea of guilty,” not later, “stating in writing the previous convictions to be relied upon.” 21 U.S.C. § 851(a)(1).</p>

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<p><u>21 USC § 841(b)(1)(B)</u></p> <ul style="list-style-type: none"> • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI 	<p><u>21 USC § 841(b)(1)(B)</u></p> <ul style="list-style-type: none"> • 5-40 years for drug type and quantity • 10 years to life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" + drug was but/for cause of death/SBI 	<p><u>Note:</u> Changes only definitions of priors, not penalties.</p>
<p><u>21 USC § 960(b)(1)</u></p> <ul style="list-style-type: none"> • 10 years to life for drug type and quantity • 20 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI 	<p><u>21 USC § 960(b)(1)</u></p> <ul style="list-style-type: none"> • 10 years to life for drug type and quantity • 15 years to life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" + drug was but/for cause of death/SBI 	<p><u>Note:</u> Unlike 841(b)(1)(A), 960(b)(1) never required mandatory life just for more than one prior (also required death or SBI).</p>
<p><u>21 USC § 960(b)(2)</u></p> <ul style="list-style-type: none"> • 5-40 years for drug type and quantity 	<p><u>21 USC § 960(b)(2)</u></p> <ul style="list-style-type: none"> • 5-40 years for drug type and quantity 	<p><u>Note:</u> Changes only definitions of priors, not penalties.</p>

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<ul style="list-style-type: none"> • 10 years to life if any prior final conviction(s) for "felony drug offense" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "felony drug offense" + drug was but/for cause of death/SBI 	<ul style="list-style-type: none"> • 10 years to life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" • 20 years to life if drug was but/for cause of death/SBI • Life if any prior final conviction(s) for "serious drug felony" or "serious violent felony" + drug was but/for cause of death/SBI 	
<p><u>Felony Drug Offense</u> - 21 USC 802(44)</p> <p>"The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 USC § 802(44).</p> <p><u>Note</u>: Includes simple possession, misdemeanors in states that make misdemeanors punishable by imprisonment for more than one year, no staleness limit, no minimum term of imprisonment served.</p>	<p><u>Serious Drug Felony</u> - 21 USC 802(57)</p> <p>"The term 'serious drug felony' means" an "offense described in section 924(e)(2) [] for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender[]" was released "within 15 years of the commencement of the instant offense."" 21 USC § 802(57).</p> <p>18 USC § 924(e)(2) (defining "serious drug offense"): "(i) an offense under [21 USC § 801 et seq., 21 USC § 951 et seq., or chapter 705 of title 46] for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State</p>	<p><u>Note</u>: Section 851 applies to enhancing prior convictions under §§ 841 and 960. See <i>Preventing and Challenging an Enhanced Sentence Under Section 851</i> (revised Mar. 4, 2019).</p> <p><u>Note</u>: Not every drug offense counts. See, e.g., <i>US v. Elder</i>, 840 F.3d 455 (7th Cir. 2016); <i>Simmons v. US</i>, 649 F.3d 237 (4th Cir. 2011) (en banc); <i>US v. Haltiwanger</i>, 637 F.3d 881 (8th Cir. 2011); <i>US v. Brooks</i>, 751 F.3d 1204 (10th Cir. 2014); <i>US v. Valencia-Mendoza</i>, ___ F.3d ___,</p>

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	<p>law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 USC § 802]), for which a maximum term of imprisonment of ten years or more is prescribed by law”</p>	<p>2019 WL 149827 (9th Cir. Jan. 10, 2019); <i>US v. Townsend</i>, 897 F.3d 66 (2d Cir. 2018); <i>US v. Epps</i>, 2018 WL 2958442 (D. Conn. June 13, 2018); <i>US v. Barrow</i>, 230 F. Supp. 3d 116, 124 (E.D.N.Y. 2017).</p> <p><u>Note</u>: Any fact that raises the statutory maximum, the mandatory minimum, or both “constitutes an element of a separate, aggravated offense,” which must be charged in an indictment and proved to a jury beyond a reasonable doubt. <i>Alleyne v. United States</i>, 133 S. Ct. 2151, 2162 (2013). Even if <i>Almendarez-Torres v. United States</i>, 523 U.S. 224, 226 (1998) (holding “the fact of an earlier conviction is not an element of the present crime”) survived <i>Alleyne</i>, whether D served more than 12 months in prison (for both “serious drug felony” and “serious violent felony”), and whether D was released within 15 years of commencement of</p>
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		instant offense (for “serious drug felony”) require factfinding beyond the mere “fact of an earlier conviction.”
No enhancement for priors defined as “violent.”	<p><u>Serious Violent Felony</u> – 21 USC 802(58)</p> <p>“The term ‘serious violent felony’ means (A) an offense described in section 3559(c)(2) for which the offender served a term of imprisonment of more than 12 months; and (B) any offense that would be a felony violation section 113 [] if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.” 21 USC § 802(58).</p> <p><u>18 USC 113</u> (Assaults within maritime and territorial jurisdiction) defines six “felony violations.” See 18 U.S.C. § 113(a)(1)-(3), (6)-(8).</p> <p><u>18 USC § 3559(c)(2)(F)</u>: “[T]he term ‘serious violent felony’ means –</p> <p>(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section</p>	<p><u>Note</u>: See notes above re <i>Ex Post Facto</i>, Section 851, <i>Alleyne/Almendarez-Torres</i>.</p> <p><u>Note</u>: Violations defined in 113(a)(4) (“assault by striking, beating or wounding”) and 113(a)(5) (“simple assault”) are not felony violations and therefore not SVFs.</p> <p><u>Note</u>: Section 3559(c)(2)(F) states that “the term ‘serious violent felony means” any of a list of “Federal or State offense[s], by whatever</p>

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	<p>1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape [defined in 3559(c)(2)(A)]; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping [defined in 3559(c)(2)(E)]; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118) [subject to 3559(c)(3)(A)]; carjacking (as described in section 2119); extortion [defined in 3559(c)(2)(C)]; arson [defined in 3559(c)(2)(B) and subject to 3559(c)(3)(B)]; firearms use [defined in 3559(c)(2)(D)]; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and</p> <p>(ii) 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 [subject to 3559(c)(3)(A)] or that, by its nature, involves a substantial risk that physical force</p>	<p>designation and wherever committed.”</p> <p>Section 3559(c)(2) provides generic definitions for some of the enumerated offenses. <i>See</i> 3559(c)(2)(A) (assault with intent to commit rape), (B) (arson), (C) (extortion), (D) (firearms use), and (E) (kidnapping).</p> <p>Section 3559(c)(2)(F) provides generic definitions for other enumerated offenses by citation to a federal statute.</p> <p>The categorical approach must be used to determine whether the elements of the offense of which the defendant was convicted match the elements of the generic offense, and whether an offense under (F)(ii) has an element of force. <i>See, e.g., US v. Leaverton</i>, 895 F.3d 1251 (10th Cir. 2018); <i>US v. Hardin</i>, 108 Fed. Appx. 74, 78 (4th Cir. 2004) (unpublished); <i>US v. Fulford</i>, 267 F.3d 1241, 1251 (11th Cir. 2001);</p>
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	<p>against the person of another may be used in the course of committing the offense”</p>	<p><i>US v. Kennedy</i>, 133 F.3d 53, 56 (D.C. Cir. 1998).</p> <p><u>Note</u>: The residual clause of § 3559(c)(2)(F)(ii) is void for vagueness. <i>See Sessions v. Dimaya</i>, 138 S. Ct. 1204 (2018).</p> <p><u>Note</u>: Whether offense is “punishable” by 10 years or more under 3559(c)(2)(F)(ii) doesn’t necessarily mean the statutory maximum. <i>See Simmons v. US</i>, 649 F.3d 237 (4th Cir. 2011) (en banc); <i>US v. Haltiwanger</i>, 637 F.3d 881 (8th Cir. 2011); <i>US v. Brooks</i>, 751 F.3d 1204 (10th Cir. 2014); <i>US v. Valencia-Mendoza</i>, ___ F.3d ___, 2019 WL 149827 (9th Cir. Jan. 10, 2019).</p> <p><u>Note</u>: Robbery, arson, and any offense that would qualify under 3559(c)(2)(F)(ii) do not qualify if the defendant proves the following by clear and convincing evidence per 3559(c)(3):</p>
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		<p>“Nonqualifying felonies.--</p> <p>(A) Robbery in certain cases.-- Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--</p> <p>(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and</p> <p>(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.</p> <p>(B) Arson in certain cases.--Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--</p> <p>(i) the offense posed no threat to human life; and</p>
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		<p>(ii) the defendant reasonably believed the offense posed no threat to human life.”</p> <p>Some circuits have held that the categorical approach does not apply to the circumstances D must prove under 3559(c)(3). <i>US v. Mackovich</i>, 209 F.3d 1227, 1240 (10th Cir. 2000); <i>Gray v. US</i>, 622 Fed. Appx. 788, 793 (11th Cir. 2015) (unpub.).</p>
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Old 924(c)(1)(C)	New 924(c)(1)(C), as amended by Sec. 403, entitled “Clarification of Section 924(c)”	Applicability/Notes
<p>18 USC § 924(c)(1)(C):</p> <p>In the case of a second or subsequent conviction under this subsection, the person shall--</p> <p style="padding-left: 40px;">(i) be sentenced to a term of imprisonment of not less than 25 years; and</p> <p style="padding-left: 40px;">(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or</p>	<p>18 USC § 924(c)(1)(C):</p> <p>In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--</p> <p style="padding-left: 40px;">(i) be sentenced to a term of imprisonment of not less than 25 years; and</p> <p style="padding-left: 40px;">(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or</p>	<p>“Applicability to Pending Cases.— This sections 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.” Sec. 403(b).</p> <p><u>Note:</u> Congress has now “clarifi[ed]” that it always intended § 924(c)(1)(C) to be a true recidivist provision. The 25-year or life minimum may be imposed only if</p>

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<p>firearm muffler, be sentenced to imprisonment for life.</p> <p><u>Note:</u> As interpreted by the majority in <i>Deal v. United States</i>, 508 U.S. 129 (1993), § 924(c)(1)(C) required stacking of the 25-year or life minimum for offenses charged in the same case with no intervening conviction.</p> <p>E.g., if a defendant was charged and convicted of three § 924(c)s in the same case (and the firearm was not described in (ii)), a minimum sentence of 55 years was required.</p> <p>If two or more § 924(c)s in the same case and the firearm was described in (ii), mandatory life.</p>	<p>firearm muffler, be sentenced to imprisonment for life.</p>	<p>the defendant has a prior final conviction for a § 924(c) offense.</p> <p><u>Note:</u> <i>But</i> 924(c) sentences are still consecutively “stacked.” Section 924(c)(1)(D) remains: “Notwithstanding any other provision of law-- (i) a court shall not place on probation any person convicted of a violation of this subsection; and (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”</p> <p>So, if defendant is charged and convicted of three § 924(c)s in the same case, a minimum sentence of 15 years (5+5+5) is required.</p>
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Sections 2 and 3, Fair Sentencing Act 2010	Section 404, Application of Fair Sentencing Act, Historical and Statutory Notes following 21 USC 841	Notes
<p>Section 2 of the Fair Sentencing Act of 2010 modified the statutory penalties (i.e., statutory ranges and minimum SR terms) by increasing the quantities triggering:</p> <ul style="list-style-type: none"> • 841(b)(1)(A)(iii) and 960(b)(1)(C) from at least 50 grams to at least 280 grams • 841(b)(1)(B)(iii) and 960(b)(2)(C) from at least 5 grams to at least 28 grams • 841(b)(1)(C) and 960(b)(3) from less than 5 grams to less than 28 grams <p>Section 3 eliminated the mandatory minimum for simple possession under 21 USC 844(a)</p> <p><u>Note:</u> The Fir Sentencing Act was silent on retroactivity (meaning it wasn't), but on June 21, 2012, the Supreme Court held that it applied to all defendants sentenced after the date of enactment (August 3, 2010) including those who committed the offense before that date. <i>See Dorsey v. United States</i>, 132 S. Ct. 2321 (2012).</p>	<p>Applies to any “covered offense” -- 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 [] that was committed before August 3, 2010.” Sec. 404(a).(freestanding remedy; 3582(c)(2)/1B1.10 do not apply)</p> <p>A court that “imposed a sentence for a covered offense may,” on motion, “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect at the time the covered offense was committed.” Sec. 404(b). (limited only by MM under FSA if any, based on quantity element (not PSR); can reduce CO GLR based on lower stat max, find not CO under current law, vary from GLR)</p> <p>Only two circumstances in which court “shall [not] entertain” a 404 motion: 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” (does not mean a guideline reduction under 3582(c)(2)/1B1.10) or a “previous motion</p>	<p>People have one chance to have a motion “under” Section 404 entertained, must get it right.</p> <p>Section 404 is a freestanding remedy. It is not subject to any restrictions in § 3582(c)(2) or USSG § 1B1.10. To avoid denial on a ground that does not apply, motions must be filed under Sec. 404 of the First Step Act.</p> <p>Issues, some not immediately obvious, must be effectively addressed. Reliable guidance has been issued to point persons in each district. Each FPD office has a point person; the CJA rep is the point person in the 2 districts with no FPD office (SD GA, ED KY).</p> <p>Clients should be advised not to file <i>pro se</i> motions. Clients or their lawyers should contact the point person in the district before taking any action.</p>

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	<p>made <i>under this section</i> to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.” Sec. 404(c). (one chance under Section 404 if denied after complete review on the merits, not legal error in interpreting the law). Sec. 404(c).</p> <p>But court has discretion: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Sec. 404(c).</p>	<p>Summaries/advice from other sources, including USSC, AO, DOJ, BOP, contain crucial inaccuracies.</p>
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Information on other sections of the First Step Act, including earned time credits, instant offenses that render prisoners ineligible to receive them (and how to avoid that result), the increase in annual good time credit (which still hasn’t taken effect), and improvements to the compassionate release statute will be addressed separately. If you have questions, contact your FPD office, abaronevans@gmail.com, or aamra_ahmad@fd.org.

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