



# The First Step Act of 2018

## *One Year of Implementation*

United States Sentencing Commission

*August 2020*







# **The First Step Act of 2018**

## ***One Year of Implementation***

CHARLES R. BREYER  
Commissioner

DANNY C. REEVES  
Commissioner

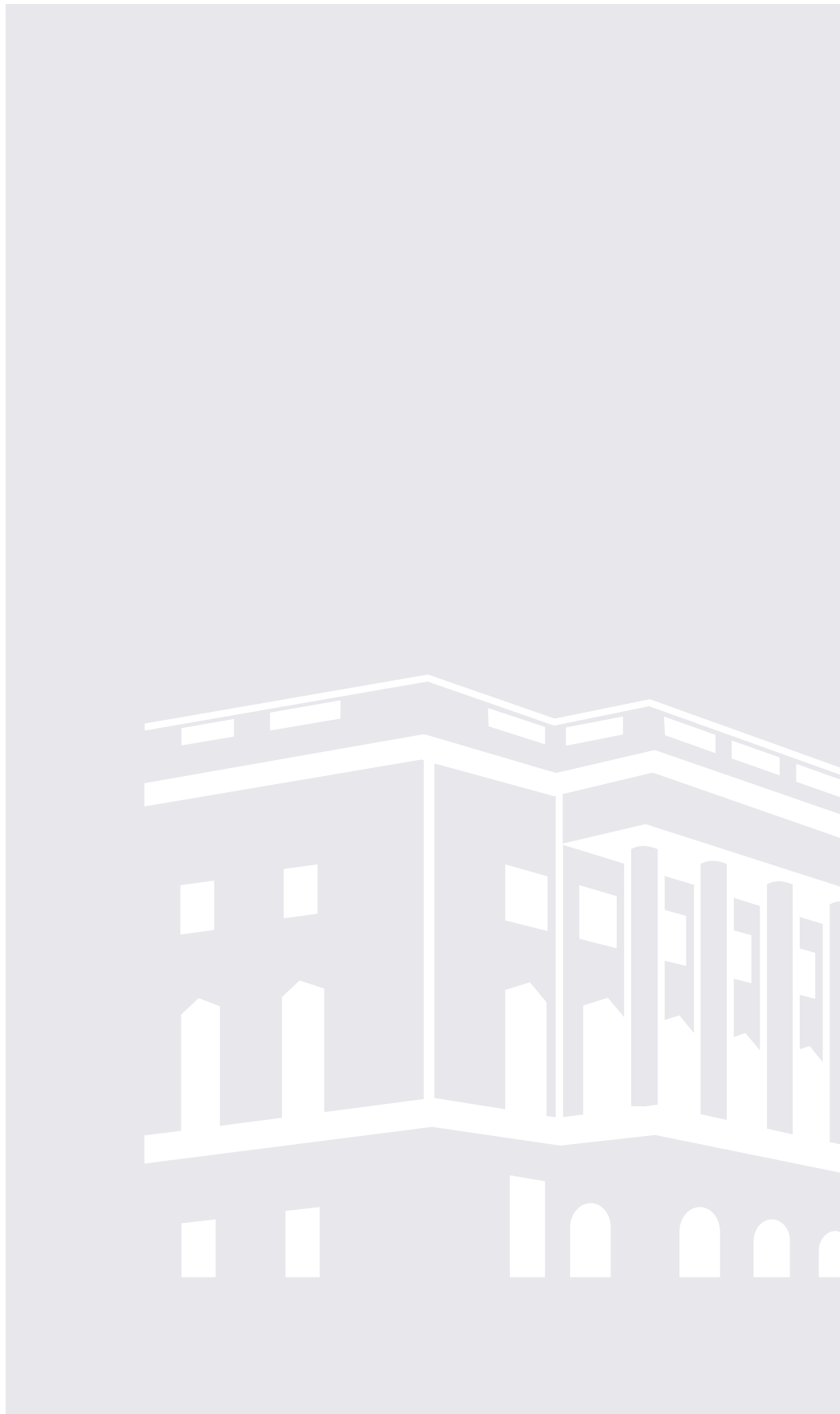
PATRICIA K. CUSHWA  
*Ex Officio*

CANDICE C. WONG  
*Ex Officio*

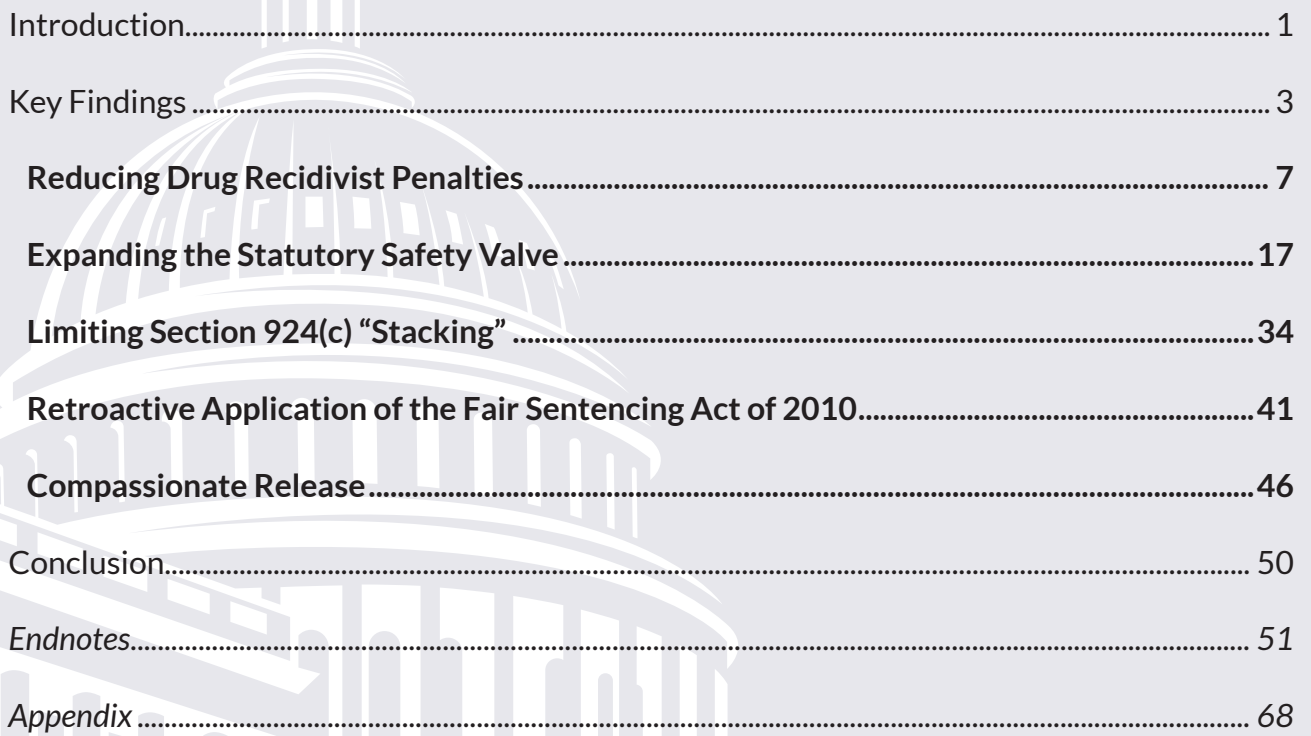
KENNETH P. COHEN  
Staff Director

GLENN R. SCHMITT  
Director, Office of Research and Data

AUGUST 2020



# Table of Contents



Introduction.....	1
Key Findings .....	3
Reducing Drug Recidivist Penalties.....	7
Expanding the Statutory Safety Valve.....	17
Limiting Section 924(c) “Stacking” .....	34
Retroactive Application of the Fair Sentencing Act of 2010.....	41
Compassionate Release.....	46
Conclusion.....	50
Endnotes.....	51
Appendix .....	68



**This report examines the impact of five provisions of the First Step Act of 2018 related to sentencing reform.**

# Introduction

The First Step Act of 2018 (the “First Step Act” or “Act”) was signed into law on December 21, 2018.<sup>1</sup> The Act contains numerous provisions relating to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. It focuses principally on creating a framework for recidivism reduction programming and incentives to be implemented by the Attorney General, the Federal Bureau of Prisons (BOP), and other criminal justice agencies. Additionally, the Act includes five provisions related to sentencing reform. Specifically, the Act:

- **reduces certain enhanced penalties** imposed pursuant to **21 U.S.C. § 851** for some repeat offenders and changes the prior offenses that qualify for such enhanced penalties;
- **broadens the existing statutory safety valve** eligibility criteria at **18 U.S.C. § 3553(f)**, which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met;
- **limits “stacking”** of the 25-year penalty imposed under **18 U.S.C. § 924(c)** for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense;
- **applies the Fair Sentencing Act of 2010 retroactively**; and
- **authorizes the defendant to file a motion for “compassionate release,”** pursuant to **18 U.S.C. § 3582(c)(1)(A)**, where previously only the BOP was so authorized.

## Authors

**Julie Zibulsky, J.D.**

*Assistant General Counsel*

*Office of General Counsel*

**Christine Kitchens, M.A.**

*Senior Research Associate*

*Office of Research and Data*

# FIRST STEP ACT

SIGNED INTO LAW ON DECEMBER 21, 2018

The First Step Act of 2018 includes **five provisions related to sentencing reform**. Each of these changes has been the subject of ongoing consideration within the criminal justice community and was the subject of Commission recommendations in its mandatory minimum reports and other work.<sup>2</sup>



authorizes the defendant to file a motion for "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A), where previously only the BOP was so authorized (see page 46)



reduces certain enhanced penalties imposed pursuant to 21 U.S.C. § 851 for some repeat offenders and changes the prior offenses that qualify for such enhanced penalties (see page 7)



The First Step Act has now been in effect for a full calendar year. This publication examines the **impact of the new law** on each of the **five sentencing provisions, comparing** data from the first full calendar year that the First Step Act was in effect ("First Step Year One"), December 21, 2018 through December 20, 2019, with data from the last full fiscal year prior to its enactment, **fiscal year 2018**.<sup>3</sup>



applies the Fair Sentencing Act of 2010 retroactively (see page 41)



broadens the existing statutory safety valve eligibility criteria at 18 U.S.C. § 3553(f), which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met (see page 17)



limits "stacking" of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense (see page 34)



# Key Findings

This publication examines the impact of the First Step Act, analyzing data from the first year following its enactment, compared to data from the last full fiscal year prior to its enactment, fiscal year 2018. As part of this analysis, the Commission makes the following key findings:

## REDUCING DRUG RECIDIVIST PENALTIES



***Enhanced recidivist penalties imposed pursuant to 21 U.S.C. § 851 applied to fewer offenders in First Step Year One, as a result of the First Step Act’s narrowing of qualifying prior drug offenses. When enhanced penalties did apply, they were less severe than in fiscal year 2018.***

- The number of offenders who received enhanced penalties decreased by 15.2 percent, from 1,001 offenders in fiscal year 2018 to 849 offenders in First Step Year One.
- The new 15-year enhanced mandatory minimum penalty, which was reduced from 20 years by the First Step Act, applied to 219 offenders in First Step Act Year One. By comparison, the 20-year enhanced mandatory minimum penalty applied to 321 offenders in fiscal year 2018.
- The new 25-year enhanced mandatory minimum penalty, which was reduced from life imprisonment by the First Step Act, applied to 21 offenders in First Step Act Year One. The enhanced mandatory minimum penalty of life imprisonment (for an offense resulting in death or serious bodily injury) applied to only 11 offenders in First Step Act Year One. By comparison, the enhanced mandatory minimum penalty of life imprisonment applied to 42 offenders in fiscal year 2018.

***Few offenders were exposed to an enhanced penalty, or exposed to a more severe enhanced penalty, on the new basis of a “serious violent felony” conviction.***

- Of the 849 offenders for whom the section 851 information applied at sentencing, only 36 had been previously convicted of one or more qualifying “serious violent felony” offenses that was relied upon by the government to support an 851 enhancement.<sup>4</sup>
- Of these 36 offenders, 25 also had at least one “serious drug felony” conviction. Only 11 offenders were exposed to an enhanced penalty solely based on one or more “serious violent felony” convictions.
- The most common “serious violent felony” convictions were weapons offenses,<sup>5</sup> robbery, and aggravated assault.



## EXPANDING SAFETY VALVE

***Offenders were more likely to receive relief from a mandatory minimum penalty or a reduction in sentence as a result of the First Step Act's expansion of the safety valve eligibility criteria at 18 U.S.C. § 3553(f).***

- In First Step Act Year One, of 13,138 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 41.8 percent (n=5,493) received statutory safety valve relief from the mandatory minimum penalty. By comparison, in fiscal year 2018, of 10,716 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 35.7 percent (n=3,820) received statutory safety valve relief.
- In First Step Act Year One, of 19,739 drug trafficking offenders, 36.1 percent (n=7,127) benefited from the safety valve, either by receiving relief from a mandatory minimum, a guideline reduction, or a variance based on the new expanded eligibility criteria. By comparison, of 18,349 drug trafficking offenders, 32.1 percent (n=5,885) benefited from the safety valve in fiscal year 2018.

***Most drug trafficking offenders who received safety-valve relief in First Step Year One (80.8%; n=5,758) were "already eligible" for relief under the old safety valve criteria. There were 1,369 (19.2%) offenders "newly eligible" as a result of the First Step Act's expanded criteria.***

- Most newly eligible safety valve recipients qualified under the Act's expanded criminal history provisions (87.9%; n=1,204).
- Newly eligible safety valve recipients received sentences on average 17 months longer than already eligible recipients, 53 months compared to 36 months.
- There were notable changes in the demographic characteristics, particularly in racial composition, between newly eligible and already eligible safety valve recipients. Newly eligible safety valve recipients were more likely to be White (30.9% compared to 16.2%) or Black (16.0% compared to 9.8%), and less likely to be Hispanic (49.9% compared to 70.5%) than already eligible recipients.

## LIMITING 924(c) “STACKING”



*The 25-year penalty for a “second or subsequent offense” under 18 U.S.C. § 924(c) applied less frequently in First Step Year One, as a result of the First Step Act’s limitation of the penalty to section 924(c) offenders with a final prior firearms conviction, as opposed to those with multiple section 924(c) charges in a single case.*

- In fiscal year 2018, one 25-year penalty was imposed consecutively to another firearm mandatory minimum penalty in most cases (92.1%; n=117) involving multiple section 924(c) counts. Multiple consecutive 25-year penalties were imposed in two cases (1.6%).
- In First Step Year One, out of the 215 cases involving multiple section 924(c) counts, the 25-year penalty was imposed in only five cases.
- In First Step Year One, five-, seven-, and ten-year penalties typically replaced what would have been a 25-year penalty prior to the First Step Act. In half (50.7%; n=109), a seven-year penalty was the highest penalty imposed, followed by ten years in 30.7 percent of cases (n=66) and five years in 14.0 percent of cases (n=30).

## RETROACTIVELY APPLYING THE FAIR SENTENCING ACT OF 2010



*Since authorized by the First Step Act, 2,387 offenders received a reduction in sentence as a result of retroactive application of the Fair Sentencing Act of 2010.<sup>6</sup>*

- Offenders’ sentences were reduced, on average, by 71 months, from 258 months to 187 months.
- The majority (66.2%) of the offenders who received statutory relief under the First Step Act were in Criminal History Category VI, and more than half (57.4%) were originally sentenced as career offenders.



## COMPASSIONATE RELEASE

*In the first year after passage of the First Step Act, 145 offenders were granted compassionate release under 18 U.S.C. § 3582(c)(1)(A), a five-fold increase from fiscal year 2018, during which 24 compassionate release motions were granted.<sup>7</sup>*

- In two-thirds of these cases (67.1%; n=96), the offender filed a motion seeking relief, rather than the Bureau of Prisons, a procedural change authorized by the First Step Act.

## Reducing Drug Recidivist Penalties

*The First Step Act changed the prior offenses that trigger the recidivist penalties (at 21 U.S.C. §§ 841 and 960) and reduced the length of those penalties.<sup>8</sup>*

Section 401 of the First Step Act changed the scope and severity of enhancements for repeat drug offenders. Section 851 of title 21 of the United States Code provides for enhanced mandatory penalties for drug trafficking offenders who have qualifying prior offenses.<sup>9</sup> Federal drug trafficking offenders are primarily convicted of offenses under title 21 of the United States Code, which prohibits the distribution, manufacture, or importation of controlled substances, and possession with intent to distribute controlled substances.<sup>10</sup> The most commonly prosecuted drug offenses that carry mandatory minimum penalties are 21 U.S.C. §§ 841 and 960.<sup>11</sup> Under both provisions, mandatory minimum penalties are tied to the quantity and type of controlled substance involved in the offense.<sup>12</sup> When certain quantity thresholds are met, a five-year mandatory minimum penalty and a maximum term of 40 years applies, while larger amounts increase the mandatory minimum penalty to ten years, with a maximum term of life imprisonment.<sup>13</sup> Higher penalty ranges apply if death or serious bodily injury results from use of the controlled substance.<sup>14</sup>

These mandatory minimum penalties may be enhanced if a drug offender has a qualifying prior conviction or convictions. Increased penalties are not, however, automatically triggered upon conviction. Prosecutors must take affirmative steps for these higher penalties to apply, including filing an information with the court specifying the previous convictions to be relied upon. These steps are set forth in 21 U.S.C. § 851.<sup>15</sup>

The First Step Act changed the prior offenses that trigger the recidivist penalties (at 21 U.S.C. §§ 841 and 960) and reduced the length of those penalties. First, the Act both narrowed and expanded the type of prior offenses that trigger mandatory enhanced penalties. Prior to the Act, a defendant's sentence was enhanced if the defendant had been convicted of a prior "felony drug offense."<sup>16</sup> The Act *narrowed* the triggering prior offenses by replacing "felony drug offense" with "serious drug felony."<sup>17</sup> As a result, a defendant's prior drug offense qualifies as a predicate offense only if it was an offense of the type specifically defined in 18 U.S.C. § 924(e)(2) (A), the defendant *served* a term of more than 12 months' imprisonment for that offense, and the offender was released within 15 years of the instant offense. Prior to the Act, any drug offense *punishable* by more than one year of imprisonment

Table 1. Common 851 Enhancements

Provisions	Statutory Penalty	Common 851 Enhancements	
		Before First Step Act	After First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year mandatory minimum	20-year mandatory minimum <i>after one</i> prior "felony drug offense" conviction	<b>15-year</b> mandatory minimum <i>after one</i> prior "serious drug" or "serious violent" felony conviction
		Life mandatory minimum <i>after two or more</i> prior "felony drug offense" convictions	<b>25-year</b> mandatory minimum <i>after two or more</i> prior "serious drug" or "serious violent" felony convictions
21 U.S.C. § 841(b)(1)(B)	5-year mandatory minimum	10-year mandatory minimum <i>after one</i> prior "felony drug offense" conviction	<b>10-year</b> mandatory minimum <i>after one</i> prior "serious drug" or "serious violent" felony conviction
21 U.S.C. § 841(b)(1)(C)	20-year statutory maximum	30-year statutory <i>maximum</i> <i>after one</i> prior "felony drug offense" conviction	<b>30-year</b> statutory <i>maximum</i> <i>after one</i> prior "felony drug offense" conviction

qualified as a predicate offense, regardless of the length of time imposed or served for that offense. The First Step Act *expanded* the class of triggering offenses by adding "serious violent felony."<sup>18</sup> A "serious violent felony" is defined as an offense for which the defendant *served* a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) or 18 U.S.C. § 113 (Assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States.<sup>19</sup>

Second, the Act reduced the length of some of the enhanced penalties. Before the First Step Act, offenders who otherwise qualified for the ten-year mandatory minimum penalty were subject to an enhanced mandatory minimum penalty of 20 years if they had one qualifying prior

conviction, and a mandatory term of life imprisonment if they had two qualifying prior convictions.<sup>20</sup> As demonstrated in Table 1, the First Step Act reduced the 20-year mandatory minimum penalty (for offenders with one prior qualifying offense) to 15 years and the life mandatory minimum penalty (for two or more prior qualifying offenses) to 25 years.<sup>21</sup> As they were before the First Step Act, offenders who otherwise qualify for a five-year mandatory minimum penalty are subject to an increased statutory range of ten years to life imprisonment if they have a qualifying prior conviction.<sup>22</sup> The First Step Act did not amend the length of the penalties imposed at section 841(b)(1)(B) or 960(b)(2). As a result, a qualifying predicate offense (a "serious drug offense" or a "serious violent felony") increases a five-year penalty to ten years.

Some provisions, 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3), do not include a statutory mandatory minimum penalty but provide for an enhanced statutory maximum penalty.<sup>23</sup> The First Step Act amended 21 U.S.C. §§ 841(b)(1)(A) & (B) and 960(b)(1) & (b)(2) only. Thus, the enhanced statutory maximum penalties provided for at sections 841(b)(1)(C) and 960(b)(3) are unchanged and are still triggered by a prior “felony drug offense,” rather than a “serious drug felony” or “serious violent felony.”<sup>24</sup>

Although the recidivist drug enhancements are found in the penalty provisions of various drug statutes, they are commonly referred to as “851 enhancements.” Consistent with common usage, this publication thus uses the term “851 enhancement” to refer to the increased penalty applicable to offenders who have been convicted of a prior predicate offense.

This publication explores offenders for whom an 851 information was filed and those for whom the 851 remained in place at sentencing, without consideration of whether the offender ultimately received relief from that penalty. Where this publication uses the term “applied at sentencing,” it refers to cases in which the 851 information was not withdrawn by the government or found to not apply by the court. These offenders may, however, have received relief from the enhanced penalty as a result of the statutory safety valve, 18 U.S.C. § 3553(f), or for providing substantial assistance pursuant to 18 U.S.C. § 3553(e).

## Application of Penalties Imposed Pursuant to Section 851

The Commission analyzed the frequency and length of the recidivist penalties applied in Year One compared to fiscal year 2018. The First Step Act affected the sentences of offenders who could have been exposed to an 851 enhancement in two ways. First, as a result of the change in qualifying predicate offenses, some offenders who previously would have qualified for an enhancement because of a prior “felony drug offense” no longer qualify, and some offenders became newly eligible for a recidivist enhancement based on a prior “serious violent felony.” Second, the First Step Act altered the length of the statutory recidivist enhancements. These issues are explored in turn below.

While most offenders included in this analysis are drug trafficking offenders, some have additional counts of conviction that required other guideline application (for example, money laundering, racketeering, or murder), resulting in a higher offense level than the drug trafficking guideline associated with the enhanced drug penalty. For more detail on offenders included in this analysis, see Appendix Figure 1.



### Section 851 Enhancements Filed

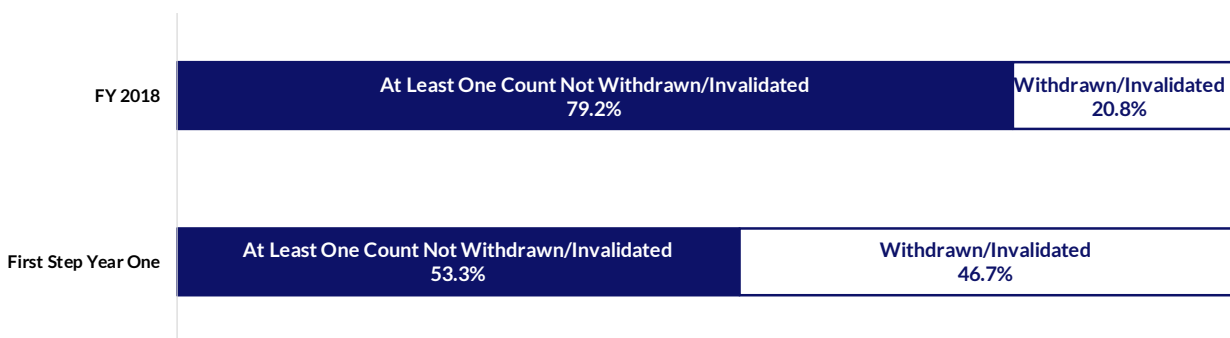
As noted above, enhanced recidivist penalties are triggered only where prosecutors take the affirmative step of filing an information pursuant to the procedural requirements set forth in 21 U.S.C. § 851. A court must impose a sentence consistent with the enhanced statutory penalties only if an information is filed and the court finds that the prior conviction qualifies under section 851.

Prosecutors filed an information at a similar rate in Year One, compared to fiscal year 2018. In fiscal year 2018, an information was filed in 1,274 cases, approximately seven percent of all drug trafficking cases. In Year One, an information was filed in 1,607 cases, approximately eight percent of all drug trafficking cases.<sup>25</sup> While the overwhelming majority of cases in which an 851 information was filed in each year were drug trafficking cases, some offenders were sentenced under other guidelines.<sup>26</sup>

### Section 851 Enhancements Withdrawn or Invalidated

Even when an 851 information was filed, there were cases in which the government later withdrew it or in which the court found the recidivist enhancement inapplicable because the offender’s prior criminal conviction was insufficient to satisfy the requirements for the enhanced penalties. This occurred with greater frequency in Year One, due in large part to the Act’s change in qualifying predicate offenses. In fiscal year 2018, the government withdrew the 851 information in 256 cases (20.3%), and the court found that it did not apply in an additional seven cases (0.5%). As a result, there were 1,001 cases (79.2%) in which an information was not withdrawn or found invalid before sentencing.<sup>28</sup> In contrast, in Year One, the government withdrew the 851 information in 610 cases (38.3%) in which it was filed. The court found that the enhancement did not apply in 134 cases (8.4%).<sup>29</sup> In nearly all

Figure 1. Enhanced Drug Penalty Status at Sentencing<sup>27</sup>  
FY 2018 and First Step Year One





these 134 cases, the court indicated that the enhancement did not apply because certain offenses no longer qualified as predicate offenses following the First Step Act. As a result, in Year One, there were 849 cases (53.3%) in which the information was not withdrawn or invalidated before sentencing.<sup>30</sup>

### Qualifying Prior Offenses

As discussed above, following the First Step Act, an 851 enhanced mandatory minimum penalty can be triggered by a prior “serious drug felony” or “serious violent felony.”

Of the 849 offenders for whom the 851 information applied at sentencing, most were exposed to an enhanced penalty

on the basis of one or more “serious drug felony” convictions; few were exposed to an enhanced penalty based on a qualifying “serious violent felony” conviction. As demonstrated in Figure 2, most commonly, offenders had two or more qualifying drug convictions and no qualifying violent conviction (59.6%; n=504), followed by offenders with one qualifying drug conviction and no qualifying violent conviction (36.1%; n=305). Only 36 offenders had one or more qualifying “serious violent felony” convictions that the government relied upon for an 851 enhancement. Of those 36 offenders, 25 also had at least one qualifying drug conviction; only 11 offenders were exposed to enhanced penalties solely based on one or more “serious violent felony” convictions.<sup>32</sup>

Figure 2. Prior Drug and Prior Violent Offenses—851 Applied<sup>31</sup>  
First Step Year One

Total Offenders	845	100.0%
<b>No Drug Priors w/</b>		
One Violent Prior	8	0.9%
Two or More Violent Priors	3	0.4%
<b>One Drug Prior w/</b>		
No Violent Priors	305	36.1%
One Violent Prior	8	0.9%
Two or More Violent Priors	2	0.2%
<b>Two or More Drug Priors w/</b>		
No Violent Priors	504	59.6%
One Violent Prior	12	1.4%
Two or More Violent Priors	3	0.4%

Figure 3. Violent Prior Offenses—851 Applied<sup>33</sup>  
*First Step Year One*

<b>Total Priors (not offender-based)</b>	<b>46</b>	<b>100.0%</b>
Weapons Offenses	15	32.6%
Aggravated Assault	12	26.1%
Robbery	10	21.7%
Simple Assault	3	6.5%
Murder/Attempted Murder	2	4.3%
Other Violent Offenses	2	4.3%
Unspecified Manslaughter	1	2.2%
Arson	1	2.2%

As shown in Figure 3, the most common “serious violent felony” convictions were weapons offenses (n=15), aggravated assault (n=12), and robbery (n=10).<sup>34</sup>

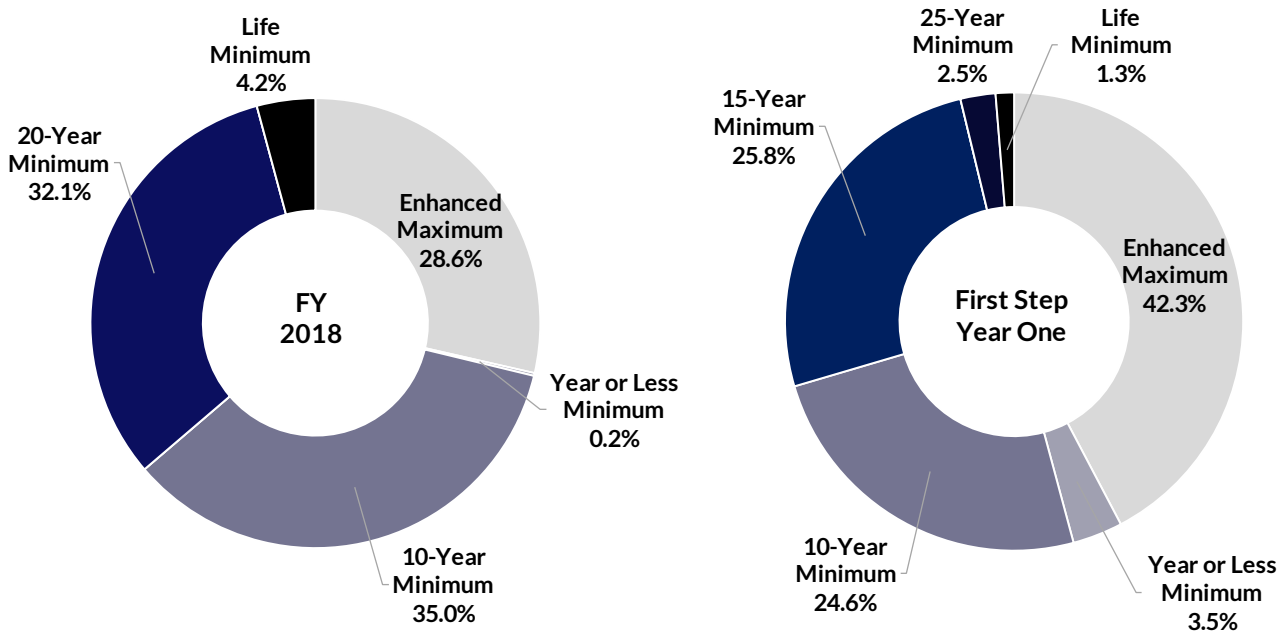
***Length of Enhanced Penalty Imposed***

The filing of an 851 information has one of two principal effects depending on the statute of conviction. In most instances, the 851 information triggers an increase in an already applicable mandatory minimum penalty. In other cases, where the statute of conviction does not provide for a mandatory minimum penalty, the 851 information triggers an enhanced statutory maximum penalty.<sup>35</sup> For example, an offender convicted of trafficking a quantity of drugs that does not meet the quantity threshold necessary

to trigger a mandatory minimum penalty would face a 20-year statutory maximum penalty under 21 U.S.C. § 841(b)(1) (C). However, if such offender has a prior “felony drug offense” and an 851 information is filed, the applicable statutory maximum increases to 30 years.

In Year One, offenders for whom the 851 information applied at sentencing were more frequently convicted of an offense carrying an enhanced statutory maximum penalty only. In fiscal year 2018, of these 1,001 offenders, 715 offenders (71.4%) were convicted of an offense carrying an enhanced statutory minimum penalty and 286 (28.6%) were convicted of an offense carrying an enhanced statutory maximum penalty only. In Year One, of the 849 offenders who did not have the

Figure 4. Length of Enhanced Statutory Penalty—851 Applied<sup>36</sup>  
 FY 2018 and First Step Year One



851 withdrawn or invalidated, 490 (57.7%) were convicted of an offense carrying an enhanced statutory minimum penalty and 359 (42.3%) were convicted of an offense in which only the statutory maximum penalty was enhanced.

The First Step Act narrowed the type of prior drug offenses that trigger an 851 enhanced mandatory minimum penalty (replacing “felony drug offense” with “serious drug felony”) but did not change the predicate convictions that trigger an enhanced statutory maximum penalty. As a result, after the First Step Act, prior drug convictions that would no longer qualify to enhance a statutory minimum penalty continue to qualify to enhance a statutory maximum penalty (for example, where the sentence imposed or served

was one year or less). The narrowing of offenses that trigger enhanced statutory minimum penalties, but not statutory maximum penalties, likely contributes to the increased percentage of 851 cases that involved an enhanced statutory maximum penalty only.

As a result of the First Step Act’s changes to the lengths of the 851 enhanced penalties, the lower 15- and 25-year enhanced penalties typically replaced the 20-year and life penalties that applied in fiscal year 2018. The average sentence length for offenders receiving an 851 enhancement decreased. On average, the sentences for offenders for whom the 851 applied at sentencing were eight months shorter in Year One compared to fiscal year 2018 (179 months compared to 187 months).<sup>37</sup>

In fiscal year 2018, of those offenders for whom the information applied at sentencing, 321 offenders (32.1%) were convicted of an offense carrying a 20-year penalty. In Year One, offenders could no longer be subject to a 20-year 851 enhanced penalty. Instead, 219 offenders (25.8%) were convicted of an offense carrying the new 15-year penalty, which prior to the First Step Act would have been enhanced to a 20-year penalty.

There was a notable decrease in application of the enhanced life penalty for offenders with two or more qualifying convictions. In fiscal year 2018, 42 offenders (4.2%) were convicted of an offense carrying an enhanced mandatory minimum penalty of life imprisonment; in Year One, only 11 offenders (1.3%) were convicted of an offense carrying an enhanced mandatory minimum penalty of life imprisonment. Instead, 21 offenders (2.5%) were convicted of the new 25-year penalty, which prior to the First Step Act would have been enhanced to a term of life imprisonment. The 11 offenders whose conviction carried an enhanced life term were convicted of a controlled substance offense that resulted in death or serious bodily injury *and* had at least one qualifying predicate conviction; the mandatory minimum penalty remains life imprisonment for these offenders following the First Step Act.<sup>38</sup>

## ***Drug Type***

The distribution of drug type among the offenders for whom an 851 information was filed was similar in Year One and fiscal year 2018. Methamphetamine offenders accounted for approximately 40 percent of drug offenders for whom an 851 information was filed during both years (42.5% in fiscal year 2018 and 38.5% in Year One). And, in both years, methamphetamine offenders were the most likely to have an 851 enhancement apply at sentencing (39.9% in fiscal year 2018 and 30.3% in Year One). However, in each year, methamphetamine offenders represented a smaller portion of offenders for whom the information applied at sentencing than they did of offenders for whom the information was filed. This decrease was more notable in Year One.

In both fiscal year 2018 and Year One, heroin and “other” drug offenders accounted for a larger portion of offenders for whom the 851 enhancement applied at sentencing than they did of all offenders for whom the 851 information was filed. In Year One, compared to fiscal year 2018, heroin and “other” drug offenders accounted for a larger portion of both the offenders for whom an 851 information was filed and the offenders for whom the 851 enhancement applied at sentencing. Most of the “other” drug cases in which an 851 enhancement applied at sentencing involved fentanyl or a fentanyl analogue.<sup>40</sup>

Figure 5. Primary Drug Type—All Filed and Not Withdrawn/Invalidated<sup>39</sup>  
 FY 2018 and First Step Year One

Drug Type	851 Information Filed		851 Enhancement Not Withdrawn	
	FY 2018	First Step Year One	FY 2018	First Step Year One
Powder Cocaine	16.3%	16.2%	17.4%	17.2%
Crack Cocaine	16.3%	15.5%	15.2%	16.3%
Heroin	14.6%	15.9%	16.0%	18.1%
Marijuana	5.5%	4.6%	5.8%	6.2%
Methamphetamine	42.5%	38.5%	39.9%	30.3%
Other	4.8%	9.3%	5.7%	11.9%

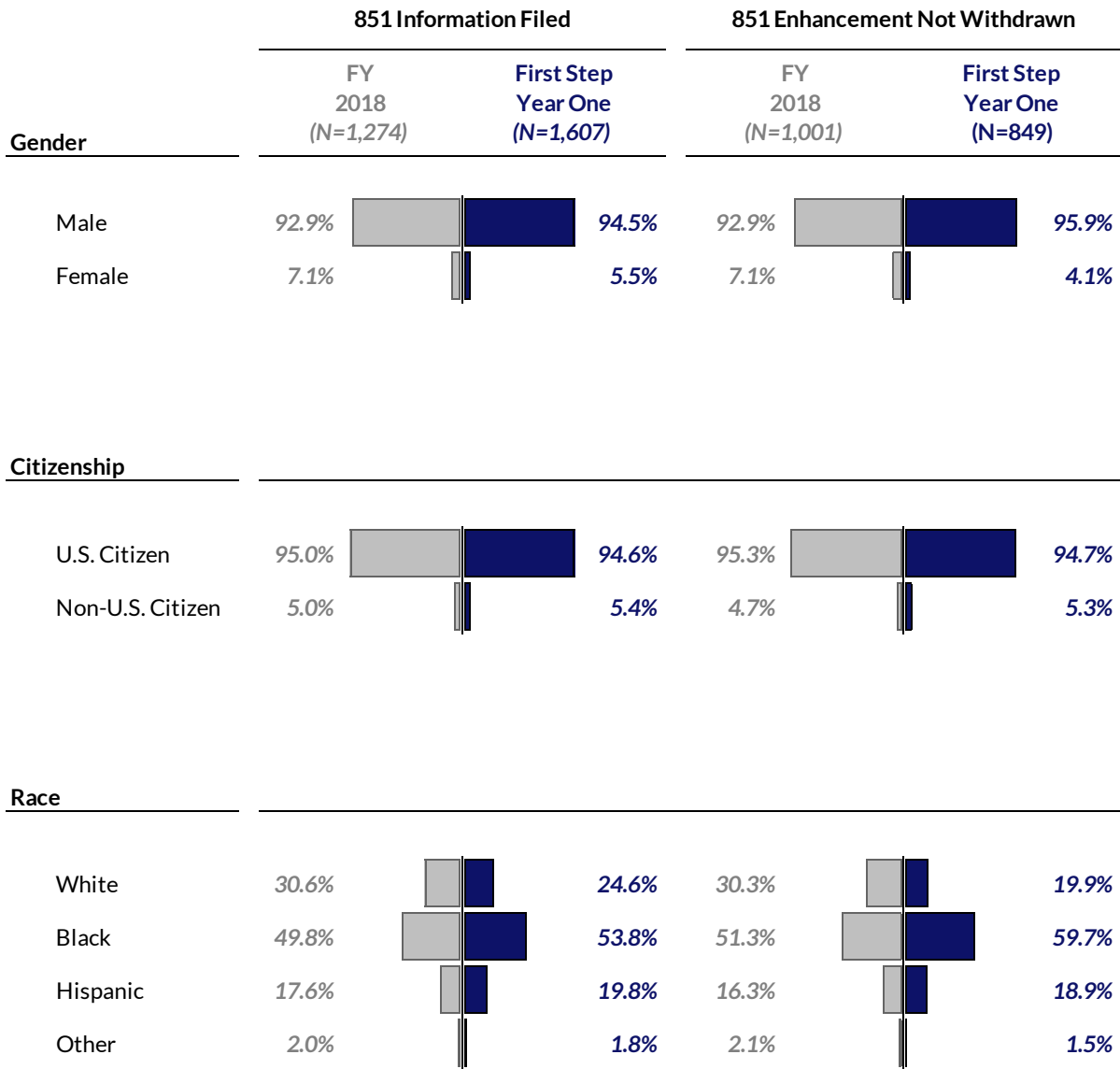
### Demographics

The demographic characteristics of offenders against whom an 851 information was filed and not withdrawn or invalidated were similar in Year One and fiscal year 2018. As demonstrated in Figure 6 on the next page, the overwhelming majority of offenders whose sentences were enhanced were male, United States citizens during both time periods.

However, although the provisions applied most frequently to Black offenders during both time periods, Black offenders accounted for a larger portion of offenders for whom an information was filed and filed and not withdrawn or invalidated in Year One. The portion of White offenders in each group decreased during the same time period. In fiscal year 2018, Black offenders

accounted for 49.8 percent (n=634) of offenders for whom an 851 information was filed and 51.3 percent (n=514) of offenders for whom the 851 enhancement applied at sentencing, which increased to 53.8 percent (n=864) of those filed and 59.7 percent (n=507) of those applied at sentencing in Year One. In fiscal year 2018, White offenders accounted for 30.6 percent (n=390) of offenders for whom an 851 information was filed and 30.3 percent (n=303) of offenders for whom the 851 enhancement applied at sentencing, decreasing to 24.6 percent (n=396) of those filed and 19.9 percent (n=169) of those applied at sentencing in Year One.

Figure 6. Demographic Characteristics—All Filed and Not Withdrawn/Invalidated<sup>41</sup>  
 FY 2018 and First Step Year One



## Expanding the Statutory Safety Valve

*The First Step Act broadened the existing statutory safety valve eligibility criteria at 18 U.S.C. § 3553(f), which authorizes a court to impose a sentence without regard to any drug mandatory minimum penalty when all criteria are met.<sup>42</sup>*

Section 402 of the First Step Act expanded the eligibility criteria for the statutory safety valve,<sup>43</sup> thereby allowing a greater number of drug offenders to receive relief from a mandatory minimum penalty or, where no mandatory minimum applies, a reduction in sentence.

Many drug trafficking offenses carry mandatory minimum terms of imprisonment that are triggered by the quantity of drugs involved in the offense.<sup>44</sup> As part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>45</sup> Congress enacted the statutory “safety valve” to authorize courts to impose a sentence without regard to a statutory minimum penalty if the court finds that the defendant meets all five criteria set forth in the statute.<sup>46</sup>

The First Step Act amended the safety valve provision, expanding it in two ways. First, the Act extended applicability of the safety valve to maritime cases.<sup>48</sup> Second, it extended eligibility to offenders who have up to four criminal history points, “excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines.”<sup>49</sup> Offenders who have a “prior 3-point offense” or a “prior 2-point violent offense” are excluded from eligibility, regardless of their criminal history score.<sup>50</sup> The Act provides that a “violent offense” is a “crime of violence, as defined by 18 U.S.C. § 16, that is punishable by imprisonment.”<sup>51</sup>

*As originally enacted, the safety valve applied to offenses under 21 U.S.C. §§ 841, 844, 846 and 21 U.S.C. §§ 961 and 963 and contained five requirements:*

1. *the defendant must have not more than one criminal history point, as determined under the sentencing guidelines;*
2. *the defendant must 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”;*
3. *the offense cannot have resulted in death or serious bodily injury to any person;*
4. *the defendant must be a limited actor (not an organizer, leader, manager, or supervisor), who was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848; and*
5. *the defendant must provide all information and assistance possible to law enforcement.<sup>47</sup>*

## ***Incorporation of the Statutory Safety Valve and the 2-Level Guideline Reduction***

When Congress first enacted the safety valve, it directed the Commission to promulgate or amend guidelines and policy statements to “carry out the purposes of [section 3553(f)].”<sup>52</sup> The *Guidelines Manual* incorporates the safety valve provision in two places. First, §5C1.2 (Limitation on Applicability of Statutory Minimum in Certain Cases) adopts the statutory language of section 3553(f), providing that where a defendant meets the criteria, “the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence.”<sup>53</sup> Second, §§2D1.1 (Drug Trafficking) and 2D1.11 (Listed Chemicals) each provide for a 2-level reduction in the guideline offense level for any defendant who meets the safety valve subdivision criteria at §5C1.2, including defendants whose conviction does not carry a mandatory minimum penalty.<sup>54</sup>

The First Step Act did not make any changes to the *Guidelines Manual*, nor did the Act provide emergency amendment authority to the Commission.<sup>55</sup> Thus, as a matter of proper guideline application, a defendant is eligible for a 2-level reduction only if the defendant meets the *old* statutory safety valve criteria still listed at §5C1.2. If a defendant meets the expanded statutory safety valve criteria, and a court chooses to reduce the sentence below the guideline range, that sentence is considered a variance under the guidelines.

## **First Step Act’s Expansion of the Safety Valve**

This section proceeds in two parts. The first part, consistent with the analyses throughout this report, presents data comparing safety valve recipients in Year One and fiscal year 2018. The second part provides further analysis of Year One safety valve recipients, comparing two groups of offenders—those offenders who were eligible under the narrower statutory safety valve criteria in place before First Step Act expansion (“Already Eligible offenders”) to those offenders who became eligible under the expanded provisions (“Newly Eligible offenders”). Except where specifically noted, the terms “safety valve recipients,” “safety valve offenders,” or offenders who “received relief,” used throughout this section refer to the offenders who met the statutory safety valve criteria and, as a result, received any form of safety valve relief (*i.e.*, relief from a mandatory minimum penalty or a reduction in sentence as a result of meeting the safety valve criteria when no mandatory minimum applied).

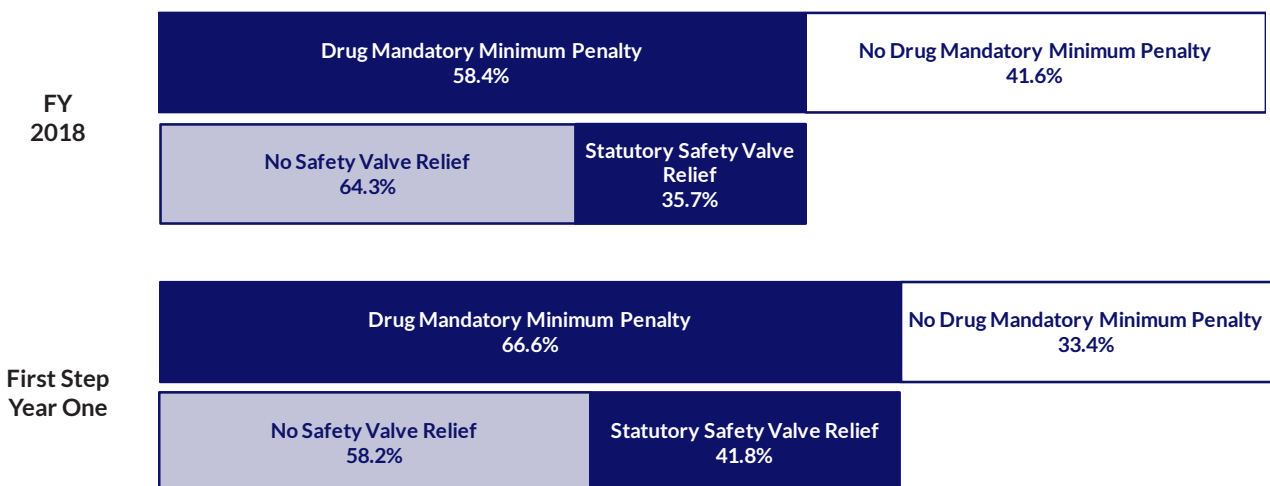


## First Step Year One and FY 2018

During Year One, there were 19,739 drug trafficking cases,<sup>56</sup> an increase from fiscal year 2018 (n=18,349).<sup>57</sup> As demonstrated in Figure 7, the number of offenders convicted of an offense carrying a drug mandatory minimum penalty also increased. In Year One, 66.6 percent of offenders (n=13,138) were convicted of a drug offense carrying a mandatory minimum penalty, while 33.4 percent (n=6,601) were not. By comparison, in fiscal year 2018, 58.4 percent (n=10,716) were convicted of a drug offense carrying a mandatory minimum penalty, while 41.6 percent (n=7,633) were not.

There was an increase in the number and percentage of offenders who received relief from a mandatory minimum penalty pursuant to the safety valve in Year One.<sup>59</sup> In Year One, of the 13,138 drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty, 5,493 (41.8%) received safety valve relief from the mandatory minimum penalty—an increase from fiscal year 2018, when 3,820 of 10,716 drug trafficking offenders convicted of a drug offense carrying a mandatory minimum penalty (35.7%) received such relief.

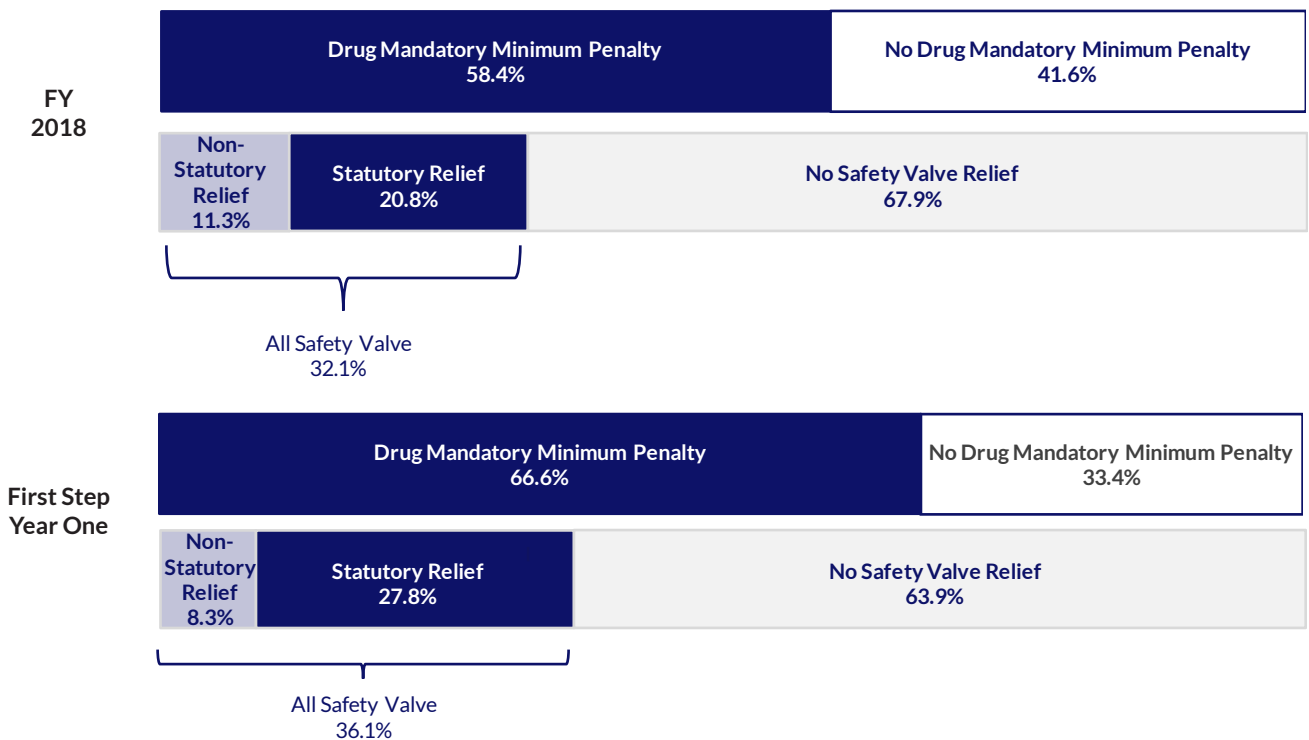
Figure 7. Safety Valve Relief Status by Drug Mandatory Minimum Penalty Status<sup>58</sup>  
 FY 2018 and First Step Year One



As discussed above, offenders who meet the criteria but are convicted of no offense carrying a mandatory minimum penalty may receive a sentence reduction. In Year One, an additional 1,634 offenders who faced no mandatory minimum penalty received a reduction in their sentence (either as a 2-level guideline reduction or as a variance) as a result of meeting the statutory safety valve criteria. In fiscal year 2018, an additional 2,065 offenders received a 2-level reduction in the guideline offense level only.<sup>60</sup>

Thus, when considering drug trafficking offenders who received *any* form of safety valve relief, there was also an increase in Year One, compared to fiscal year 2018. In Year One, a total of 7,127 drug trafficking offenders (36.1%) received some form of safety valve relief, and the remaining 12,612 offenders (63.9%) did not—an increase from fiscal year 2018, when a total of 5,885 drug trafficking offenders (32.1%) received some form of safety valve relief, and the remaining 12,460 offenders (67.9%) did not.

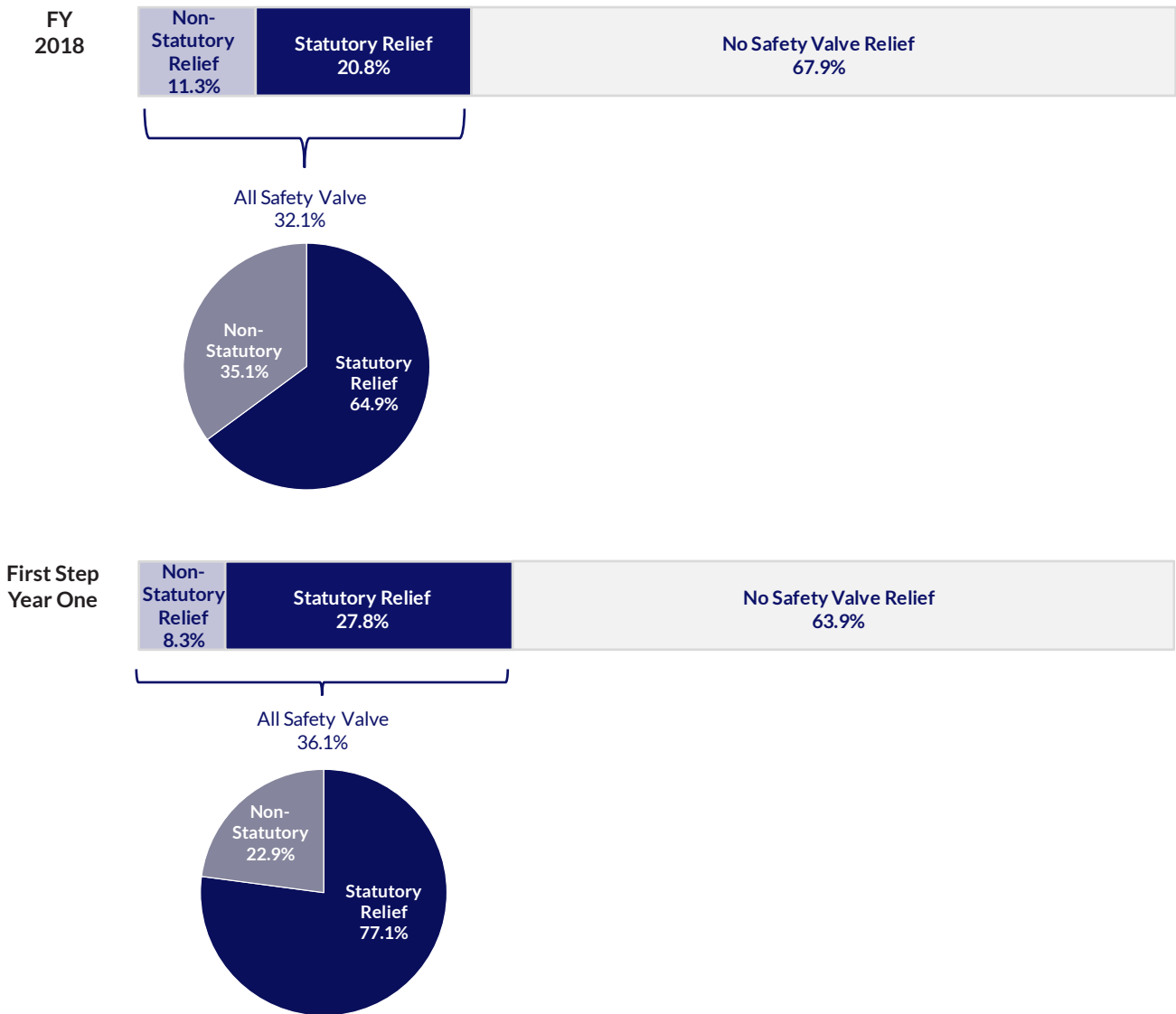
Figure 8. Safety Valve Relief Status for All Drug Trafficking Cases<sup>61</sup>  
FY 2018 and First Step Year One



Of offenders who received any form of safety valve relief, there was also a shift in the nature of that relief. As demonstrated in Figure 9, in Year One, of the 7,127 offenders who received any form of safety valve relief, more than three-quarters received relief from a mandatory minimum

penalty (77.1%; n=5,493), an increase from fiscal year 2018, when 64.9 percent (n=3,820) of the 5,885 offenders who received any form of safety valve relief were relieved of a mandatory minimum penalty.

Figure 9. Nature of Safety Valve Relief for All Drug Trafficking Offenders<sup>62</sup>  
 FY 2018 and First Step Year One

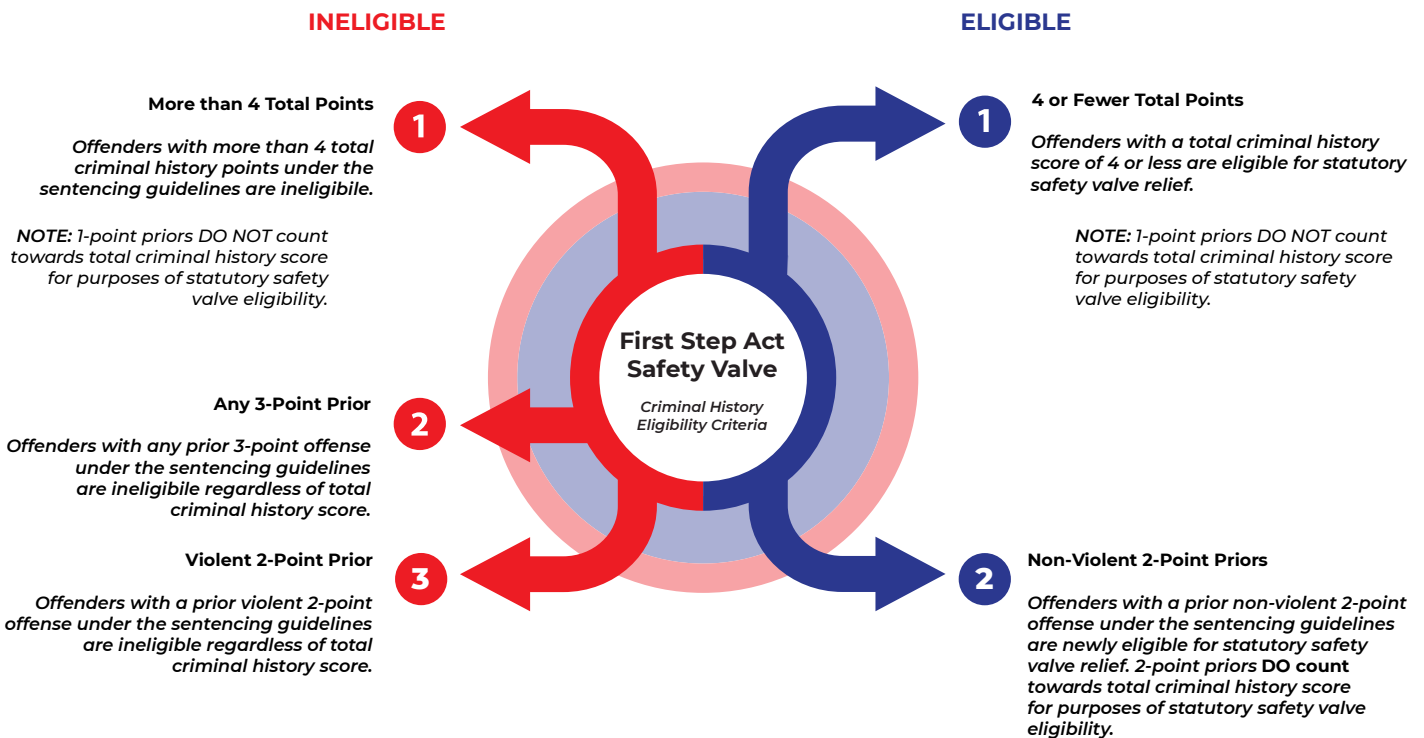


The increase in the number and percentage of offenders receiving relief appears to be largely attributable to the First Step Act’s safety valve expansion. Of the 7,127 offenders who received relief in Year One, the majority (80.8%; n=5,758) met the requirements under the *old* safety valve criteria and, therefore, would have received relief absent the First Step Act’s expansion. These offenders had zero or one criminal history points and were convicted under one of the statutes initially included under the safety valve provision. An additional 1,369 Newly Eligible offenders became eligible as a result of the First Step Act’s expansion of the safety valve criteria. These offenders are discussed in more detail in the second part of this section.

### Number of Criminal History Points

In fiscal year 2018, prior to the First Step Act’s expansion, 5,885 offenders received safety valve relief. These offenders all had zero or one criminal history points.<sup>63</sup> Similarly, in Year One, the overwhelming majority of offenders who received safety valve relief had zero or one criminal history points (83.1%; n=5,923). Among those with zero criminal history points were 165 offenders who became newly eligible for relief as a result of the addition of the maritime provisions. The remaining 1,204 offenders (16.9%) had more than one criminal history point and became newly eligible for relief as a result of the First Step Act’s expanded criminal history provision. The criminal history scores of the Newly Eligible offenders are discussed in the second part of this section.

Figure 10. New Criminal History Criteria for Statutory Safety Valve Relief

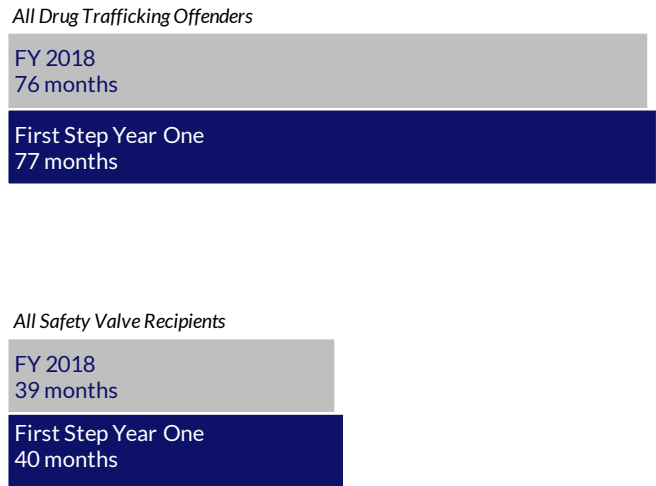


**NOTE:** Offenders with 2, 3, or 4 total CH points are **newly eligible** for statutory relief. Offenders with 0 or 1 total CH points were **already eligible** for statutory and guideline relief.

## Average Sentence Length

The average sentence lengths for all drug trafficking offenders and for safety valve offenders remained stable between fiscal year 2018 and Year One. As demonstrated in Figure 11, in fiscal year 2018, the average sentence was 76 months for all drug trafficking offenders and 39 months for all offenders who received safety valve relief. In Year One, the average sentence was 77 months for all drug trafficking offenders and 40 months for offenders who received relief.

Figure 11. Average Sentence Length<sup>64</sup>  
FY 2018 and First Step Year One



## Drug Type

As demonstrated in Figure 12, the distribution of drug type among safety valve offenders remained relatively consistent when comparing Year One and fiscal year 2018. In Year One, cocaine and marijuana offenders received safety valve relief less frequently, while methamphetamine offenders received relief more frequently.

Figure 12. Primary Drug Type in Safety Valve Cases<sup>65</sup>  
FY 2018 and First Step Year One

Drug Type	All Safety Valve Recipients	
	FY 2018	First Step Year One
Powder Cocaine	27.4%	22.9%
Crack Cocaine	1.3%	2.0%
Heroin	10.7%	10.5%
Marijuana	17.1%	11.7%
Methamphetamine	37.2%	43.4%
Other	6.4%	9.4%

## Demographics

Although Hispanic offenders continued to represent the largest group to receive safety valve relief, they accounted for a smaller percentage of safety valve recipients in Year One than in fiscal year 2018; the percentage of White and Black offenders increased. In fiscal year 2018, 75.0 percent (n=4,406) of safety valve recipients were Hispanic offenders, followed by White offenders (13.8%; n=812), Black offenders (8.6%; n=504), and Other Race offenders (2.6%; n=155). In Year One, 66.5 percent (n=4,739) of safety valve recipients were Hispanic offenders,

19.0 percent (n=1,355) were White offenders, 11.0 percent (n=781) were Black offenders, and 3.5 percent (n=247) were Other Race offenders. As discussed more in the next part of this section, this shift in demographics is largely attributable to the Newly Eligible offenders.

United States citizens represented a larger percentage of safety valve recipients in Year One. In fiscal year 2018, slightly over half (52.6%; n=3,092) of offenders who received safety valve relief were United States citizens. In Year One, the percentage of United States citizens increased to 60.9 percent (n=4,333).

Figure 13. Demographic Characteristics for All Drug Trafficking Offenders and Safety Valve Recipients<sup>66</sup> FY 2018 and First Step Year One

	All Drug Trafficking Offenders		All Safety Valve Recipients	
	FY 2018 N=18,349	First Step Year One N=19,739	FY 2018 N=5,885	First Step Year One N=7,127
<b>Total Offenders</b>				
<b>Gender</b>				
Male	83.5%	83.6%	74.7%	74.1%
Female	16.5%	16.4%	25.3%	25.9%
<b>Citizenship</b>				
U.S. Citizen	75.5%	78.9%	52.6%	60.9%
Non-U.S. Citizen	24.5%	21.1%	47.4%	39.1%
<b>Race</b>				
White	24.1%	25.2%	13.8%	19.0%
Black	25.0%	27.5%	8.6%	11.0%
Hispanic	48.0%	44.2%	75.0%	66.5%
Other	2.9%	3.1%	2.6%	3.5%

Male offenders comprised approximately three-quarters of safety valve recipients in both fiscal year 2018 (74.7%; n=4,397) and in Year One (74.1%; n=5,280).

## Year One Safety Valve Offenders: Already Eligible and Newly Eligible Offenders

Of the 7,127 offenders who received relief in Year One, the majority (80.8%; n=5,758) met the requirements for relief under the *old* safety valve criteria and, therefore, would have received relief absent the First Step Act’s expansion. These Already Eligible offenders had zero or one criminal history points and were convicted under one of the statutes originally included under the safety valve provision.

The remaining 1,369 Newly Eligible offenders became eligible as a result of the First Step Act’s expansion of the safety valve criteria. As demonstrated in Figure 14, of the 1,369 offenders who received relief under the new safety valve criteria, 165 offenders (12.1%) became eligible as a result of convictions under the maritime statutes and 1,204 (87.9%) became eligible as a result of the First Step Act’s criminal history expansion.

Figure 14. Distribution of Offenders Eligible for Safety Valve<sup>67</sup>  
First Step Year One

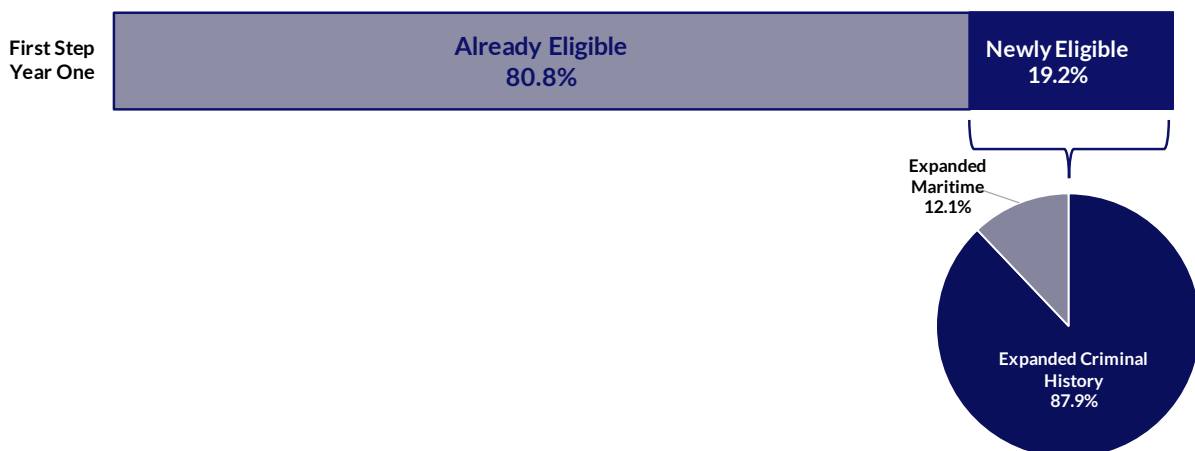
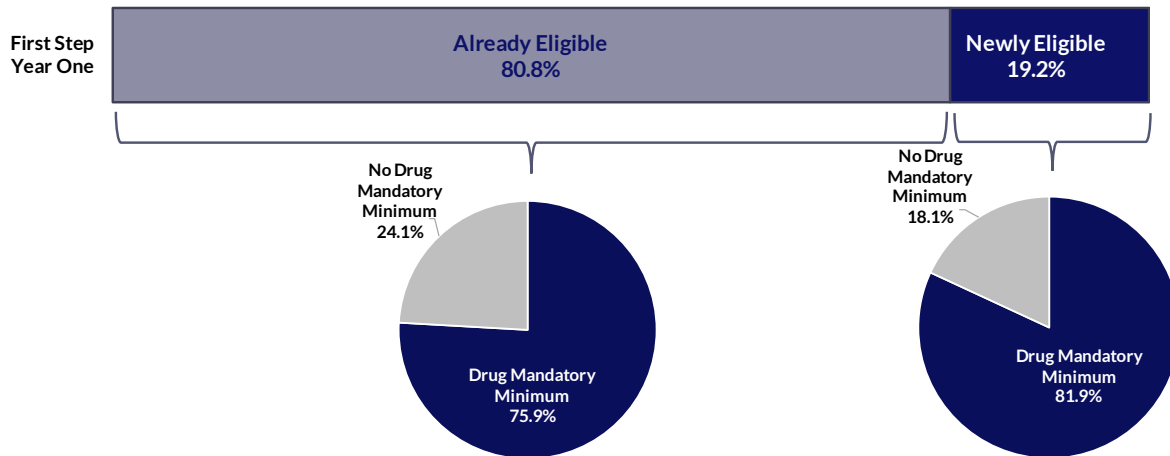


Figure 15. Drug Mandatory Minimum Status Among Offenders Eligible for Safety Valve<sup>68</sup>  
*First Step Year One*



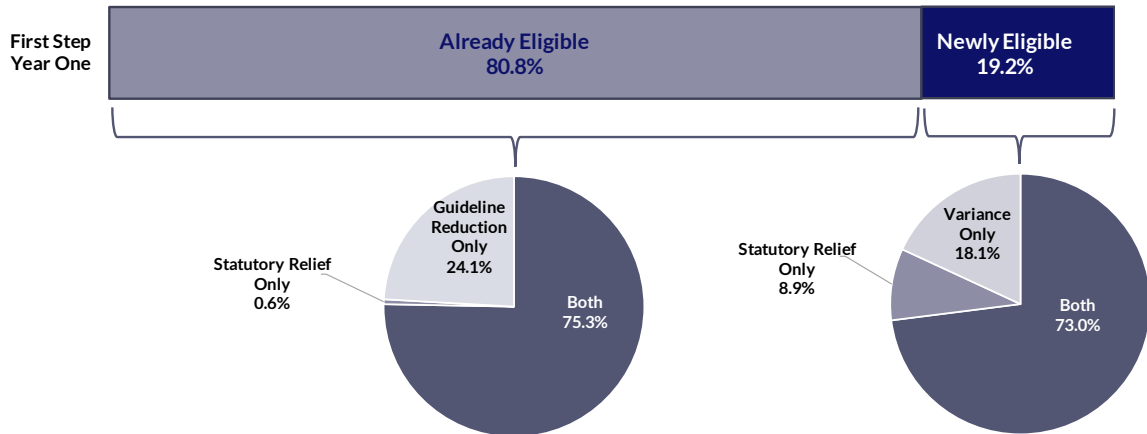
### ***Drug Mandatory Minimum Status and Safety Valve Relief***

Newly Eligible offenders were convicted of an offense carrying a drug mandatory minimum penalty at a higher rate than Already Eligible offenders. Among Already Eligible offenders, 75.9 percent (n=4,372) were convicted of a drug offense carrying a mandatory minimum penalty, while 24.1 percent (n=1,386) were not. By comparison, of the Newly Eligible offenders, 81.9 percent (n=1,121) were convicted of a drug offense carrying a mandatory minimum penalty, while 18.1 percent (n=248) were not.

The nature of relief offenders received was similar between the two groups, but Already Eligible offenders received a 2-level guideline reduction under §2D1.1 at a higher rate than the Newly Eligible offenders received a comparable reduction. Because §5C1.2 has not been amended to reflect the First Step Act’s expansion of the safety valve, if courts choose to reduce a Newly Eligible offender’s sentence below the guideline range because he or she was eligible for the expanded safety valve, that sentence is considered a variance under the guidelines. As demonstrated in Figure 16, of the 5,758 Already Eligible offenders, three-quarters (75.3%; n=4,337) received relief from the statutory minimum penalty *and* a 2-level guideline reduction under §2D1.1, 1,386 offenders (24.1%) were not convicted of an offense carrying a drug



Figure 16. Nature of Relief Among Offenders Eligible for Safety Valve<sup>69</sup>  
 First Step Year One



mandatory minimum penalty and received the 2-level guideline reduction only, and 35 offenders (0.6%) received statutory relief only. Of the Newly Eligible offenders, nearly three-quarters (73.0%; n=999) received relief from a statutory minimum penalty *and* a variance below the applicable guideline range, 248 (18.1%) were not convicted of an offense carrying a drug mandatory minimum penalty and received a variance below the guideline range only, and 122 (8.9%) received statutory safety valve relief only.

### Criminal History

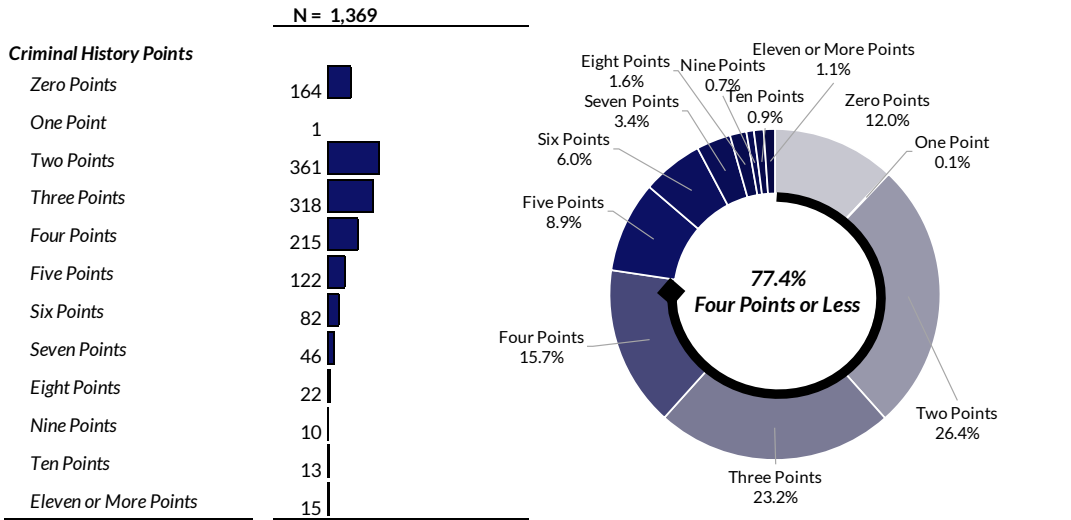
Already Eligible offenders can have no more than one criminal history point. Most Already Eligible offenders had zero criminal history points (84.6%; n=4,869), and the remaining 889 (15.4%) had one criminal

history point. This is consistent with fiscal year 2018, when 85.8 percent (n=5,049) of safety valve recipients had zero criminal history points, and the remaining 823 offenders (14.0%) had one criminal history point.<sup>70</sup>

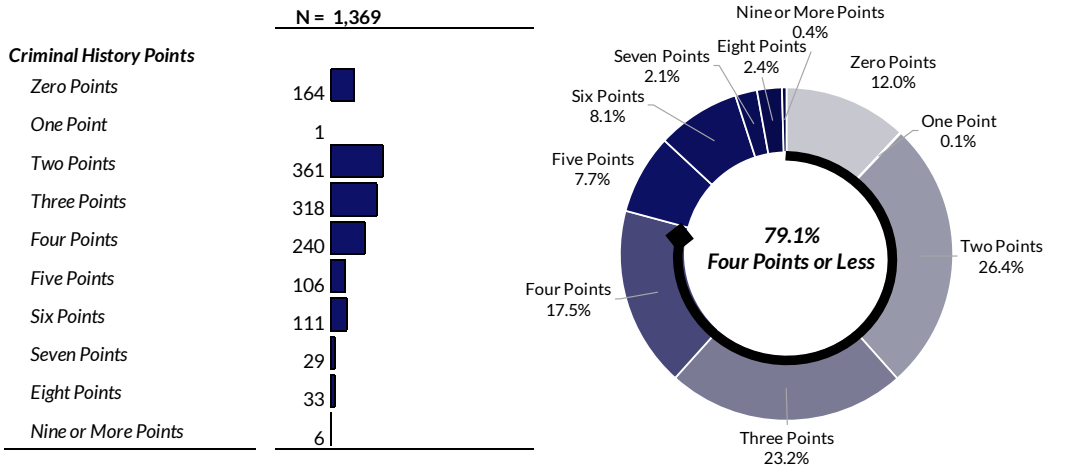
Newly Eligible offenders had a wider distribution of criminal history points used in the calculation of their Criminal History Category. This is consistent with the changes made by First Step Act. As described above, an eligible defendant can have no more than four criminal history points, comprised of up to two non-violent 2-point offenses. An eligible defendant can have *any* number of 1-point offenses due to the Act “excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines.”<sup>71</sup>

Figure 17 A, B, and C. Total Criminal History Points for Newly Eligible Safety Valve Offenders<sup>72</sup>  
 First Step Year One

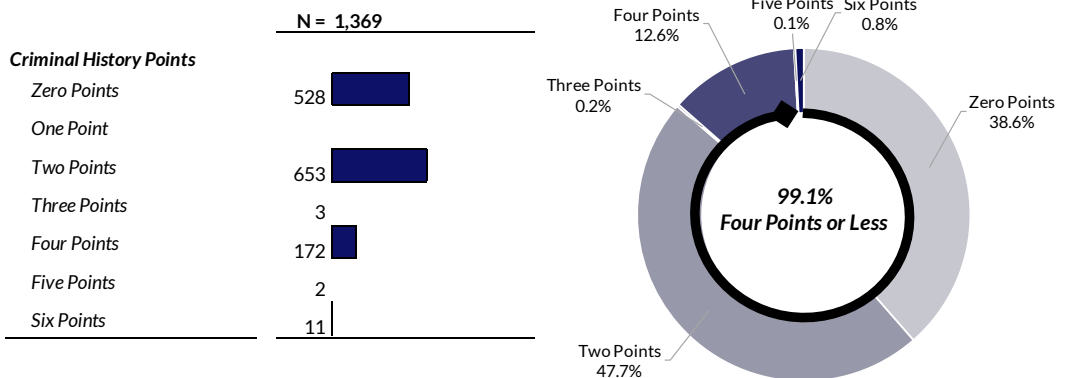
17A. Point Calculation Without Guideline Cap on 1-Point Offenses



17B. Points Used to Determine Criminal History Category



17C. Points Used for Safety Valve Determination Post-First Step Act



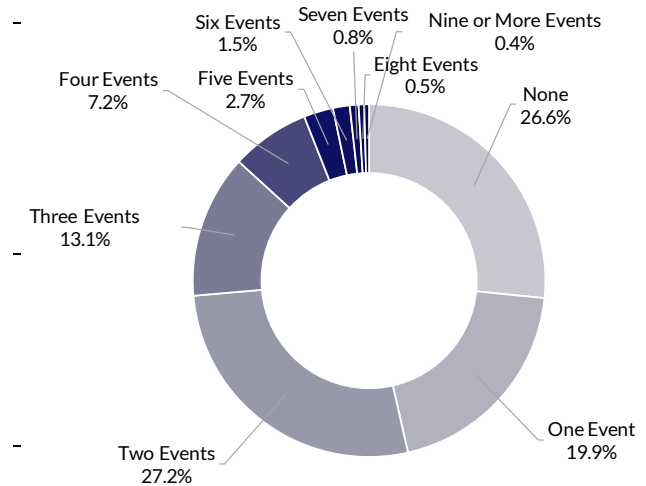
As demonstrated in Figure 17, before excluding 1-point offenses for safety valve consideration, nearly 80 percent (79.1%; n=1,084) of the Newly Eligible offenders had four or fewer criminal history points and half had two or three criminal history points applied in the calculation of their Criminal History Category (49.6%; n=679).<sup>73</sup> One-fifth (20.9%; n=285) had more than four criminal history points. Newly Eligible offenders with zero criminal history points are those who were convicted under the maritime statutes, 46 U.S.C. §§ 70503 or 70506.

A slightly wider distribution is seen when considering all criminal history events without the cap used for calculating an offender’s Criminal History Category. The criminal history rules provide that prior sentences assigned one point under §4A1.1(c) are counted “up to a total of 4 points for this subsection.”<sup>74</sup> Thus, an offender can have some 1-point offenses above the 4-point cap. While the court can consider these added points for departure reasons,<sup>75</sup> they are not included in the total points used in determining the Criminal History Category.

As demonstrated in Figure 18, among the 1,369 Newly Eligible offenders, 26.6 percent (n=364) had no 1-point events, 19.9 percent (n=272) had one 1-point event, 27.2 percent (n=372) had two 1-point events, 13.1 percent (n=180) had three 1-point events, and 7.2 (n=99) had four 1-point events.

The remaining 6.0 percent (n=82) of Newly Eligible offenders had more than four 1-point events, though only four are counted for criminal history purposes

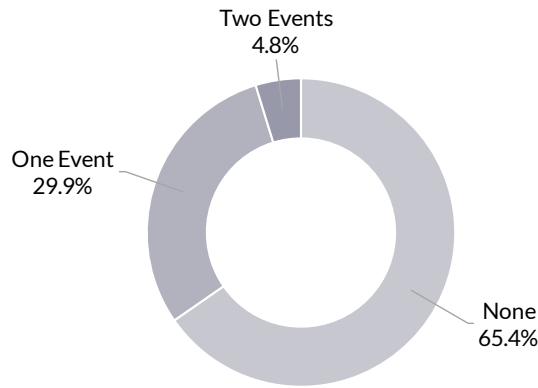
Figure 18. Number of 1-Point Events Without Guideline Cap for Newly Eligible Safety Valve Offenders<sup>76</sup> First Step Year One



under §4A1.1(c).<sup>77</sup> Of those offenders with more than four 1-point criminal history events, most had five (45.1%; n=37), six (25.6%; n=21), or seven (13.4%; n=11). One offender had 16 1-point events, the most among the Newly Eligible. As demonstrated in Figure 17A, when these criminal history events above the guideline cap on 1-point offenses are considered, 38 Newly Eligible offenders (2.7%), had nine or more points. One offender had 22 points, the most among Newly Eligible offenders.

When considering the impact of the First Step Act (see Figure 17C), excluding all 1-point offenses from safety valve consideration, the majority of Newly Eligible offenders had either two (47.7%; n=653) or zero (38.6%; n=528) remaining points. Over ten percent (12.6%; n=172) had four remaining points, the maximum number a defendant can have and remain eligible.<sup>78</sup>

Figure 19. 2-Point Events for Newly Eligible Safety Valve Offenders<sup>80</sup>  
*First Step Year One*



As a corollary of not counting 1-point offenses, and the exclusion of any offender with a 3-point offense from receiving relief, 2-point offenses have become the primary factor in determining an offender’s eligibility. The majority of Newly Eligible offenders (65.4%; n=894) had no 2-point criminal history events, 29.9 percent (n=409) had one 2-point criminal history event, and 4.8 percent (n=65) had two 2-point criminal history events.<sup>79</sup> An offender who has any *violent* 2-point offense is prohibited from receiving relief.

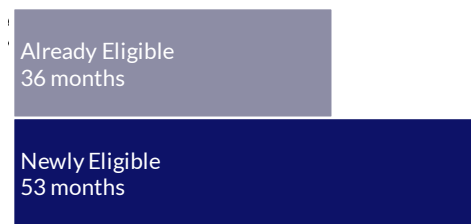
Of the 1,369 Newly Eligible offenders, 35.9 percent (n=491) received points under §4A1.1(d) (“status points”) for committing an offense while under a criminal justice

sentence.<sup>81</sup> Five Newly Eligible offenders (0.4%) were sentenced as career offenders under §4B1.1.<sup>82</sup> None received points under §4A1.1(e) for a crime of violence offense that did not otherwise receive points,<sup>83</sup> were sentenced as Armed Career Criminals pursuant to 18 U.S.C. § 924(e), or received an enhancement under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).<sup>84</sup> Because Already Eligible offenders can have no more than one criminal history point, none received points under §4A1.1(d) or (e). No Already Eligible offenders were sentenced as career offenders or Armed Career Criminals. One Already Eligible offender received an enhancement under §4B1.5.

## Average Sentence Length

There was a substantial difference in the average sentence length when comparing Already Eligible and Newly Eligible offenders. As demonstrated in Figure 20, the average sentence for Already Eligible offenders was 36 months, three months shorter than the average sentence for all offenders receiving safety valve relief in fiscal year 2018 (39 months). Of Newly Eligible offenders, most of whom qualified under the expanded criminal history provision, the average sentence was 53 months, 17 months longer than for Already Eligible offenders.

Figure 20. Average Sentence Length<sup>85</sup>  
First Step Year One



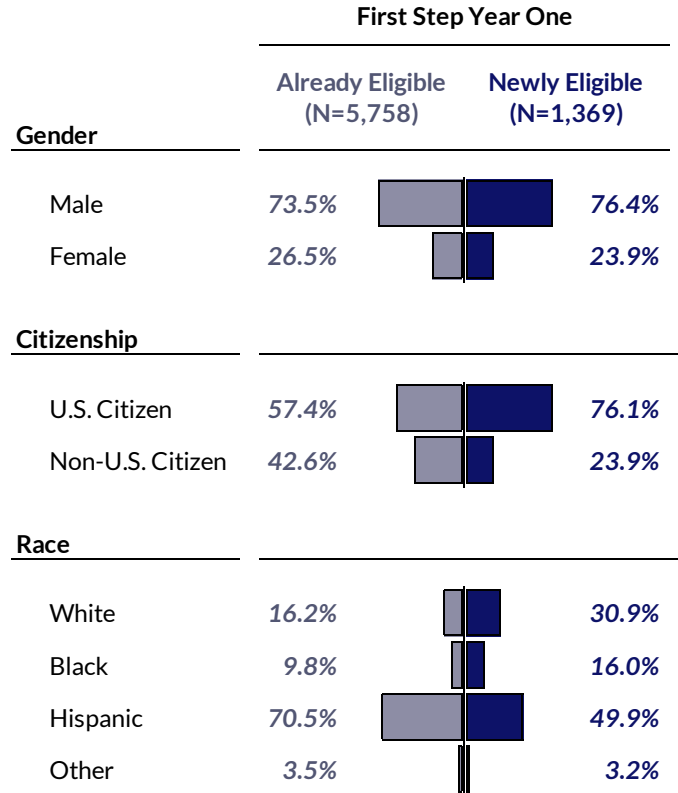
## Drug Type

The distribution of drug type among Newly Eligible offenders was generally consistent with that of the Already Eligible offenders. However, a larger percentage of the Newly Eligible offenders were methamphetamine (48.5% compared to 42.2%) or crack offenders (4.2% compared to 1.5%), and a smaller percentage were marijuana offenders (6.9% compared to 12.8%).

Figure 21. Primary Drug Type for Newly Eligible Offenders<sup>86</sup>  
First Step Year One

Drug Type	First Step Year One	
	Already Eligible	Newly Eligible
Powder Cocaine	22.9%	22.9%
Crack Cocaine	1.5%	4.2%
Heroin	10.8%	9.4%
Marijuana	12.8%	6.9%
Methamphetamine	42.4%	48.5%
Other	9.8%	8.1%

Figure 22. Demographic Characteristics<sup>87</sup>  
*First Step Year One*



## Demographics

There were notable differences in racial composition and citizenship status when comparing Already Eligible offenders to Newly Eligible offenders. Although Hispanic offenders represented the largest portion of each group, Newly Eligible offenders were more frequently White or Black and less frequently Hispanic, compared to Already Eligible offenders. Of Already Eligible offenders, more than two-thirds (70.5%; n=4,056) were Hispanic, followed by White offenders (16.2%; n=933), Black offenders (9.8%; n=562), and Other Race offenders (3.5%; n=203). Among Newly Eligible offenders, Hispanic offenders represented

nearly half (49.9%; n=683) followed by White offenders (30.9%; n=422), Black offenders (16.0%; n=219), and Other Race offenders (3.2%; n=44).

Newly Eligible offenders were also more frequently United States citizens than were Already Eligible offenders. Of Already Eligible offenders, 57.4 percent (n=3,294) were United States citizens. This is similar to fiscal year 2018, when slightly over half (52.6%; n=3,092) of offenders who received safety valve relief were United States citizens. Among the Newly Eligible offenders, roughly three-quarters were United States citizens (76.1%; n=1,039).

These changes in the racial composition and citizenship status among Newly Eligible offenders, compared to the Already Eligible offenders, are in part a result of the First Step Act's increase in the number of criminal history points a safety-valve eligible defendant is permitted. Foreign convictions are not counted for purposes of the criminal history rules<sup>88</sup> and, as a result, criminal history scores for non-citizens may underrepresent past criminal activity that would otherwise be countable.

Non-United States citizens account for smaller portions of drug trafficking offenders as the number of criminal history points increases. For example, in Year One, non-United States citizens represented 43.5 percent of drug trafficking offenders with zero criminal history points, 16.7 percent of those with one criminal history point, and, on average, only 9.1 percent of offenders with between two and ten criminal history points.

Similarly, Hispanic offenders have accounted for the largest portions of drug trafficking offenders with zero or one criminal history points, respectively, and have accounted for smaller portions of overall drug trafficking offenders as criminal history points increase. For example, in both fiscal year 2018 and Year One, Hispanic offenders comprised approximately 70 percent of drug trafficking offenders with zero criminal history points (72.1% in fiscal year 2018 and 69.1% in Year One) and just under half of those with one criminal history point (48.4% in fiscal year 2018 and 46.1% in Year One). Black and White drug offenders accounted for larger portions of drug

trafficking offenders with three or more criminal history points.

Male offenders comprised approximately three-quarters of both the Already Eligible (73.5%; n=4,234) and the Newly Eligible safety valve recipients (76.4%; n=1,046).

## Impact on the Variance Rate

As noted above, because §5C1.2 has not been amended to reflect the First Step Act's expansion of the safety valve, when courts choose to reduce an offender's sentence below the guideline range because he or she was eligible under the expanded statutory safety valve criteria, that sentence is considered a variance under the guidelines. These variances partially account for an increase in the overall variance rate in drug trafficking cases in Year One. In fiscal year 2018, 21.8 percent of drug trafficking offenders received a below-range variance. This increased to 24.8 percent in Year One (a 3.0% increase). When Newly Eligible safety valve cases are removed, however, the below-range variance rate decreases slightly to 23.4 percent. The use of variances to reflect the sentence reduction for Newly Eligible safety valve offenders accounts for 1.4 percent—nearly half—of the 3.0 percent increase in the below-range variance rate for drug trafficking offenders in Year One.

# Limiting Section 924(c) “Stacking”

*The First Step Act limits “stacking” of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense.<sup>89</sup>*

Section 403 of the First Step Act limits “stacking” of the 25-year penalty imposed under 18 U.S.C. § 924(c) for multiple weapon offenses. Section 924(c) prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a “crime of violence” or “drug trafficking crime.”<sup>90</sup> The statute prescribes a mandatory minimum penalty of at least five years of imprisonment, with increasingly longer penalties based on how the firearm was used (seven years if the firearm was brandished and ten years if the firearm was discharged)<sup>91</sup> and the type of firearm involved in the crime (ten years if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon and 30 years if the weapon was a machinegun, a destructive device or was equipped with a silencer or muffler).<sup>92</sup>

Section 924(c) further requires that these mandatory minimum penalties be imposed in addition to, and must run consecutively to, “any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the” underlying crime of violence or drug trafficking crime.<sup>93</sup> The statutory maximum penalty under each of these provisions is life imprisonment.

Section 924(c) also requires a mandatory minimum penalty of 25 years for each “second or subsequent conviction” of an offense under section 924(c).<sup>94</sup> Prior to the enactment of the First Step Act, these longer penalties applied even when a defendant was convicted of multiple section 924(c) counts *in the same case*. The Supreme Court upheld this practice and

Table 2. Penalties Under 18 U.S.C. § 924(c)

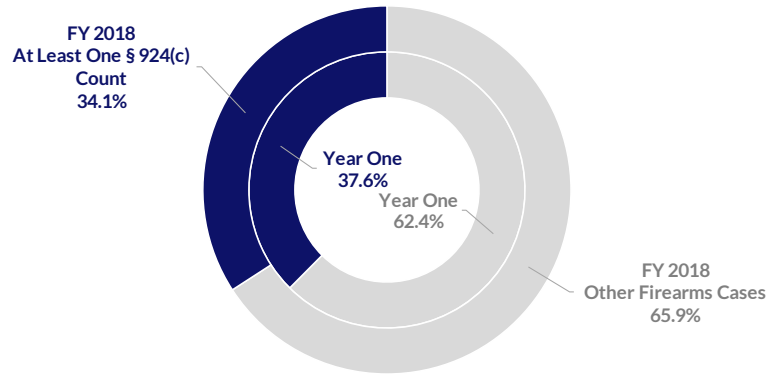
<b>18 U.S.C. § 924(c) Counts Per Indictment</b>	<b>Pre-First Step Act</b>	<b>Post-First Step Act</b>
<b>1 Count</b>	Mandatory minimum of <b>5 years</b>	Mandatory minimum of <b>5 years</b>
<b>2 Counts</b>	Mandatory minimums of 5 years + 25 years = <b>30 years</b>	Mandatory minimums of 5 years + 5 years = <b>10 years</b>
<b>3 Counts</b>	Mandatory minimums of 5 years + 25 years + 25 years = <b>55 years</b>	Mandatory minimums of 5 years + 5 years + 5 years = <b>15 years</b>



interpretation of the statute, reasoning that any additional convictions of an offense under section 924(c) are “second or subsequent” to the first conviction.<sup>95</sup> Thus, the longer recidivist mandatory minimum penalty had to be served consecutively to any sentences imposed for the underlying offenses *and* other section 924(c) offenses, even when all the offenses were charged in a single indictment.<sup>96</sup> This practice of charging multiple violations of section 924(c) within the same proceeding has commonly been referred to as “stacking” of mandatory minimum penalties.

The First Step Act limits the application of the 25-year penalty by providing that the 25-year enhanced penalty at section 924(c)(1)(C) applies only to offenders whose instant violation of 924(c) occurs *after* a prior section 924(c) conviction has become *final*.<sup>97</sup> As a result, a defendant can no longer be sentenced to a “stacked” 25-year penalty based on another section 924(c) conviction in the same case. The First Step Act did not make any changes to the other penalty provisions of section 924(c) and, as a result, if an offender commits multiple violations of section 924(c) during the course of a crime, the five-, seven-, and ten-year penalties will be imposed consecutively at one sentencing. And, after the First Step Act, where an offender has previously been convicted of a section 924(c) offense that has become final, and subsequently commits multiple violations of section 924(c), the 25-year penalty can then be imposed consecutively at one sentencing. This change to the penalties is demonstrated on the previous page, using the five-year mandatory minimum penalty as an example.

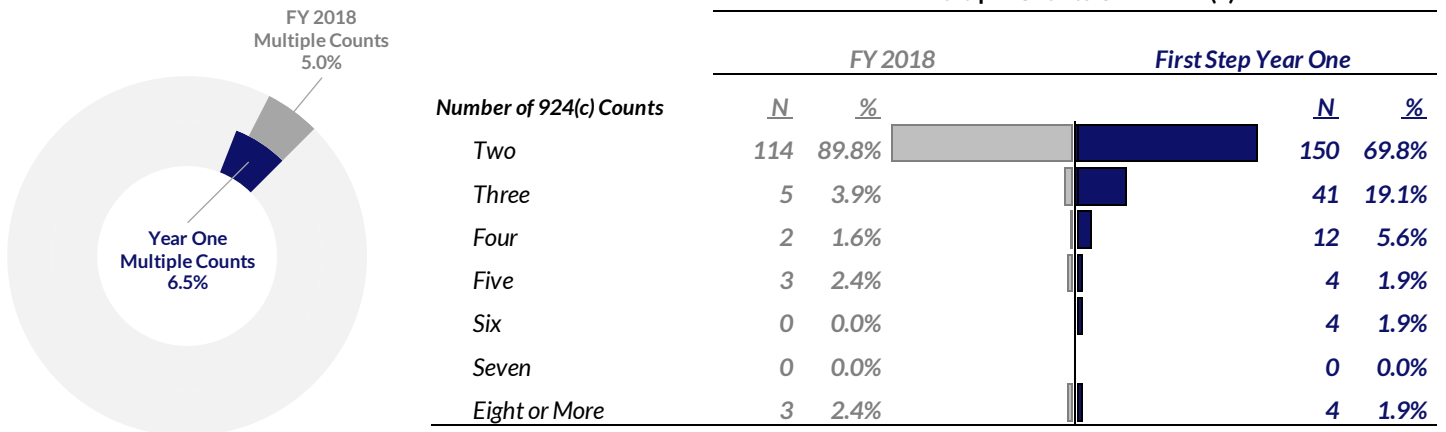
Figure 23. Change in Firearms Offenses Over Time<sup>98</sup>  
FY 2018 and First Step Year One



### Prevalence of 18 U.S.C. § 924(c) Offenses

Offenders convicted under section 924(c) increased in Year One compared to fiscal year 2018, both as a number and as a percentage of all firearms offenders. In fiscal year 2018, 2,564 offenders were convicted of at least one count under section 924(c), which represents 34.1 percent of all firearms offenders. This number increased to 3,288 offenders in Year One, which represents 37.6 percent of all firearms offenders. The number of total firearms offenders also increased from 7,512 (10.8% of cases overall) in fiscal year 2018, to 8,753 (11.2% of cases overall) in First Step Year One.<sup>99</sup>

Figure 24. Cases Involving Multiple Counts Under Section 924(c) and Number of Section 924(c) Counts<sup>100</sup>  
 FY 2018 and First Step Year One



While the number of offenders convicted of multiple counts under section 924(c) increased in Year One, the percentage of 924(c) offenders convicted of multiple counts remained relatively stable, compared to fiscal year 2018. In fiscal year 2018, 2,437 (95.0%) offenders were convicted of a single count and 127 (5.0%) were convicted of multiple counts. By comparison, in Year One, 3,073 (93.5%) offenders were convicted of a single count and 215 (6.5%) were convicted of multiple counts. As demonstrated in Figure 24, during both time periods, offenders convicted of multiple counts under section 924(c) were most frequently convicted of two such counts; however, a greater number of offenders were convicted of three or more counts in Year One. In fiscal year 2018, 114 (89.8%) offenders convicted of multiple counts under section 924(c) were convicted of two such counts, while the remaining 13 offenders were convicted of three or more counts (with a high of 11 counts for a single offender). By

comparison, in Year One, 150 offenders (69.8%) were convicted of two such counts, 41 (19.1%) were convicted of three counts, 12 (5.6%) were convicted of four counts, and an additional 12 offenders (5.6%) were convicted of between five and ten counts.

### Severity of Penalties Imposed for Section 924(c) Offenses

There was a significant decrease in cases involving the 25-year penalty for a “second or subsequent” offense in Year One. In fiscal year 2018, a 25-year penalty applied in 133 cases (5.2%) in which an offender was convicted under section 924(c). In Year One, a 25-year penalty applied in only 18 cases (0.6%) in which an offender was convicted of at least one count under section 924(c).

The First Step Act’s changes to the 25-year penalty are most evident when considering cases involving multiple counts under section 924(c). In fiscal year 2018, in most cases (92.1%; n=117) involving multiple counts under section 924(c), one 25-year penalty applied consecutively to another firearm mandatory minimum penalty. In two additional cases (1.6%), multiple consecutive 25-year penalties applied. By comparison, in Year One, of the 215 cases involving multiple counts, the 25-year penalty was imposed in only five cases. In four of these cases—all where the offender had a final prior section 924(c) conviction—multiple, consecutive 25-year penalties applied. In the fifth case, the offender had no final prior section 924(c) conviction and the penalty was applied consecutively to another firearm mandatory minimum penalty. In the vast majority of remaining cases, five-, seven-, and ten-year penalties

typically replaced what would have been a 25-year penalty prior to the First Step Act. In Year One, in half of the cases involving multiple counts (50.7%; n=109) a seven-year penalty was the highest penalty imposed. The highest penalty imposed was ten years in 30.7 percent of cases (n=66) and five years in 14.0 percent of cases (n=30). The specific penalties imposed in Year One are depicted in Figure 25.

The First Step Act’s limitation on the use of the 25-year penalty resulted in a considerable decrease in the average sentence length for section 924(c) offenders, particularly those convicted of multiple counts. In fiscal year 2018, offenders convicted of at least one count under section 924(c) had an average sentence of 150 months.<sup>102</sup> In Year One, the average sentence for these offenders was ten months shorter (140 months).<sup>103</sup>

Figure 25. Highest Mandatory Minimum Penalty in Cases with Multiple 18 U.S.C. § 924(c) Counts<sup>101</sup>  
FY 2018 and First Step Year One

	FY 2018		First Step Year One	
	N	%	N	%
<b>Total Offenders</b>	<b>127</b>	<b>100.0</b>	<b>215</b>	<b>100.0</b>
<b>Life</b>	<b>5</b>	<b>3.9%</b>	<b>5</b>	<b>2.3%</b>
Multiple Life MM	2	1.6%	4	1.9%
Life + Other Lower MM	3	2.4%	1	0.5%
<b>25-Year</b>	<b>119</b>	<b>93.7%</b>	<b>5</b>	<b>2.3%</b>
Multiple 25-Year MM	2	1.6%	4	1.9%
25-Year + Other Lower MM	117	92.1%	1	0.5%
<b>10-Year</b>	<b>3</b>	<b>2.4%</b>	<b>66</b>	<b>30.7%</b>
Multiple 10-Year MM	1	0.8%	23	10.7%
10-Year + Other Lower MM	2	1.6%	43	20.0%
<b>7-Year</b>	<b>0</b>	<b>0.0%</b>	<b>109</b>	<b>50.7%</b>
Multiple 7-Year MM	0	0.0%	104	48.4%
7-Year + Other Lower MM	0	0.0%	5	2.3%
<b>5-Year</b>	<b>0</b>	<b>0.0%</b>	<b>30</b>	<b>14.0%</b>
Multiple 5-Year MM	0	0.0%	30	14.0%

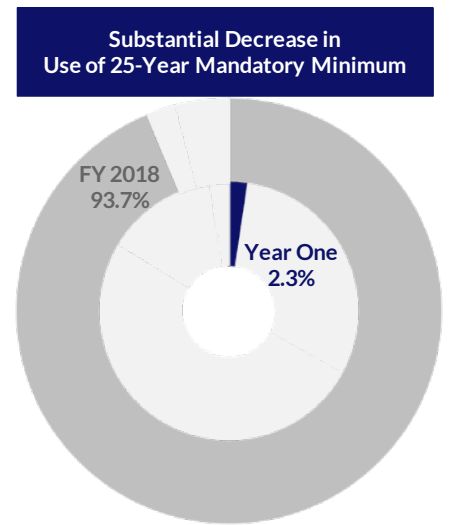
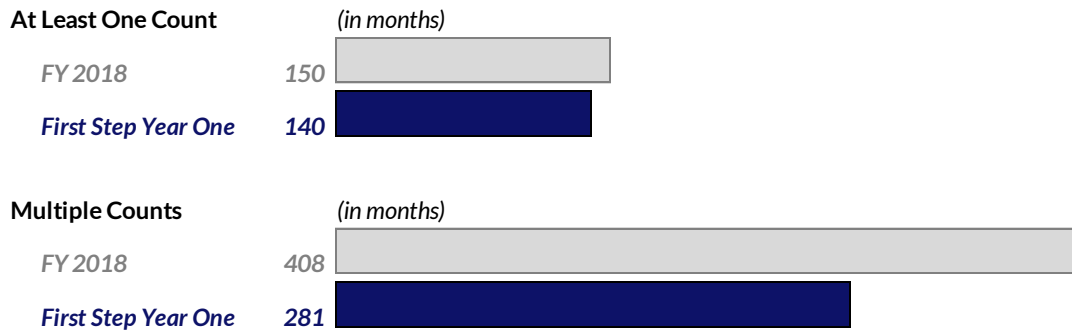


Figure 26. Average Sentence Length in 18 U.S.C. § 924(c) Cases<sup>104</sup>  
 FY 2018 and First Step Year One



For offenders convicted of multiple counts under section 924(c), the average sentence length was more than ten years shorter in Year One, decreasing from 408 months in fiscal year 2018 to 281 months (a difference of 127 months).

Aside from the substantial change in the number of 25-year penalties for “second or subsequent” offenses, the distribution of mandatory minimum penalty lengths for all section 924(c) offenses remained relatively stable between the two time periods. As demonstrated in Figure 27, in cases involving at least one count under section 924(c), the statute’s five-year mandatory minimum penalty was most commonly the highest penalty applied during both time periods—62.3 percent (n=1,597) during fiscal year 2018 and

67.2 percent (n=2,208) during Year One—followed by the seven-year penalty and the ten-year penalty. In fiscal year 2018, the seven-year penalty was the highest penalty applied in 21.8 percent of cases (n=559), and the ten-year penalty was the highest applied in 10.2 percent of cases (n=262). In Year One, the seven-year mandatory minimum for brandishing a firearm was the highest penalty applied in 21.5 percent of cases (n=707), and the ten-year minimum for discharging a firearm, or for an offense involving a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon was the highest penalty applied in 10.3 percent of cases (n=339). Penalties of 30 years and life imprisonment applied in less than one percent of cases during each time period.<sup>106</sup>

Figure 27. Highest Mandatory Minimum Penalty in Cases with At Least One Count Under 18 U.S.C. § 924(c)<sup>105</sup>  
 FY 2018 and First Step Year One

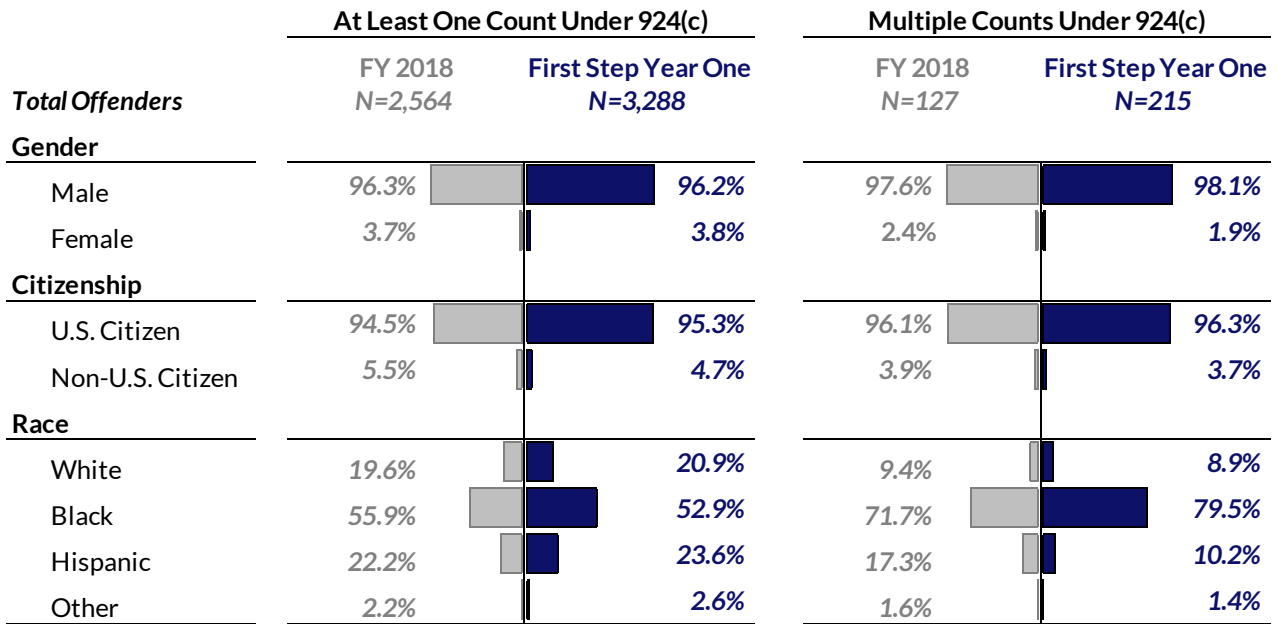
	FY 2018		First Step Year One	
	N	%	N	%
<b>Total Offenders</b>	<b>2,564</b>	<b>100.0</b>	<b>3,286</b>	<b>100.0</b>
5-Year	1,597	62.3%	2,208	67.2%
7-Year	559	21.8%	707	21.5%
10-Year	262	10.2%	339	10.3%
25-Year	133	5.2%	18	0.5%
30-Year	4	0.2%	7	0.2%
Life	9	0.4%	7	0.2%

Although the distribution of the penalty lengths remained stable across the two time periods, there was an increase in the *number* of offenders convicted under section 924(c) receiving a five-year penalty, from 1,597 offenders in fiscal year 2018 to 2,208 offenders in Year One (an increase of 611 offenders). These offenders largely account for the 28.2 percent increase in offenders convicted of an offense under section 924(c) during the same time period, from 2,564 to 3,288 offenders (an increase of 724 offenders).

### Demographics

Black offenders represented over half of offenders convicted of at least one count under section 924(c), and more than 70 percent the offenders convicted of multiple counts, in both fiscal year 2018 and Year One. The racial distribution of offenders convicted of at least one count under section 924(c) was stable between fiscal year 2018 and Year One. In Year One, Hispanic offenders comprised a smaller portion of offenders convicted of multiple counts under section 924(c) (10.2% compared to 17.3%), while Black offenders comprised a larger portion (79.5% compared to 71.7%).

Figure 28. Demographic Characteristics of Offenders Convicted Under 18 U.S.C. § 924(c)<sup>107</sup>  
 FY 2018 and First Step Year One



Male offenders were convicted under section 924(c) far more frequently than female offenders during both time periods, accounting for 96.3 percent of offenders convicted of at least one count in fiscal year 2018 and 96.2 percent in Year One. Of offenders convicted of multiple counts under section 924(c), this increased to 97.6 percent in fiscal year 2018 and 98.1 percent in Year One.

The overwhelming majority of offenders convicted of at least one count under section 924(c) were United States citizens in fiscal year 2018 (94.5%; n=2,419) and in Year One (95.3%; n=3,128).

# Retroactive Application of the Fair Sentencing Act of 2010

The First Step Act applies the Fair Sentencing Act of 2010 retroactively, authorizing offenders sentenced prior to enactment of the Fair Sentencing Act to seek sentence reductions.<sup>108</sup>

## The Fair Sentencing Act of 2010

Section 404 of the First Step Act applies the Fair Sentencing Act of 2010 retroactively, authorizing offenders sentenced prior to enactment of the Fair Sentencing Act to seek sentence reductions. The Fair Sentencing Act, enacted August 3, 2010, reduced the disparity between sentences for crack and powder cocaine (from a 100-to-1 to an 18-to-1 crack-to-powder ratio) for offenders sentenced on or after its effective date.<sup>109</sup> Prior to the Fair Sentencing Act, an offense involving five grams or more of crack cocaine carried a mandatory minimum penalty of five years (and a maximum sentence of 40 years), and

an offense involving more than 50 grams of crack cocaine carried a ten-year mandatory minimum sentence (and a maximum sentence of life imprisonment).<sup>110</sup> Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggers these penalties, from five to 28 grams for the five-year mandatory minimum penalty and from 50 to 280 grams for the ten-year mandatory minimum penalty,<sup>111</sup> as demonstrated in Table 3 below.

Section 3 of the Fair Sentencing Act also eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine.<sup>112</sup>

Table 3. Penalties for Crack Cocaine Offenses

Provisions	Statutory Penalties*	Pre-Fair Sentencing Act Quantity	Post-Fair Sentencing Act Quantity
21 U.S.C. §§ 841(b)(1)(B) and 960(b)(2)	5-year mandatory minimum; 40-year statutory maximum  (10-year mandatory minimum after one prior "felony drug offense")	5 grams	28 grams
21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)	10-year mandatory minimum; life statutory maximum  (20-year mandatory minimum after one prior "felony drug offense")  (Life after two or more prior convictions for a "felony drug offense" under section 841(b)(1)(A) only)	50 grams	280 grams

\*These penalties do not reflect changes made by the First Step Act, as such changes were prospective only and do not apply retroactively.



### The Commission’s Retroactive Guideline Amendment

The Fair Sentencing Act applied to defendants sentenced on or after its effective date;<sup>113</sup> however, it did not provide for retroactive application to offenders sentenced prior to its enactment. The Commission amended the drug quantity tables at §2D1.1 to incorporate the changes made by the Fair Sentencing Act into the guidelines and made those changes retroactive.<sup>114</sup> However, while offenders sentenced before August 3, 2010 were eligible for a retroactive *guideline* reduction, they remained subject to the *statutory* penalty in effect at the time they were sentenced. Thus, those offenders who had been sentenced at the mandatory minimum penalty could not receive any reduction, and defendants who were sentenced above a mandatory minimum penalty could receive smaller reductions than would otherwise be available, down to the mandatory minimum penalty. In addition, offenders who were sentenced under the career offender guideline at §4B1.1 were not eligible for the guideline reduction because the amendment did “not have the effect of lowering the defendant’s applicable guideline range.”<sup>115</sup> As a result, several thousand offenders were ineligible for some or all of the sentence reduction that would have resulted from the retroactive application of the lowered sentencing guideline.

### The First Step Act Applies the Fair Sentencing Act Retroactively

The First Step Act provides that an offender sentenced before enactment of the Fair Sentencing Act may be sentenced as if the provisions of the Fair Sentencing Act were in effect at the time the offender was sentenced.<sup>116</sup> Motions for a reduced sentence may be made by the defendant, the Director of the BOP, the government, or the court.<sup>117</sup> Although the First Step Act authorizes offenders to seek a reduction where it was previously unavailable, whether a reduction is warranted and will be granted is within the discretion of the court.<sup>118</sup>

Figure 29. Origin of Motion for Offenders Receiving a Retroactive Sentence Reduction Pursuant to First Step Act<sup>119</sup>

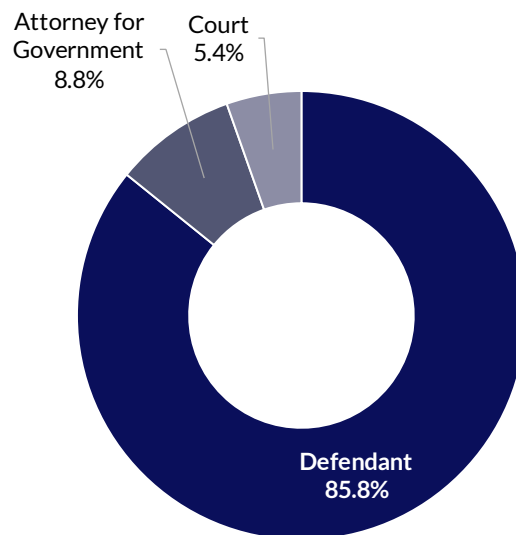
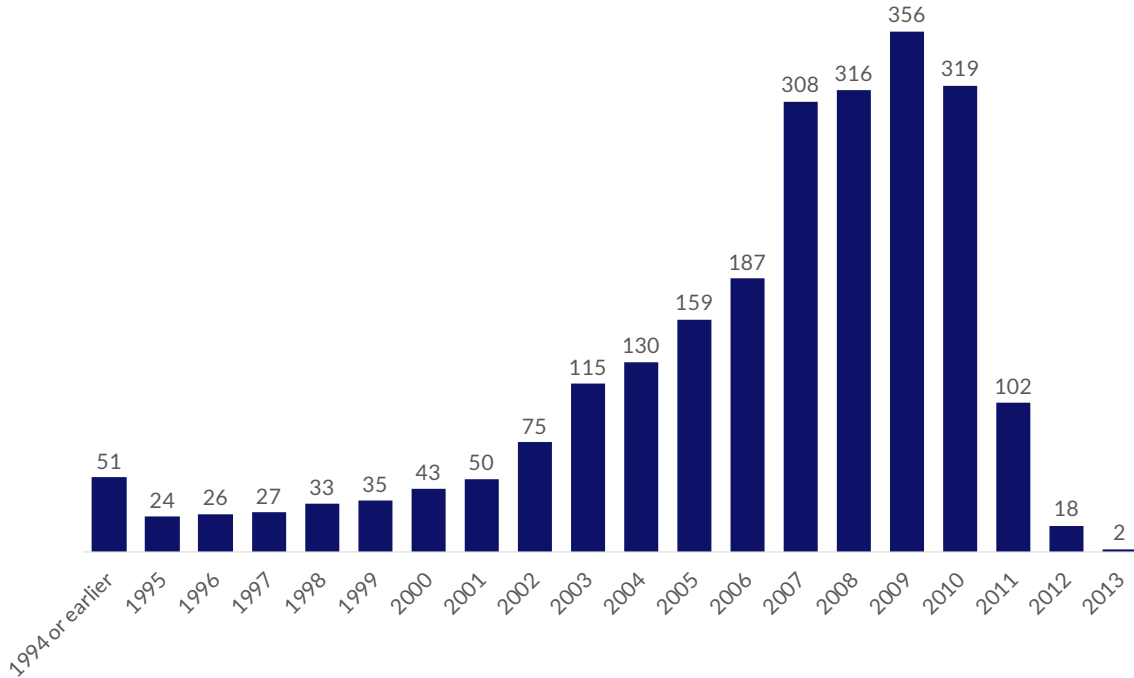




Figure 30. Year of Original Sentence for Offenders Receiving Sentence Reductions Pursuant to Resentencing Provisions of the First Step Act<sup>120</sup>



### First Step Act Retroactive Fair Sentencing Act Reductions

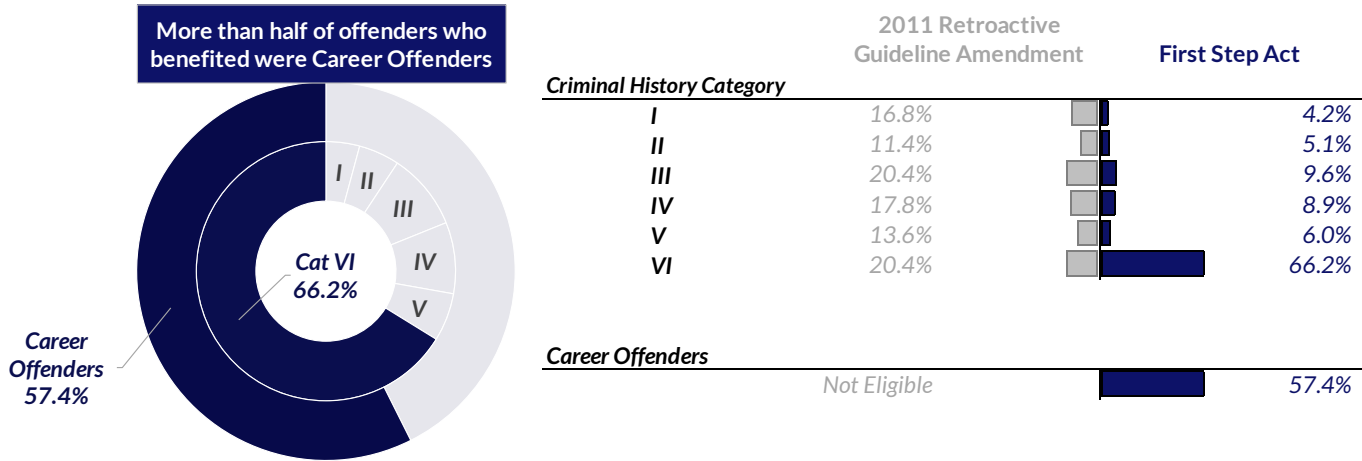
In the year after passage of the First Step Act, courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act. These offenders were originally sentenced between 1990 and 2013, with the majority sentenced between 2003 and 2011.

Most of these motions were filed by the defendant (85.8%; n=2,223). Less than ten percent (8.8%; n=229) were filed by the government and 5.4 percent (n=140) were granted by the court on its own motion. None were filed by the Director of the BOP (see Figure 29).

### Average Sentence, Criminal History, and Other Sentencing Factors

The sentence reductions offenders have received as a result of the First Step Act’s retroactivity provision have been substantial. The average length of sentence reduction for these offenders was 71 months, or 26 percent—from 258 months to 187 months.<sup>121</sup> These sentence reductions are more than twice as long as the sentence reductions offenders received pursuant to the Commission’s Fair Sentencing Act retroactive guideline amendment (on average 30 months or 19.9%).<sup>122</sup> This difference is largely a reflection of the fact that the First Step Act group of retroactivity beneficiaries had much longer original sentences, for two reasons. First, these offenders have more extensive criminal histories and, therefore, higher criminal history scores.

Figure 31. Criminal History of Offenders Receiving Fair Sentencing Act Retroactive Sentence Reductions<sup>123</sup>



Second, many were sentenced under the Career Offender guideline, which provides for an increased offense level, at or near the statutory maximum, and an automatic increase to Criminal History Category VI.<sup>124</sup>

Among the offenders who benefited from the retroactive guideline reduction, only 20 percent were in Criminal History Category VI,<sup>125</sup> and career offenders were ineligible to receive the guideline reduction. In contrast, 66.2 percent of the offenders who received statutory relief under the First Step Act were in Criminal History Category VI, and more than half (57.4%) were originally sentenced as career offenders. Only 9.3 percent of the offenders who received statutory relief under the First Step Act were in Criminal History Categories I and II, compared to 28.2 percent of those who received retroactive application of the Commission’s guideline amendment.<sup>126</sup>









The Commission also analyzed selected sentencing factors for offenders receiving sentence reductions under section 404,

including whether a weapon was involved in the offense, whether the safety valve applied, whether certain guideline role adjustments applied, and the sentence relative to the guideline range. For more on these sentencing factors, see Appendix Figure 3.

### Demographics

The demographic characteristics of offenders receiving reductions under section 404 of the First Step Act are consistent with crack offenders generally. Black offenders accounted for the overwhelming majority of offenders receiving a reduction (91.4%; n=2,172), followed by Hispanic offenders (4.2%; n=100), White offenders (3.7%; n=87), and Other Race offenders (0.8%; n=18). In fiscal year 2018, 80.0 percent of crack offenders were Black, 13.0 percent were Hispanic, 6.3 percent were White, and 0.7 percent were Other Race.<sup>127</sup>

Figure 32. Offense and Offender Characteristics for Offenders Receiving Sentence Reductions Pursuant to First Step Act<sup>130</sup>

<b>Total Offenders</b>			
<b>Gender</b>		<b>N</b>	<b>%</b>
Male		2,339	98.1%
Female		46	1.9%
<b>Citizenship</b>			
U.S. Citizen		2,305	97.2%
Non-U.S. Citizen		67	2.8%
<b>Race</b>			
White		87	3.7%
Black		2,172	91.4%
Hispanic		100	4.2%
Other		18	0.8%
<b>Average Age</b>			
Original Sentencing		32	
Resentencing		45	

Nearly all offenders receiving sentence reductions were male (98.1%; n=2,339), consistent with the proportion of male crack offenders generally (92.2% in fiscal year 2018).<sup>128</sup>

United States citizens accounted for 97.2% (n=2,305) of offenders receiving sentence reductions, which is consistent with their representation among crack offenders generally (97.9% in fiscal year 2018).<sup>129</sup>

*The Commission has published a series of data reports providing more detail regarding the geographical distribution, demographics, sentencing factors, and average sentence reduction for offenders who have received sentence reductions through retroactive application of statutory and guideline changes. The reports are available on the Commission’s website at:*

<https://www.usc.gov/research/data-reports/retroactivity-analyses-and-data-reports>.

# Compassionate Release

*The First Step Act authorizes the defendant to file a motion for “compassionate release,” pursuant to 18 U.S.C. § 3582(c)(1)(A), where previously only the BOP was so authorized.*<sup>131</sup>

## 18 U.S.C. § 3582(c)(1)(A)

Section 603 of the First Step Act authorizes the defendant to file a motion for “compassionate release,” pursuant to 18 U.S.C. § 3582(c)(1)(A). Prior to the First Step Act, section 3582(c)(1)(A) authorized a court “upon motion of the Director of the Bureau of Prisons,” to reduce the term of imprisonment of a federal inmate if the court finds that:

- extraordinary and compelling reasons warrant such a reduction; or
- the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community.<sup>132</sup>

The statute also required that the reduction be consistent with applicable policy statements issued by the Commission.<sup>133</sup>

Congress directed the Commission to promulgate policy statements implementing this provision and describing “what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”<sup>134</sup> This policy statement appears at §1B1.13 and largely restates the requirements of the statute, but also requires that the defendant not be a danger to the safety of others or the community generally, regardless of the prong under which the defendant is granted compassionate release.<sup>135</sup> It provides four categories of “extraordinary and compelling reasons,” each of which is then further described.

These four categories are:

(A) the medical condition of the defendant;

(B) the age of the defendant;<sup>136</sup>

(C) family circumstances;<sup>137</sup> or

(D) an extraordinary or compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C), as determined by the Director of the Bureau of Prisons.

With respect to prong (A), the medical condition of the defendant, the defendant must *either* be (i) suffering from a terminal illness;<sup>138</sup> or (ii) suffering from (I) a serious physical or medical condition, (II) serious functional or cognitive impairment, or (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.<sup>139</sup>

**First Step Act’s Changes to 18 U.S.C. § 3582(c)(1)(A)**

The First Step Act amended section 3582(c) (1)(A) to allow the *defendant* to file a motion in federal court seeking compassionate release after the defendant has exhausted administrative appeals, or after a failure of the BOP to bring a motion on the defendant’s behalf or 30 days from the warden’s receipt of a request, whichever is earlier.<sup>140</sup>

The statutory changes made by the First Step Act did not make any changes to the *Guidelines Manual*, nor did the Act provide emergency amendment authority to the Commission.<sup>142</sup> Thus, the policy statement at §1B1.13 does not reflect the First Step Act’s changes. The procedural change implemented by the First Step Act, however, is being successfully implemented, with defendants filing motions for and obtaining compassionate release.

During Year One, 145 motions seeking compassionate release were granted, a five-fold increase from fiscal year 2018 (n=24).<sup>143</sup> As demonstrated in Figure 33, of those motions granted during Year One, 96 (67.1%) were filed by the offender and 47 (32.9%) were filed by the BOP.

Figure 33. Origin of Compassionate Release Motion<sup>141</sup>  
First Step Year One

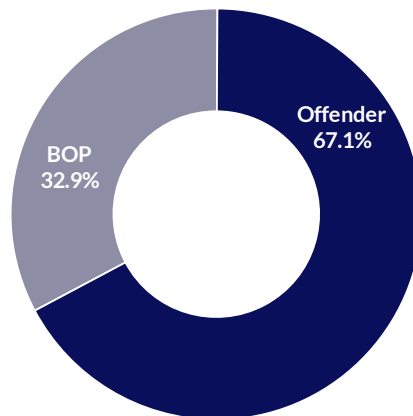
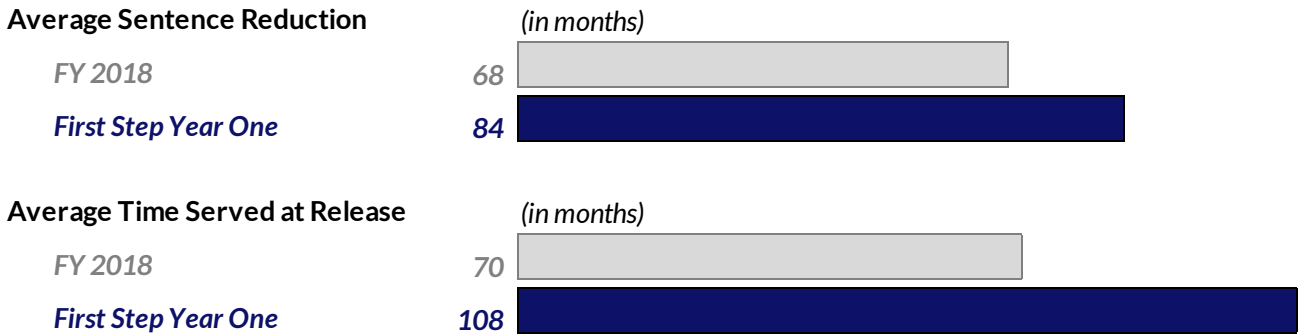


Figure 34. Average Sentence Reduction and Time Served in Compassionate Release Cases<sup>144</sup>  
 FY 2018 and First Step Year One



Offenders who benefited from compassionate release in Year One received larger reductions and served more time when compared to those granted release in fiscal year 2018. The average length of the reduction in sentence was 68 months in fiscal year 2018; sentences were reduced, on average, by 84 months in Year One.<sup>145</sup> The average months of time served at the time of release also increased, from 70 months to 108 months.<sup>146</sup> The average age at the time of release increased by ten years, from 51 years old at the time of release to 61 years old.

Of the four examples of what may qualify as “extraordinary and compelling reasons” according to the Commission’s policy statement, compassionate release was most frequently granted based on the medical condition of the defendant, and, in particular, based on terminal illness. In fiscal year 2018, of the 24 grants of compassionate release, 15 were granted based on the medical condition of the defendant, two were granted based on the age of the defendant, and four were granted for other extraordinary and compelling reasons.<sup>147</sup> None were granted based on family circumstances. Of the 15 granted based on the medical condition of the defendant, 11 were based on a terminal illness, two were based on a condition or impairment that substantially diminishes the ability of the defendant to provide self-care within the correctional facility environment, and in two the type of medical reason was not further specified.

Figure 35. “Extraordinary and Compelling” Reasons for Granting Compassionate Release<sup>148</sup>  
 FY 2018 and First Step Year One

Number of Cases	FY 2018	First Step Year One
Medical Condition	15	118
Age of Offender	2	15 <i>*6 mentioned</i>
Family Circumstances	0	2
Other Reasons	4	15 <i>*2 mentioned</i>

In Year One, most (81.4%) compassionate release grants were also based on medical reasons. Of the 145 compassionate release motions granted,<sup>149</sup> 118 were based on the medical condition of the defendant, 15 were based on age,<sup>150</sup> two were based on family circumstances, and 15 were based on other extraordinary and compelling reasons.<sup>151</sup> Of the 118 granted for medical reasons, 75 were based on terminal illness, 31 based on a condition or impairment that substantially diminishes the ability of the defendant to provide self-care within the correctional facility environment, and in 12 the type of medical reason was not further specified.

For the primary offense guidelines for offenders granted release in each year, see Appendix Figure 4.

## Conclusion

The First Step Act of 2018 amended five federal sentencing provisions. In particular, it: reduced the scope and severity of certain enhanced recidivist penalties for some drug offenders; broadened the existing safety valve at 18 U.S.C. § 3553(f); limited “stacking” of the 25-year penalty imposed for multiple weapon offenses; applied the Fair Sentencing Act of 2010 retroactively; and authorized the defendant to file a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). These provisions have now been in effect for a full calendar year. The Commission analyzed sentencing data related to these specific provisions, comparing the first full year that the First Step Act was in effect (December 21, 2018 through December 20, 2019) with data from the fiscal year prior to its enactment, fiscal year 2018.

The Commission will continue to collect data on the sentencing impact of the First Step Act, release its First Step Act retroactivity data reports on the website,<sup>152</sup> and publish additional reports as appropriate.



# Endnotes

1 Pub. L. No. 115–391, 132 Stat. 5194 (2018).

2 U.S. SENTENCING COMM’N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 16 (July 2018) [hereinafter APPLICATION AND IMPACT OF 21 U.S.C. § 851] (summarizing recommendations from 2011 *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, including that Congress reassess the severity and scope of section 851 enhancements and reconsider the definition of “felony drug offense” to reduce inconsistent application of the enhancement across districts), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 14 (Oct. 2017) (noting 2011 recommendations that Congress expand the safety valve and reassess section 851 enhancements), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025\\_Drug-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 14 (Mar. 2018) (noting 2011 recommendations regarding 18 U.S.C. § 924(c), including making the enhanced mandatory minimum penalty for a “second or subsequent” offense apply to prior convictions only, rather than to multiple section 924(c) counts in the same proceeding), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315\\_Firearms-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf); U.S. SENTENCING COMM’N, *Guidelines Manual*, App. C, amend. 759 (effective Nov. 1, 2011) (in retroactively applying Amendment 750—which incorporated the Fair Sentencing Act’s changes into the guidelines—explaining that the “statutory changes reflect congressional action consistent with the Commission’s long-held position that the then-existing statutory penalty structure for crack cocaine ‘significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere’”); USSG App. C, amend. 799 (effective Nov. 1, 2016) (noting low approval rates of compassionate release motions, broadening certain eligibility criteria, and “encourag[ing] the Director of the Bureau of Prisons to file a motion for compassionate release when ‘extraordinary and compelling reasons’ exist”).

3 All the sections in this report compare data from two time periods: fiscal year 2018 and one year after the enactment of the First Step Act. The Commission’s FY2018 individual offender datafile contains 69,425 cases. Most Commission reports use the Commission’s fiscal-year based individual offender datafiles. However, the First Step Act Year One datafile (hereafter “Year One datafile”) is not a traditional “fiscal year” file running from October 1st through September 30th. Rather, the Year One datafile spans approximately three quarters of the FY2019 datafile as well as approximately one quarter of the FY2020 datafile. The exact sentencing dates included in the report are December 21, 2018, through December 20, 2019. The Year One datafile includes 58,760 individual offenders from the Commission’s FY2019 datafile, USSCFY2019 who were sentenced between December 21, 2018, through September 30, 2019. Additionally, because this report was completed and published prior to the closure of the FY2020 datafile, a portion of the Year One datafile includes the Commission’s preliminary FY2020 datafile, PRELIMFY2020 which includes information on the 19,559 individual offenders sentenced between October 1, 2019, through December 20, 2019, for whom sentencing documents were received as of March 16, 2020. The total individual offender cases included in the Year One datafile is 78,319.

4 A “serious drug felony” is defined as an offense described in 18 U.S.C. § 924(e)(2)(A) for which the defendant *served* a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines “serious drug offense” as an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), chapter 705 of title 46 (Maritime Law Enforcement), or under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

5        See *infra* Figure 3 and note 33 for a list of the offenses that were considered “violent” offenses for purposes of this analysis.

6        The Commission regularly publishes data reports on the First Step Act’s retroactive application of the Fair Sentencing Act, which are available at <https://www.ussc.gov/research/data-reports/retroactivity-analyses-and-data-reports>.

7        As with other sentencing documentation, district courts must send the Commission orders granting a reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). For the Year One time period, the Commission also obtained the Bureau of Prisons’ (BOP) list of inmates released pursuant to this provision and cross-referenced its documentation against the BOP’s. The Commission did not include in its analysis any grants that were outside of the one-year time period (December 21, 2019 through December 20, 2020) considered in this publication. See also *infra* note 131.

8        Data in this section of the report is from the Commission’s individual offender datafile as well as the Commission’s Enhanced Drug Penalty Datafile (“851 datafile”). Only cases in which the government filed for an enhanced drug penalty for at least one count of conviction were included in the “851 datafile” included in this section. The government filed an 851 information/indictment which enhanced the drug statutory penalty in 1,274 cases in fiscal year 2018 and 1,607 in Year One. Whenever the text, tables, or figures discuss offenders who have had the enhanced drug penalty(s) “withdrawn,” this includes cases in which either the government withdrew all counts of the enhanced drug penalty or cases in which the court found that no enhanced drug penalty applied at sentencing. In fiscal year 2018, there were ten cases in which the status of the enhanced drug penalty was unable to be determined; 14 cases were missing the same information in Year One. Cases missing the above information were removed from the denominator when reporting the percentages of “withdrawn” and “not withdrawn” offenders. A total of 1,001 offenders in fiscal year 2018 and 849 offenders in Year One met the not withdrawn or found inapplicable criteria. Note that these offenders may still have received statutory relief at sentencing via providing substantial assistance to the government or the safety valve.

9        21 U.S.C. § 851. The Commission published a report about the impact of these enhanced penalties as part of its series on mandatory minimum penalties. See APPLICATION AND IMPACT OF 21 U.S.C. § 851, *supra* note 2.

10       21 U.S.C. §§ 841, 960. They also prohibit certain specific acts like distributing drugs to persons who are under the age of 21 or who are pregnant, using persons under the age of 18 in drug operations, and distributing drugs in or near schools and colleges. See 21 U.S.C. §§ 859, 860, and 861. A person who commits one of those offenses is subject to a mandatory minimum penalty of at least one year of imprisonment, unless a greater mandatory minimum penalty otherwise applies.

11       Section 841 prohibits the knowing or intentional manufacture, distribution, dispensation, or possession with intent to manufacture, distribute or dispense a controlled substance. Section 960 prohibits the knowing and intentional importation or exportation of a controlled substance. 21 U.S.C. §§ 841, 960. Controlled substance is defined as “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this subchapter,” and includes powder cocaine, crack cocaine, marijuana, methamphetamine, and heroin, among others. 21 U.S.C. § 802(6).

12       The penalties for committing other drug offenses under title 21 are also tied to the same penalty structure. For example, attempts or conspiracies to commit any drug offense are subject to the same penalty structure as the substantive offense. See 21 U.S.C. §§ 846, 963.

13       These mandatory minimum penalties became effective on November 1, 1987, for all drug types, except methamphetamine. See Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)). The mandatory minimum penalties for methamphetamine became effective on November 18, 1988. See Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4181, 4378 (1988) (amending 21 U.S.C. § 841(b)(1)).

Congress also added a mandatory minimum penalty for simple possession of crack cocaine in 1988. See Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844(a)). The Fair Sentencing Act of 2010 altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively. See Pub. L. No. 111-220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

14 See 21 U.S.C. §§ 841(b) and 960(b).

15 See 21 U.S.C. § 851(a) (“No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.”).

16 The term “felony drug offense” is defined as “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 U.S.C. § 802(44). Certain state drug offenses that are classified as misdemeanors by the state but are punishable by imprisonment for more than one year qualify as a felony drug offense under this definition. See *Burgess v. United States*, 553 U.S. 124, 126–27 (2008).

17 A “serious drug felony” is defined as an offense described in 18 U.S.C. § 924(e)(2)(A) for which the defendant *served* a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines “serious drug offense” as an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), chapter 705 of title 46 (Maritime Law Enforcement), or under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

18 Pub. L. No. 115-391, § 401.

19 Section 3559(c)(2)(F) defines “serious violent felony” to include a list of a number of enumerated offenses (including, among other offenses, murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses), or as any other offense “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 course of committing the offense” and is punishable by a maximum term of imprisonment of ten years or more. 18 U.S.C. § 3559(c)(2)(F). Section 113 prohibits a range of assault offenses occurring within maritime or territorial jurisdictions. 18 U.S.C. § 113.

20 See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)–(H).

21 Pub. L. No. 115-391, § 401.

22 See 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)(A)–(H).

23 See, e.g., 21 U.S.C. §§ 841(b)(1)(C) (20-year statutory maximum increased to 30-year statutory maximum); *id.* § 960(b)(3) (same). Cases involving an enhanced statutory maximum penalty could nevertheless involve an offense carrying an otherwise applicable mandatory minimum penalty that was not increased through the filing of an 851 information. For example, some offenders were also convicted of a firearms offense carrying a mandatory minimum penalty pursuant to 18 U.S.C. § 924(c). Additionally, some drug statutes carry a short mandatory minimum penalty that is not increased as the result of the filing of an 851 information. For

example, while a prior conviction would trigger an increased statutory maximum for an offender convicted under 21 U.S.C. § 859 (Distribution to persons under age twenty-one), the one-year mandatory minimum term of imprisonment would remain unaffected.

In addition to increasing the minimum and maximum terms of imprisonment, enhancements under section 851 also typically double the required term of supervised release. See 21 U.S.C. §§ 841(b)(1), 960(b). The length of these enhanced supervised release penalties are unchanged by the First Step Act. For example, the court still must impose a term of supervised release of at least five years for any offender convicted under 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1). Similarly, offenders convicted under 21 U.S.C. §§ 841(b)(1)(B) and section 960(b)(1) must receive a term of supervised release of at least four years. However, the mandatory term of supervised release is generally doubled when the offender has a qualifying prior conviction.

24 21 U.S.C. §§ 841(b)(1)(C) (20-year statutory maximum increased to 30-year statutory maximum); *id.*  
§ 960(b)(3) (same). See *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019) (“[T]he First Step Act did  
not alter the definition of ‘felony drug offense[s]’ that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)  
(C).”) (second alteration in original).

25 The total number of cases also increased from 69,425 in fiscal year 2018 to 77,848 in Year One.

26 For detail on all offenders included in this analysis, see Appendix Figure 1.

27 Figure 1 displays the withdrawn/not withdrawn status of cases in which the government filed an 851  
information seeking an enhanced drug penalty. Note that this figure does not consider whether the offender  
received relief from the enhanced drug penalty through the safety valve under 18 U.S.C § 3553(f) or by  
providing substantial assistance under 18 U.S.C. § 3553(e), but only the “withdrawn/not withdrawn” status.

28 Of the 1,274 cases in which an information was filed, there were ten cases in which there was not clear  
documentation of whether the information remained in place at the time of sentencing. These ten cases were  
excluded from this analysis. In 31 of the 1,001 cases, at least one information was withdrawn and at least one  
was not.

29 In an additional three cases the government withdrew the 851 enhancement and the court found that  
it did not apply. These cases are included in the “withdrawn” category.

30 Of the 1,607 cases in which an information was filed, there were 14 cases in which there was not clear  
documentation of whether the information remained in place at the time of sentencing. These 14 cases were  
excluded from this analysis. In 17 of the 849 cases, at least one information was withdrawn and at least one was  
not.

31 Figure 2 displays a frequency of the prior drug felonies and prior violent felonies for offenders for  
whom the 851 enhanced penalty was not withdrawn or invalidated prior to sentencing. Four cases with no drug  
priors and no violent priors were excluded from the table due to unclear documentation—all four received relief  
at sentencing due to substantial assistance or safety valve, so the court may not have felt the need to make a  
specific ruling on withdrawing the motion or making a finding that the enhancement did not apply.

32 Four offenders for whom an 851 information was filed and not withdrawn or invalidated before  
sentencing had no offense that qualified as a “serious drug felony” or “serious violent felony” conviction under  
the First Step Act. These offenders were excluded from this analysis. See *supra* note 31.

33 Figure 3 displays the type of violent prior offense committed by offenders in cases where an 851  
enhanced penalty was filed and not withdrawn or invalidated. Note that each offender may have committed  
more than one prior violent offense, so the frequency is offense-based instead of case-based. In addition to  
the violent offense types listed in the table, the Commission also collected information for Non-Negligent  
Manslaughter, Vehicular Manslaughter, Forceable Sex Offense, Intimidating a Witness, Intimidating (Not a

Witness), Hit and Run with Bodily Injury, Child Abuse, and Rioting, but no offenders had any of these offense types among their prior felony offenses. Note that some of the violent offense types listed in the table (e.g., “Weapons Offenses” which may encompass minor hunting/safety violations through more serious weapon possession/discharge violations) have not been used in other Commission publications discussing “violent offenses.”

34 Sentencing documentation does not consistently identify which prior convictions support an 851 information. For cases in which an 851 information was filed, the Commission identified all prior convictions that appear to meet the current statutory requirements. For cases in which an 851 was filed, there were 102 convictions that appeared to be possible “serious violent felony” predicate offenses. More than half of these (n=56) did not support an enhancement at the time of sentencing. *See also supra* note 33 for a list of the offenses that were considered “violent” offenses for purposes of this analysis.

35 Even in these enhanced statutory maximum cases, the 851 information generally increases the minimum term of supervised release.

36 Figure 4 displays the length of the enhanced statutory penalty (or the length of the most serious penalty if more than one applied). Only offenders whose enhanced penalty still applied at sentencing (*i.e.*, not withdrawn by the government and not found inapplicable at sentencing by the court) were included in this figure. The Year One cases with a drug mandatory minimum of five-years or 20-years were grouped into the “enhanced statutory maximum” category after a sample of the cases was reviewed and it was determined that the enhanced penalty was applied on a count of conviction that had the enhanced statutory maximum and a separate count of conviction had a five-year or 20-year statutory minimum penalty.

37 Offenders whose enhanced penalty was one year or less were excluded from this analysis.

38 *See* 21 U.S.C. § 841(b)(1)(A)–(C). Of these 11 offenders, five were convicted of an offense involving heroin, five were convicted of an offense involving a drug in the “other” category, and one was convicted of an offense involving cocaine.

39 Figure 5 displays the primary drug type for all cases in which an 851 enhancement was filed as well as for those cases in which an 851 enhancement was filed and not withdrawn or found inapplicable by the court for fiscal year 2018 and Year One. In the FY2018 datafile, there was one case missing information about the status of the enhanced drug penalty or relief, and it was excluded from this table.

40 USSC 851 Datafile.

41 Figure 6 displays the demographic characteristics of offenders for whom an 851 enhancement was filed as well as for cases in which the 851 enhancement was not withdrawn or found inapplicable by the court for fiscal year 2018 and Year One.

42 Data in this section of the report is from the Commission’s individual offender datafile. All data in this section is limited to offenders whose primary sentencing guideline was USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life While Manufacturing), or 2D1.14 (Narco-Terrorism). In addition, only cases with complete guideline application information were included in this section of the report. In fiscal year 2018, 18,349 offenders met the above criteria; in Year One, 19,739 offenders met the above criteria for inclusion. In fiscal year 2018, there were 5,885 safety valve recipients and in the First Step Year One file there were 7,127 safety valve recipients. Of those 7,127 safety valve recipients in the Year One datafile, 5,758 were “Already Eligible” offenders (*i.e.*, met the criteria prior to the expansion under the First Step Act) and the remaining 1,369 were “Newly Eligible” offenders. Of the 1,369 newly eligible offenders, 165 were in Criminal History Category (CHC) I and newly eligible based on the addition of maritime statutes, while the remaining 1,204 offenders were Newly Eligible based on the expanded criminal history criteria.



In fiscal year 2018, offenders who received either statutory safety valve relief and/or guideline SOC relief are included in the “All Safety Valve Offenders” category. In Year One, offenders assigned to CHC I, who received either statutory safety valve relief or guideline SOC relief and who were convicted under one of the statutes listed in §5C1.2 were reported in the “Already Eligible” safety valve recipients category. Offenders assigned to a CHC greater than I, who received either statutory safety valve relief and/or received a variance below the applicable guideline range for the First Step Act safety valve expansion, or offenders assigned to CHC I who were convicted only under one of expanded safety valve statutes (46 U.S.C. §§ 70503 or 70506) were included in the “Newly Eligible” category. In the Year One file both the “Already Eligible” and “Newly Eligible” safety valve recipients were included in the “All Safety Valve” recipient category.

The individual offender FY2018 and Year One datafiles capture only information about a maximum of four 1-point offenses under USSG §4A1.1(c), as that is the current limit counted for criminal history calculation purposes. To determine the total number of 1-point offenses (*i.e.*, including those not currently counted under §4A1.1(c)), the criminal history point information for the Newly Eligible (n=1,369) Year One cases in the Commission’s Criminal History Datafile was also used to supplement data in this section of the report. The supplemental data consists of preliminary fiscal year 2019 and fiscal year 2020 cases identified in the individual offender data and then matched with the corresponding cases in the Commission’s Criminal History datafile.

43 Pub. L. No. 115–391, § 402 (amending 18 U.S.C. § 3553(f)).

44 *See, e.g.*, 21 U.S.C. §§ 841(b) (providing mandatory minimum terms of imprisonment of five or ten years triggered by amount and type of drug), 846 (attempt and conspiracy subject to same penalty as the underlying offense), 960 (providing mandatory minimum terms of imprisonment of five or ten years triggered by amount and type of drug).

45 Pub. L. 103–322, 108 Stat. 1796 (1994).

46 *Id.* § 80001(a).

47 Specifically, section 3553(f)(5) provides “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 other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.”

The First Step Act added, immediately following subsection 3553(f)(5), an instruction that “[i]nformation 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.” Pub. L. No. 115–391, § 402. Previously, the statute was silent regarding how information disclosed under section 3553(f)(5) could be used for purposes of sentencing.

48 Sections 70503 and 70506 are the prohibited acts and penalties sections, respectively, of chapter 705 of title 46 (Maritime Drug Law Enforcement Act).

49 Pub. L. No. 115–391, §402.

50 *Id.*

51 The Act does not provide any guidance as how to determine if the prior offense is a “crime of violence.” Courts will likely use the categorical approach to determine whether the prior offense meets the definition of “crime of violence” at section 16. There have been very few opinions discussing the legal requirements of the expanded safety valve. At the time of this publication, there was only one reported decision evaluating whether a prior violent offense qualified as a predicate offense. *See United States v. Hicks*, No. 2:19-CR-023, 2019 WL 3292132 (E.D. Tenn. July 22, 2019).

The definition at 18 U.S.C. § 16 is different from the definition of “crime of violence” in the *Guidelines Manual* at USSG §4B1.2. *See* USSG §4B1.2.

52 Pub. L. No. 103-322, § 80001(b).

53 USSG §5C1.2. The Commission first promulgated §5C1.2 in 1994 as an emergency amendment. USSG App. C, amend. 509 (effective Sept. 23, 1994). The amendment was repromulgated under regular procedures the following year, with minor editorial changes. USSG App. C, amend. 515 (effective Nov. 1, 1995). The guideline further provides that for a defendant who meets the criteria in subsection (a) and for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two and Three shall not be less than level 17. USSG §5C1.2(b).

54 USSG §2D1.1(b)(18); §2D1.11(b)(6). Subsections 2D1.1(b)(18) and 2D1.11(b)(6) each provide: “If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.”

55 In a typical amendment cycle, the Commission first publishes its proposed priorities in the Federal Register and seeks comment in June. After reviewing comment on the proposed priorities, the Commission publishes its list of final priorities in August. The Commission engages with stakeholders, conducts legal research and data analysis, and publishes proposed amendments for comment in January. The Commission then holds a public hearing on proposed amendments and hears from various witnesses, including representatives of the stakeholder groups. Thereafter, typically in April, the Commission votes on whether to adopt any of the proposed amendments. By statute, no later than May 1st the Commission must submit the amendments it has voted to promulgate along with “reasons for amendment” (contained in Appendix C to the Guidelines Manual) to Congress, which has 180 days to decide whether to modify or disapprove them. If Congress does not pass legislation (signed by the President) modifying or disapproving amendments by November 1st, the amendments become effective on that date.

On rare occasions, Congress has authorized the Commission to promulgate “emergency amendments” which can be passed on an expedited basis outside of the regular amendment cycle.

56 The overwhelming majority (98.4%; n=19,429) of these drug trafficking offenders were sentenced under USSG §2D1.1. Only cases with complete guideline information were included in this analysis. For more detail and the complete distribution by primary sentencing guideline, see Appendix Figure 2.

57 The total number of cases also increased from 69,425 in fiscal year 2018 to 78,319 in Year One.

58 Figure 7 displays the drug mandatory minimum penalty status and safety valve status in drug trafficking cases in fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the “Drug Mandatory Minimum Penalty” category.

59 For purposes of this analysis, any defendant who was convicted of an offense carrying a drug mandatory minimum penalty and who the court indicated qualified under USSG §5C1.2 is included as an offender who received relief from the mandatory minimum penalty. Some of these offenders, whose guideline range exceeded the mandatory minimum penalty, may have been sentenced above the mandatory minimum penalty, and some of the offenders sentenced below the mandatory minimum penalty may have also received relief as the result of providing substantial assistance to the government. The Commission did not further analyze the specific nature of the relief offenders received for purposes of this publication.

60 The majority of offenders who received relief from a mandatory minimum penalty also received a reduction in sentence. However, in Year One, some Newly Eligible offenders received statutory relief only and did not receive a variance to reflect the guideline safety valve reduction. This is discussed in more detail in the second part of Section Four. For a breakdown of the nature of relief by drug mandatory minimum status in each year, see Appendix Table 3.

61 Figure 8 displays the drug mandatory minimum penalty status and safety valve status in drug trafficking cases in fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the “Drug Mandatory Minimum Penalty” category.

It also displays the safety valve status in drug trafficking cases for both fiscal year 2018 and Year One. In fiscal year 2018, the four cases missing information on safety valve application were excluded from this figure. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the “Drug Mandatory Minimum Penalty” category.

62 Figure 9 displays the nature of the safety valve relief in safety valve cases in both fiscal year 2018 and Year One. Offenders who received both statutory relief and guideline/variance relief were categorized as receiving statutory relief for this figure.

63 Thirteen offenders had more than one criminal history point, which was not consistent with the statutory requirements then in effect. *See* 18 U.S.C. § 3553(f) (2017).

64 Figure 11 displays the average length of sentence imposed (in months) in both fiscal year 2018 and Year One. Average sentence length imposed for all drug trafficking offenders and all safety valve offenders is displayed for both FY2018 and the Year One files. Cases missing information on the sentence length imposed were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. When sentences are expressed as “time served” on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

65 Figure 12 displays the primary drug type for all safety valve recipients in fiscal year 2018 and Year One.

66 Figure 13 displays the demographic information for all drug trafficking offenders and all safety valve recipients in fiscal year 2018 and Year One. Cases missing demographic information were excluded from this figure.

67 Figure 14 displays the distribution of safety valve cases between safety valve recipients meeting the old safety valve criteria (already eligible) and those newly eligible due to either having zero or one criminal history points and meeting the expanded maritime statutes criteria or meeting the expanded criminal history criteria in Year One.

68 Figure 15 displays the drug mandatory minimum penalty status of the Already Eligible and the Newly Eligible safety valve recipients in Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the “Drug Mandatory Minimum Penalty” category.

69 Figure 16 displays the nature of relief among Already Eligible and Newly Eligible safety valve recipients. Those in the already eligible group are classified as either receiving both the guideline (2-level reduction at §2D1.1) and statutory relief, only the guideline relief (offender did not have a drug mandatory minimum), or only the statutory relief. Those in the newly eligible group are classified as either receiving both the statutory relief and a variance for the First Step Act, only a variance for the First Step Act (offender did not have a drug mandatory minimum), or only the statutory relief. Note that the offenders who received a variance may have had other reasons cited for the variance in addition to the First Step Act.

70 Thirteen offenders had more than one criminal history point, which was not consistent with the statutory requirements then in effect. *See* 18 U.S.C. § 3553(f) (2017).



71 Pub. L. No. 115–391, § 402. One-point criminal history events are those assigned one point under §4A1.1(c).

72 Figure 17A displays the total criminal history points for Newly Eligible offenders who received expanded safety valve relief in Year One. The total points include all 1-points events (above the four currently counted in USSG §4A1.1(c)). The Commission’s preliminary FY2019 and FY2020 Criminal History Datafiles were used for this figure.

Figure 17B first displays the total criminal history points for Newly Eligible offenders who received expanded safety valve relief in Year One. The points represent how the current criminal history points are calculated in USSG §4A1.1(a) – §4A1.1(e), including that only four 1-point events are countable.

Figure 17C displays the criminal history points for offenders who received expanded safety valve relief in Year One as counted by the court for the expanded eligibility, after excluding 1-point events under USSG §4A1.1(c).

73 Six newly eligible offenders (0.4%) had more than eight total criminal history points, which does not appear consistent with the current statutory requirements.

74 USSG §4A1.1(c).

75 USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

76 Figure 18 displays the 1-point events for Newly Eligible offenders who received expanded safety valve relief in Year One, including all 1-points events (above the four currently counted in USSG §4A1.1(c)). The Commission’s preliminary FY2019 and FY2020 Criminal History Datafiles were used for this figure.

77 Section 4A1.1(c) provides that prior sentences that are assigned one point are counted “*up to a total of 4 points for this subsection.*” USSG §4A1.1(c) (emphasis added). Although a defendant may have more than four such prior sentences, this provision limits to four the number of points counted towards the defendant’s criminal history score.

78 Four offenders (0.3%) had three remaining points. An additional 13 offenders (0.9%) had five or six remaining points, which appears to be inconsistent with the statutory requirement that a defendant have no “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense.” 18 U.S.C. § 3553(f)(1). One of these offenders had three offenses each assigned two criminal history points under USSG §4A1.1(b). The other 12 offenders had two offenses each assigned two criminal history points under §4A1.1(b), any number of offenses assigned one point under §4A1.1(c), and two “status” points under §4A1.1(d). In six of the 12, the “status” points were associated with an offense assigned one point under §4A1.1(c), in one they were associated with an offense assigned two points under §4A1.1(b), and in the other five they were associated with multiple offenses, some assigned one point under §4A1.1(c) and some assigned two points under §4A1.1(b).

79 Two-point criminal history events are those assigned two points under USSG §4A1.1(b). One offender who received safety valve relief under the expanded safety valve had three 2-point events, which is inconsistent with the statutory requirements. This offender is excluded from the analysis. In addition, four offenders had at least one 3-point event, which is likewise inconsistent with the statutory requirements.

80 Figure 19 displays the number of criminal history events assigned two points under USSG §4A1.1(b) for offenders who received expanded safety valve relief in Year One. One offender with three 2-point events was removed from this figure.

81 Section 4A1.1(d) provides for a 2-point increase to the defendant’s criminal history score “if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” USSG §4A1.1(d).

82 See USSG §4B1.1.

83 Section 4A1.1(e) provides for a one point increase to the defendant's criminal history score for "each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection." USSG §4A1.1(e).

84 Section 4B1.5 provides for increases to the offense level and, in some cases, the criminal history category, for cases in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 does not apply, and the defendant either has at least one prior sex conviction or engaged in a pattern of activity involving prohibited sexual conduct. See USSG §4B1.5.

85 Figure 20 displays the average sentence length imposed (in months) for Already Eligible and Newly Eligible offenders during Year One. Offenders missing information on the length of sentence were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. When sentences are expressed as "time served" on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

86 Figure 21 displays the primary drug type for Already Eligible and the Newly Eligible safety valve recipients in Year One. Cases missing information on the primary drug type were excluded from this figure.

87 Figure 22 displays the demographic information of Already Eligible and the Newly Eligible safety valve recipients in Year One. Offenders with missing information on gender, race, or citizenship were excluded from that section of the table.

88 USSG §4A1.2(h) ("Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

89 Data in this section of the report is from the Commission's individual offender datafile. All data in this section is limited to offenders who were convicted of at least one count under 18 U.S.C. § 924(c). In fiscal year 2018, 2,564 offenders met this criteria; in Year One, 3,288 offenders met this criteria for inclusion. When the text or figures in this section refer to "stacked" counts, this refers to offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) (the statutory minimum penalties are consecutive to each other, as well as to any other count of conviction). In fiscal year 2018, there were 127 offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) out of the 2,564 offenders who had at least one count of conviction under 18 U.S.C. § 924(c); in Year One, there were 215 offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) out of the 3,288 offenders who had at least one count of conviction under 18 U.S.C. § 924(c).

90 The statute defines a "crime of violence" as any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." A "drug trafficking crime" is defined as any felony that is punishable under the Controlled Substances Act, codified at 21 U.S.C. 801 et seq., or the Controlled Substances Import and Export Act, codified at 21 U.S.C. 951, et seq., or chapter 705 of title 46 of the United States Code. 18 U.S.C. § 924(c)(2)-(3).

91 18 U.S.C. § 924(c)(1)(A).

92 *Id.* § 924(c)(1)(B). Both the manner in which the weapon was used and the type of weapon involved are elements of the offense that must be submitted to a jury. In 2013, in *Alleyne v. United States*, the Supreme Court held that any fact that increases a mandatory minimum sentence is an "element" of the crime that must be submitted to a jury and proven beyond a reasonable doubt. 570 U.S. 99 (2013). In particular, *Alleyne* held that the determination of whether a defendant "brandished" a firearm rather than merely carried it was an

element of the offense, rather than a sentencing factor, overruling *Harris v. United States*, 536 U.S. 545 (2002) (determination of whether defendant “brandished” the firearm rather than merely carried it was a sentencing factor properly determined by the court), *overruled by* *Alleyne v. United States*, 570 U.S. 99 (2013). Prior to *Alleyne*, some provisions of 18 U.S.C. § 924(c) had been treated as elements of the offense that had to be proven beyond a reasonable doubt, while others were treated as sentencing factors that could be determined by the court at sentencing. *Compare, e.g.,* *Harris v. United States*, 536 U.S. 545 (2002) (whether the defendant brandished the firearm, triggering a seven-year mandatory minimum sentence, is a sentencing factor) *with* *United States v. O’Brien*, 560 U.S. 218 (2010) (whether the offense involved a machinegun, triggering the 30-year mandatory minimum penalty, is an element of the offense).

93 18 U.S.C. § 924(c)(1)(D).

94 The mandatory minimum penalty for a second or subsequent violation of 18 U.S.C. § 924(c) is 25 years of imprisonment. *See* 18 U.S.C. § 924(c)(1)(C)(i). The mandatory minimum penalty for a second or subsequent violation increases to life imprisonment if the firearm involved was a machinegun or destructive device, or if it was equipped with a silencer or muffler. *Id.* § 924(c)(1)(C)(ii).

95 *See* *Deal v. United States*, 508 U.S. 129 (1993).

96 Although the sentence for an 18 U.S.C. § 924(c) conviction must be imposed consecutively to any other term of imprisonment, in 2017 the Supreme Court held that section 924(c) does not prevent a sentencing court from considering a mandatory minimum sentence that will be imposed pursuant to it when calculating a guidelines sentence for the underlying predicate offense. *Dean v. United States*, 137 S. Ct. 1170 (2017). The Court explained that a sentencing court generally is permitted to consider the sentence imposed for one count of conviction when determining the sentence for other counts of conviction and that nothing in the text of 18 U.S.C. § 924(c) prohibits such consideration. *Id.* at 1175–77. Prior to the *Dean* decision, many sentencing courts interpreted 18 U.S.C. § 924(c) to bar consideration of the mandatory minimum penalty when calculating a sentence for an underlying predicate offense. *See, e.g.,* *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015) (affirming district court’s determination that it could not vary from the guidelines range in calculating defendant’s sentence for offenses based on the mandatory minimum he would receive under 18 U.S.C. § 924(c)), *overruled by* *Dean v. United States* 130 S. Ct. 1170 (2017); *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008); *United States v. Franklin*, 499 F.3d 578, 583 (6th Cir. 2007); *United States v. Roberson*, 474 F.3d 432, 436 (7th Cir. 2007); *United States v. Powell*, No. 09-4427, 444 F. App’x 517, 522 (3d Cir. 2011); *United States v. McCullers*, No. 09-4437, 395 F. App’x 975, 978 (4th Cir. 2010). *But see* *United States v. Smith*, 756 F.3d 1179, 1190 (10th Cir. 2014) (“Nothing in current law prohibits a district court’s considering a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence.”); *United States v. Webster*, 54 F.3d 1, 4 (1st Cir. 1995) (“[I]n departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence.”).

97 Pub. L. No. 115–391, § 403.

98 Figure 23 displays total number of firearms offenders in fiscal year 2018 and Year One and the percentage firearms cases represents out of all cases.

99 The increase in offenders convicted of at least one count under 18 U.S.C. § 924(c) was more substantial from fiscal year 2018 to Year One than over the previous fiscal year (2,108 offenders and 31.2% of all firearms offenders in fiscal year 2017).

100 Figure 24 displays the number of counts of conviction under 18 U.S.C. § 924(c) offenders had in both fiscal year 2018 and Year One. This figure is limited to offenders who had multiple counts of conviction under 18 U.S.C. § 924(c).

101 Figure 25 displays the highest mandatory minimum penalty for offenders convicted of multiple counts under 18 U.S.C. § 924(c). For example, if an offender was facing one count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of “Life” and another count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of “5 years,” the offender is reported in the “Life” category.

The figure also displays the mutually exclusive categories of mandatory minimum penalty combinations for offenders with multiple counts of conviction under 18 U.S.C. § 924(c).

102 Consistent with the methodology used in the Commission's Annual Report and Sourcebook of Sentencing Statistics, a sentence of life imprisonment is assigned a value of 470 months. However, where a sentence was any term of years, including a term of years exceeding 470 months, it was not capped at 470 months for this analysis. The longest sentence in fiscal year 2018 was 3,120 months.

103 The longest sentence in Year One was 1,260 months.

104 Figure 26 displays the average sentence length imposed (in months) for offenders who have at least one count of conviction under 18 U.S.C. § 924(c) and offenders who had multiple counts of conviction under 18 U.S.C. § 924(c) in both fiscal year 2018 and Year One. Offenders missing information on the length of sentence were excluded from this figure. Sentences of probation only are included as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of life were included in the sentence average computations as 470 months. Larger sentences (e.g., 1,200 months) were not capped for this analysis. When sentences are expressed as "time served" on the Judgement and Commitment Order, Commission staff uses the dates in federal custody to determine the length of time served when an offender has been in custody the entire time. If the offender has been in and out of custody, or the start date is unclear/missing, then the Commission assigns a value of one day as a minimal time served amount for these cases.

105 Figure 27 displays the highest mandatory minimum penalty for offenders with at least one count of conviction under 18 U.S.C. § 924(c). For example, if an offender was facing one count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "Life" and another count of 18 U.S.C. § 924(c) that required a statutory minimum penalty of "5 years" the offender is reported in the "Life" category.

106 In fiscal year 2018, a 30-year penalty applied in four (0.2%) cases and a term of life imprisonment applied in nine (0.4%) cases. In Year One, a 30-year penalty applied in seven (0.2%) cases and a term of life imprisonment applied in another seven (0.2%) cases.

107 Figure 28 displays demographic information for offenders convicted of at least one count and multiple counts under 18 U.S.C. § 924(c), in both fiscal year 2018 and Year One. Offenders with missing information on gender, race, or citizenship were excluded from that section of the table.

108 Data in this section of the report is from the Commission's drug resentencing datafile matched with data from the individual offender datafile. All data in this section is limited to offenders whose motion for a reduced sentence under section 404 of the Act was granted based on the Fair Sentencing Act being made retroactive. During the first year after passage of the First Step Act, courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act. The data in this section includes offenders who were originally sentenced between 1990 and 2013, were resentenced through December 31, 2019, and for whom court documentation was received, coded, and edited at the Commission by January 29, 2020.

109 Pub. L. No. 111-220, 124 Stat. 2372 (2010).

110 21 U.S.C. § 841(b)(1)(A) & (B) (2009); 21 U.S.C. § 960(b)(1) & (b)(2) (2009).

111 Pub. L. No. 111-220, § 2. As discussed *supra* Section 3, Section 401 of the First Step Act amended the enhancement provisions of sections 841 and 960. Not only did it reduce some of the enhanced penalties listed (from 20 to 15 years and from life to 25 years), but it also changed the prior offenses that trigger these enhanced penalties. Rather than a "felony drug offense," the defendant's prior convictions must meet the new definition of "serious drug felony" or "serious violent felony." The defendant must have served a term

of imprisonment of more than 12 months on the prior offense and, for a serious drug felony, must have been released within 15 years of the current federal offense. In addition, for any “serious drug felony” or a “serious violent felony” based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of ten years or more. These changes are not retroactive.

112 Pub. L. No. 111-220, § 3.

113 See *Dorsey v. United States*, 567 U.S. 260, 280–81 (2012) (new penalties apply to offenses committed before but sentenced after enactment).

114 On October 15, 2010, the Commission voted to promulgate Amendment 748, the emergency amendment which took effect on November 1, 2010. Among other changes, Amendment 748 made conforming changes to the guidelines to adjust the crack cocaine quantity levels in the Drug Quantity Table in §2D1.1 to the new statutory minimums, added new aggravating and mitigating factors in drug trafficking cases, and reflected the elimination of the statutory five-year mandatory minimum penalty for simple possession of crack cocaine. On April 28, 2011, the Commission submitted to Congress Amendment 750, the permanent guideline amendment implementing the Fair Sentencing Act. The three-part amendment (A, B & C) re-promulgated as permanent the temporary emergency amendment and took effect on November 1, 2011. On June 30, 2011, the Commission voted to promulgate Amendment 759 which added Parts A and C of Amendment 750 as amendments listed in §1B1.10 (Reduction in Term of Imprisonment as a Result of an Amended Guideline Range) (Policy Statement) that apply retroactively. The Commission voted to make Amendment 759 effective November 1, 2011, the same date that Amendment 750 took effect.

115 USSG §1B1.10; see *United States v. Akers*, 892 F.3d 432, 434 (D.C. Cir. 2018) (“Amendment 782, however, did not lower the offense levels applicable to career offenders. Rather, it impacted only offense levels calculated under the drug trafficking guideline, U.S.S.G. §2D1.1. Accordingly, the drug trafficking guideline ‘played no role in determining’ [the defendant’s] sentencing range.”).

116 Pub. L. No. 115-391, § 404(b) (authorizing a court to “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”).

117 *Id.*

118 *Id.* § 404(c) (“Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”). Section 404(c) provides only two specific limitations on the availability of a sentence reduction—that “[n]o court shall entertain a motion made under this section . . . if the sentence was previously imposed or previously reduced in accordance with . . . the Fair Sentencing Act of 2010 or if a previous motion made under this section . . . was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.” *Id.*

Courts have largely agreed that the proper vehicle to file such a motion is 18 U.S.C. § 3582(c)(1)(B), which provides that a “court may modify an imposed term of imprisonment to the extent otherwise permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.” See, e.g., *United States v. Holloway*, 956 F.3d 660, 666 & n.8 (2d Cir. 2020) (concluding that motions under section 404 of the First Step Act are administered under 3582(c)(1)(B) and collecting cases for same). However, the nature of the proceedings and the rights afforded to a defendant in such proceedings are currently the subject of extensive litigation.

119 Figure 29 displays the origin of the filing of the motion for relief under the Fair Sentencing Act in Year One. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 26 cases were excluded from this analysis because the information received by the Commission prevented a determination of motion origin. Additionally, courts may cite multiple origins for a motion; consequently, the total number of origins cited generally exceeds the total number of cases. In this figure, 2,592 origins were cited for the 2,361 cases.



120 Figure 30 displays the year of the original sentence for the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act. Eleven cases were excluded from this analysis because the cases cannot be matched with an original case in the Commission's records.

121 In fiscal year 2018, the average sentence for all crack cocaine offenders was 78 months and the average sentence for all career offenders was 150 months. U.S. SENTENCING COMM'N, 2018 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. D-3 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureD3.pdf> [hereinafter 2018 SOURCEBOOK] (crack offenders); U.S. SENTENCING COMM'N, QUICK FACTS ON CAREER OFFENDERS (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf). The relatively high average sentence among the offenders receiving reductions under section 404 of the First Step Act may also be a function of the large number of cases that were excluded for this analysis. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 696 were excluded from this analysis because the resulting term of imprisonment could not be determined. Another 37 cases were excluded because the court documentation provided did not specify the length of a new sentence of imprisonment but only a modification to the length of supervised release. The exclusion of these cases likely increases the average sentence length, as some of these cases likely involved resentencings to terms of shorter duration and time-served sentences.

122 See U.S. SENTENCING COMM'N, FINAL CRACK RETROACTIVITY SENTENCING REPORT FAIR SENTENCING ACT, Tbl. 8 (Dec. 2014), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/RETROACTIVITY-ANALYSES/fair-sentencing-act/Final\\_USSC\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/RETROACTIVITY-ANALYSES/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf) [hereinafter 2014 FSA RETROACTIVITY REPORT].

123 Figure 31 displays the Criminal History Categories of offenders granted a retroactive sentence reduction pursuant to section 404 of the First Step Act and the Commission's 2011 retroactive guideline amendment. Of the 2,387 cases in which the court granted a motion for a sentence reduction pursuant to section 404 of the First Step Act, 11 were excluded from this analysis because the cases could not be matched with an original case in the Commission's records. The data in this figure was also limited to the 2,276 cases with complete guideline application information.

124 USSG §4B1.1; see also 28 U.S.C. § 994(h) (directing that the guideline range for a career offender be at or near the statutory maximum).

125 See 2014 FSA RETROACTIVITY REPORT, *supra* note 122, at Tbl. 6.

126 See *id.*

127 See 2018 SOURCEBOOK, *supra* note 121, at Tbl. D-2.

128 See *id.* at Tbl. D-3.

129 See *id.* at Tbl. D-5.

130 Figure 32 displays the demographic information for offenders who received a retroactive sentence reduction pursuant to the First Step Act. Of the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act, cases were excluded from each section of this figure for the following reasons: missing race information (10), missing citizenship information (15), missing gender information (2), and missing age information (21).

131 Data in this section of the report is derived from the Commission's regular resentencing datafile merged with data from the Commission's individual offender datafile. In addition, a special coding project was undertaken to determine the underlying reason why the compassionate release was granted. To ensure a more complete datafile, the Commission requested information from the BOP on offenders granted compassionate release in Year One. Cases on the BOP's list that were sentenced within the one-year timeframe after the First Step Act that had not yet been received by the Commission were specifically

requested from the sentencing district. In fiscal year 2018, 24 offenders were granted a reduction in their sentence based on compassionate release; in Year One, there were 145 offenders who were granted a reduction. Whenever a variable discussed in the analysis was missing information, that offender was excluded from that analysis.

132 18 U.S.C. § 3582(c)(1)(A).

133 See 18 U.S.C. § 3582(c)(1)(A); see also 28 U.S.C. §§ 994(a)(2)(C) (stating that the Commission shall promulgate general policy statements regarding “the sentence modification provisions set forth in section[] . . . 3582(c) of title 18”); and 994(t) (stating that the Commission, in promulgating any such policy statements, “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”).

134 28 U.S.C. § 994(t).

135 USSG §1B1.13. This section was first promulgated in 2006. USSG App. C, amend. 683 (effective Nov. 1, 2006). At the time, the policy statement tracked the statutory language, providing that only the Director of the BOP may file a motion seeking compassionate release. The Reason for Amendment explained that the policy statement “restates the statutory bases for a reduction in sentence . . .” and “provides that in all cases there must be a determination made by the court that the defendant is not a danger to the safety of any other person or to the community.” *Id.* In the Background Commentary to that amendment, the Commission explained that the policy statement was “an initial step toward implementing 28 U.S.C. § 994(t)” and that the Commission “intend[ed] to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction” pursuant to the compassionate release statute. *Id.*

The following year, 2007, the Commission further clarified some of the circumstances creating “extraordinary and compelling reasons.” USSG App. C, amend. 698 (effective Nov. 1, 2007). In 2016, the Commission further amended the policy statement to broaden the eligibility criteria for compassionate release. Among other things, the Commission amended Application Note 1(A) to expand the list of circumstances that should be considered “extraordinary and compelling reasons.” It restructured the list to provide for the four categories that exist in the current guideline: (A) Medical Condition of the Defendant; (B) Age of the Defendant; (C) Family Circumstances; and (D) Other Reasons. USSG App. C, amend. 799 (effective Nov. 1, 2016); USSG §1B1.13, comment. (n.1).

136 The defendant must be (i) at least 65 years old; (ii) experiencing a serious deterioration in health because of the aging process; and (iii) have served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.” USSG §1B1.13, comment. (n.1(B)).

137 Specifically, this includes the death or incapacitation of the caregiver of the defendant’s minor child or minor children or the incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner. USSG §1B1.13, comment. (n.1(C)).

138 *Id.* at comment. (n.1(A)(i)). Terminal illness is defined as “a serious and advanced illness with an end of life trajectory.” *Id.* The note further explains that “[a] specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.” *Id.* The Commission added this definition as part of its 2016 amendment to the Compassionate Release policy statement in order to clarify that a specific prognosis is not required (as it had been under BOP’s Program Statement). USSG App. C, amend. 799 (effective Nov. 1, 2016). In the Reason for Amendment, the Commission explained, “while an end-of-life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period. For that reason, the Commission concluded that requiring a specified prognosis (such as the 18-month prognosis in the BOP’s program statement) is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications.” *Id.*

139 USSG §1B1.13 comment. (n.1)(A)(ii)).

140 Pub. L. No. 115–391, § 603(a). Section 603(b) further provides a set of notification requirements for “a defendant diagnosed with a terminal illness” or “a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)” at new subsection 3582(d). Pursuant to the notification requirements, the BOP must (1) inform the defendant’s attorney, partner, and family members that they may prepare and submit a request on the defendant’s behalf; (2) process such a request; and (3) “ensure that [BOP] employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A).” “Terminal illness” is defined as “a disease or condition with an end-of-life trajectory.” Pub. L. No. 115–391, § 603(b)(3) (adding new 18 U.S.C. 3582(d)). Section 1B1.13 defines a terminal illness slightly differently, at Note 1(A)(i), as “a serious and advanced illness with an end of life trajectory.” It further explains that “[a] specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. USSG §1B1.13, comment. (n.1(A)(i)).

The First Step Act also made changes to 34 U.S.C. § 60541(g), a pilot program operated by the Attorney General, in which “eligible elderly offenders” could be placed in home detention until the expiration of their term of imprisonment. In particular, it reauthorized the program for fiscal years 2019 through 2023 and expanded it from “at least one [BOP] facility” to BOP “facilities,” without any specific limitation. Pub. L. No. 115–391, § 504(b). Section 603(a) of the First Step Act amended the eligibility requirements for elderly offenders both with respect to age (from 65 to 60) and duration of sentence served (from the greater of ten years or 75% to two-thirds of the term). It also extended release under the pilot program to “eligible terminally ill offenders.” Finally, it provided that a request for release into home detention may be initiated by either the BOP “or an eligible elderly offender or eligible terminally ill offender.” Pub. L. No. 115–391, § 603(a) (amending § 60451(g)(1)(B)). The statute authorizes the Attorney General and the BOP to operate this program. Courts do not have authority to grant home confinement or review any denials under section 60541(g). *See, e.g.*, *Lewis v. Rios*, No. 19-cv-1030, 2020 WL 555373, at \*4 (D. Minn. Jan. 13, 2020) (“The federal courts, including this District, that have considered the recently amended 34 U.S.C. § 60541(g) have found a district court has no power to use it to grant a prisoner early release to home detention.”) (collecting cases for same).

141 Figure 33 displays the origin of the motion for Year One. There were two cases missing information in Year One that were excluded from this figure.

142 *See supra* note 55.

143 This includes the 24 grants of compassionate release that occurred in fiscal year 2018 (September 1, 2017 through August 30, 2018) for which sentencing documentation was provided to the Commission. In fiscal year 2018, there were four cases in which a reduction was granted under section 3582(c)(1)(A) although the BOP did not appear to file a motion, and, instead, the court acted *sua sponte* or in response to a defendant’s motion. This would not have been consistent with section 3582(c)(1)(A)’s authorization to reduce a sentence “upon motion of the Director of the Bureau of Prisons.” 18 U.S.C. § 3582(c)(1)(A).

144 Figure 34 displays the average length of reduction (in months) and the average months of time served for compassionate release offenders in both fiscal year 2018 and Year One. The amount of time served is calculated based on the difference between the offender’s original sentence date and the date that the compassionate release motion was granted (or the date that the offender was scheduled to be released, where different from the date granted and clear from the court’s order). Sentences of probation only are included here as zero months of imprisonment. In addition, the information presented in this column includes conditions of confinement as described in USSG §5C1.1. Sentences of 470 months or greater (including life) were included in the sentence average computations as 470 months. There were two cases missing information in fiscal year 2018 and six cases missing information in the Year One datafile that were excluded from this figure.

145 This analysis excludes cases in which (1) a defendant was granted a reduction in sentence that did not result in immediate or near-immediate release, (2) the reduction was granted while the defendant was



146 serving a term of imprisonment based on a supervised release revocation, or (3) where the length of time-served and amount of reduction otherwise could not be determined. In fiscal year 2018, there were three cases in which a defendant did not receive a time-served sentence and two additional cases where the length of reduction and time-served could not be determined. In Year One, there was one case in which an offender did not receive a time-served sentence, three cases in which a defendant was serving a term of imprisonment as a result of a revocation, and an additional eight cases where the length of reduction and time-served could not be determined. *See also supra* note 144.

147 *See supra* notes 144 and 145 for inclusion criteria.

148 In the final three cases, the basis for the grant of compassionate could not be determined from the sentencing documentation.

149 Figure 35 displays the reasons that courts cited for granting the compassionate release motions. Note that the total reasons cited may exceed the total number of offenders. Cases missing information on the reasons cited for granting compassionate release were not included in the figure.

150 In two cases, the basis for the grant of compassionate release could not be determined. These cases are not included in the analysis. In some cases, the court based the compassionate release grant on more than one reason. As a result, the number of grants reported under each reason exceeds the total number of motions granted.

151 In an additional six cases, age was mentioned in the court's order granting release, but it was not clear whether this was the basis for the court's grant of compassionate release.

152 In an additional two cases, extraordinary and compelling reasons other than those provided for in subsection (A) through (C) were referenced, but it was not clear whether this was the basis for the court's grant of compassionate release.

153 *See supra* note 122 for Commission data retroactivity reports.

# Appendix

Appendix Figure 1. Primary Sentencing Guideline – 851 Filed  
 FY 2018 and First Step Year One

	FY 2018		First Step Year One	
	N	%	N	%
<b>Primary Sentencing Guideline</b>	<b>1,274</b>	<b>100.0</b>	<b>1,607</b>	<b>100.0</b>
§2A1.1	5	0.4%	7	0.4%
§2D1.1	1,142	89.6%	1,418	88.2%
§2D1.2	18	1.4%	24	1.5%
§2D1.5	1	0.1%	0	0.0%
§2D1.11	1	0.1%	0	0.0%
§2D2.1	1	0.1%	20	1.2%
§2K2.1	53	4.2%	86	5.4%
§2S1.1	44	3.5%	39	2.4%
All Other Guidelines	6	0.5%	12	0.7%
Missing Guideline	3	0.2%	1	0.1%

Appendix Figure 1 displays the primary sentencing guideline in cases in which an 851 enhancement was filed for both fiscal year 2018 and Year One. Cases missing the guideline information are included in the “Missing Guideline” category.

Appendix Table 1. Primary Drug Type by Primary Sentencing Guideline in Drug Trafficking Cases  
First Step Year One

Drug Type	§2D1.1 Drug Trafficking		§2D1.2 Protected Locations		§2D1.5 Continuing Criminal Enterprise		§2D1.6 Communication Facility		§2D1.8 Rent/Manage Drug Establishment		§2D1.10 Endangering Human Life While Manufacturing		§2D1.14 Narco-Terrorism			
	N	%	N	%	N	%	N	%	N	%	N	%	N	%		
<b>TOTAL</b>	<b>19,738</b>		<b>19,429</b>	<b>98.4</b>	<b>285</b>	<b>1.4</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>15</b>	<b>0.1</b>	<b>5</b>	<b>0</b>	<b>0</b>	<b>0</b>
Powder Cocaine	3,534		3,377	95.6	145	4.3	3	0.1	0	0	2	0.1	0	0	0	0
Crack Cocaine	1,541		1,482	96.2	57	3.7	0	0	0	0	2	0.1	0	0	0	0
Heroin	2,435		2,413	99.1	20	0.9	0	0	0	0	1	0	0	0	0	0
Marijuana	1,599		1,592	99.6	3	0.2	0	0	0	0	0	0	4	0.2	0	0
Methamphetamine	8,562		8,515	99.5	37	0.4	1	0	0	0	8	0.1	0	0	0	0
Other	2,067		2,050	99.2	15	0.7	0	0	0	0	1	0	1	0	0	0

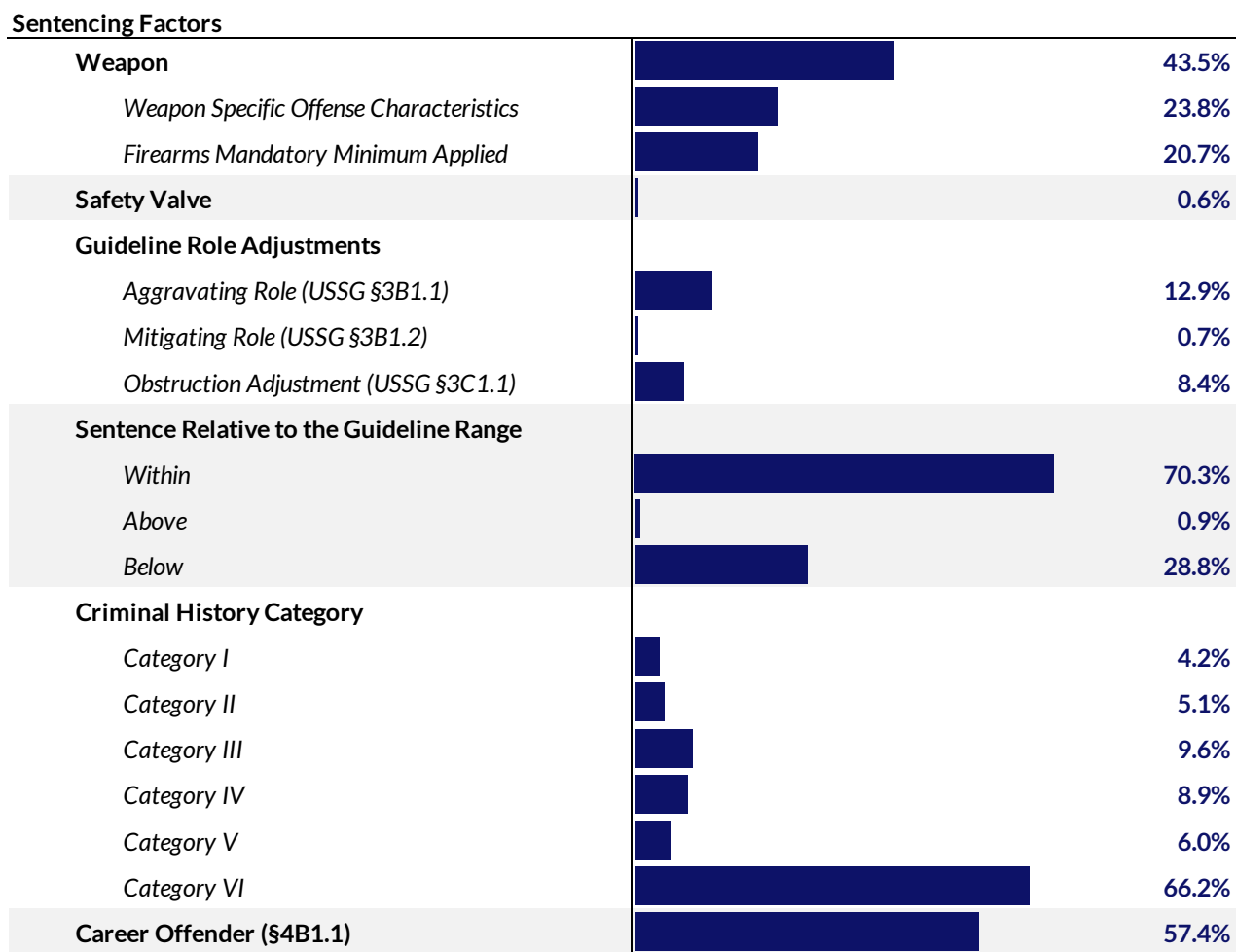
Appendix Table 1 displays the primary sentencing guideline by the primary drug type for all drug trafficking offenders in Year One. This table is limited to offenders whose primary sentencing guideline was §2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life While Manufacturing), or 2D1.14 (Narco-Terrorism). In addition, only cases with complete guideline application information were included in this table.

Appendix Figure 2. Safety Valve Status by Mandatory Minimum Penalty Status in Drug Trafficking Cases  
FY 2018 and First Step Year One

	FY 2018		First Step Year One	
	Drug Mandatory Minimum		Drug Mandatory Minimum	
	No	Yes	No	Yes
<b>TOTAL CASES</b>	<b>7,630</b>	<b>10,715</b>	<b>6,601</b>	<b>13,138</b>
No Safety Valve	5,565	6,895	4,967	7,645
Old Safety Valve	2,065	3,820	1,386	4,372
Expanded Safety Valve	--	--	248	1,121
Variance Only	--	--	248	0
Statutory Only	--	--	0	123
Variance and Statutory	--	--	0	998

Appendix Figure 2 displays both the safety valve status and the mandatory minimum penalty status in drug trafficking cases for both fiscal year 2018 and Year One. Offenders who had any drug statutory minimum penalty (from one month to life imprisonment) are included in the "Drug Mandatory Minimum Penalty" category. In fiscal year 2018, four cases missing information on safety valve application (three without and one with a drug mandatory minimum) were excluded from this table.

Appendix Figure 3. Selected Sentencing Factors for Offenders Receiving Sentence Reductions Pursuant to the Fair Sentencing Act Retroactivity Provision  
First Step Year One



Appendix Figure 3 shows selected sentencing factors for the 2,387 cases in which the court granted a motion for a sentence reduction under section 404 of the First Step Act of 2018, 11 were excluded from this analysis because the cases cannot be matched with an original case in the Commission’s records. The weapons, safety valve, and guideline role adjustment sections were limited to the 2,276 cases with complete guideline application information. In 22 cases, the court applied the weapon specific offense characteristic and the offender was also convicted of a firearms offense carrying a mandatory minimum penalty.

Appendix Figure 4. Primary Sentencing Guideline in Original Sentencing  
First Step Year One

	FY 2018		First Step Year One	
	N	%	N	%
<b>Primary Sentencing Guideline</b>	<b>23</b>	<b>100.0</b>	<b>142</b>	<b>100.0</b>
§2A1.1	1	4.3%	1	0.7%
§2B1.1	2	8.7%	17	12.0%
§2B3.1	1	4.3%	10	7.0%
§2C1.1	0	0.0%	2	1.4%
§2D1.1	12	52.2%	70	49.3%
§2G1.3	0	0.0%	2	1.4%
§2G2.1	0	0.0%	2	1.4%
§2G2.2	0	0.0%	5	3.5%
§2K2.2	3	13.0%	6	4.2%
§2L1.1	1	4.3%	1	0.7%
§2S1.1	3	13.0%	8	5.6%
§2T1.1	0	0.0%	2	1.4%
All Other Guidelines	0	0.0%	16	11.3%

Appendix Figure 4 displays the primary sentencing guideline for the original sentencing for offenders who were granted compassionate release in either FY 2018 or in Year One. Offenders whose primary sentencing guideline was missing were excluded from this table.



## United States Sentencing Commission

[www.ussc.gov](http://www.ussc.gov)

THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING  
ONE COLUMBUS CIRCLE N.E., SUITE 2-500  
WASHINGTON, DC 20002-8002

