No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN JONES
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit held below that Steven Jones's prior conviction qualified as a "covered offense" under § 404(a) of the First Step Act because his prior "violation" of 21 U.S.C. § 841(a)(1) involved crack-cocaine. But the Eleventh Circuit nonetheless held that he was ineligible for a reduced sentence under § 404(b) because his "violation" involved more than 280 grams of crack cocaine (as found by the district court at Mr. Jones's pre-*Apprendi* sentencing hearing). The questions presented are:

I. Whether "statutory penalties" in § 404(a) of the First Step Act modifies the entire phrase – "a violation of a Federal criminal statute" – as the Eleventh Circuit held below, or whether that phrase instead modifies the last antecedent – "a Federal criminal statute" – as every other Circuit has held?

II. Whether, as the Eleventh Circuit held below (in conflict with other Circuits), § 404(b) binds a district court to drug-found quantities made at a pre-*Apprendi* sentencing hearing when determining a defendant's statutory penalty range for purposes of § 404?

A third question arises in light of an intervening published decision from the Eleventh Circuit:

III. Should this Court grant, vacate, and remand to the Eleventh Circuit to reconsider Mr. Jones's appeal in light of *United States v. Taylor*, __ F.3d __, 2020 WL 7239632 (11th Cir. Dec. 9, 2020)?

RELATED PROCEEDINGS

United States v. Jones, Case No. CR 94-0067-WS, 2019 WL 1560879 (S.D. Ala. Apr. 9, 2019).

United States v. Jones, Case No. 19-11505-KK, 962 F.3d 1290 (11th Cir. Jun. 16, 2020).

TABLE OF CONTENTS

TABLE OF AUTHORITES

Federal Cases **Page**

Federal Statutes

United States Sentencing Guidelines

Miscellaneous

INDEX TO APPENDIX

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mr. Steven Jones, respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's published decision, affirming the denial of Mr. Jones's First Step Act motion, is available at 962 F.3d 1290, and is included as Appendix A. The Eleventh Circuit's unpublished order denying Mr. Jones's petition for rehearing en banc is included as Appendix B.

The district court's unpublished order denying Mr. Jones's First Step Act motion is not available on a commercial legal database but is included as Appendix C. The district court's unpublished order denying Mr. Jones's motion to reconsider the denial of his First Step Act motion is available at 2019 WL 1560879, and is included as Appendix D.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. The Eleventh Circuit denied the petition for rehearing en banc on August 10, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018) (full text included as Appendix E).

STATEMENT OF THE CASE

This petition raises important questions over the interpretation of § 404 of the First Step Act. In determining whether a defendant has a "covered offense" under § 404(a), the Eleventh Circuit held that the phrase "statutory penalties" modifies "a violation of a Federal criminal statute." With that premise, the Eleventh Circuit held that, although Mr. Jones was convicted of a "covered offense," he was still ineligible for a reduction because his "violation" involved more than 280 grams of crack cocaine. Pet. App. 15a. The Eleventh Circuit's decision conflicts with decisions from every other Circuit that has considered this issue. *See United States v. Smith*, 954 F.3d 446 (1st Cir. 2020); *United States v. Davis*, 961 F.3d 181, 188-191 (2d Cir. 2020); *United States v. Jackson*, 964 F.3d 197, 206 (3d Cir. 2020); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. Beamus*, 943 F.3d 789, 791–92 (6th Cir. 2019); *United States v. Shaw*, 957 F.3d 734, 738–39 (7th Cir. 2020); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019) and *United States v. White*, __ F.3d __, 2020 WL 7702705 (D.C. Cir. Dec. 29, 2020). Every other Circuit would have found Mr. Jones eligible for First Step Act relief under § 404(a) because his statute of conviction – 21 U.S.C. § 841(b)(1)(A)(iii) – was modified by the Fair Sentencing Act.

Moreover, the Eleventh Circuit held that § 404(b)'s "as if" clause binds a district court to drug-found quantities made at a pre-*Apprendi* sentencing hearing when determining a defendant's statutory penalty range for purposes of § 404. Pet. App. 28a. No other court of appeals has interpreted § 404(b) to include such an

additional limitation (beyond the requirements found in § 404(a)). *See United States v. Smith*, 954 F.3d 446, 448–49 (1st Cir. 2020); *United States v. Davis*, 961 F3d 181,188-190 (2d Cir. 2020); *United States v. Wirsing*, 943 F.3d 175, 185–86 (4th Cir. 2019); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019);*United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020); and *United States v. McDonald*, 944 F.3d 769, 771–72 (8th Cir. 2019). At least one court of appeals has expressly found that district courts can consider *Apprendi* when exercising discretion to grant or deny relief. *United States v. Ware*, 964 F.3d 482 (6th Cir. 2020); *see also United States v. Kirtman*, __ Fed. Appx. __, 2020 WL 7090692 (10th Cir. 2020) (unpublished) (affirming grant of reduction for pre-*Apprendi* defendant accountable for 1.5 kilograms of crack). At least one circuit has found that when none of the 404(c) limitations apply, defendants with § 404(a) "covered offenses" are eligible for relief under section 404(b) "even if the Fair Sentencing Act did not modify the statutory range for the specific drug quantity attributed to [them]." *United States v. White*, __ F.3d __, 2020 WL 7702705, at *7 (D.C. Cir. Dec. 29, 2020). This Court's review is necessary to resolve these conflicts.

The resolution of these conflicts is critically important. Congress enacted the First Step Act to remedy unwarranted racial disparities within the federal criminal justice system, and the Act's application affects thousands of prisoners. A uniform interpretation of the Act is important to ensure that Congress's aims in enacting the legislation are fulfilled and that similarly situated prisoners are not treated disparately.

On the merits, the Eleventh Circuit was wrong. As every other Circuit has held, the phrase "statutory penalties" is modified by its last antecedent, "of a Federal criminal statute." Nothing within § 404(b) even remotely acts as a "limitation" to relief for pre-*Apprendi* defendants like Mr. Jones. Finally, this case is an excellent vehicle to resolve these splits. Mr. Jones sought relief below, and the Eleventh Circuit addressed his claims on the merits. There are no procedural hurdles to this Court's review.

At a minimum, this Court should grant, vacate, and remand in light of the Eleventh Circuit's intervening decision in *United States v. Taylor*, __ F.3d __, 2020 WL 7239632 (11th Cir. Dec. 9, 2020). *Taylor* plainly indicates that the Eleventh Circuit's resolution of Mr. Jones's appeal was based on a critical misunderstanding of his argument. Without that critical misunderstanding, *Taylor* makes plain that the Eleventh Circuit would remand Mr. Jones's appeal to the district court for further proceedings.

A. Legal Background

The Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act ("FIRST STEP Act"), Pub. L. No. 115-391, 132 Stat. 5194 (2018), was enacted by Congress on December 21, 2018. "Behind the passage of the First Step Act lies an extensive history of congressional revisions to the penalties for drug-related crimes." *Wirsing*, 943 F.3d at 176. "The First Step Act is a remedial statute intended to correct earlier statutes' significant disparities in the treatment of cocaine base (also known as crack cocaine) as compared to powder cocaine." *Id.* at 176–77.

In 1970, the Comprehensive Drug Abuse Prevention and Control Act listed powder cocaine as a controlled substance and "assigned penalties in accordance with a drug's schedule and whether it was a narcotic, without considering quantity (with one minor exception related to distribution of 'a small amount of marihuana for no remuneration')." *Wirsing*, 943 F.3d at 177 (citing Pub. L. No. 91-513, § 202(a)-(b), 84 Stat. 1236, 1247-48, 1261-62 (1970)). Fourteen years later, "The Controlled Substances Penalties Amendments Act of 1984, . . . first made punishment dependent upon the quantity of the controlled substance involved." *Chapman v. United States*, 500 U.S. 453, 460 (1991). "The 1984 amendments were intended 'to provide a more rational penalty structure for the major drug trafficking offenses,' by eliminating sentencing disparities caused by classifying drugs as narcotic and nonnarcotic." *Id.* at 460–61 (internal citations omitted). Two years later, Congress introduced a 100-to-1 crack /powder weight ratio when it enacted the Anti –Drug Abuse Act of 1986 (1986 Act), Pub. L. 99-570, 100 Stat. 3207. *Kimbrough v. United States*, 552 U.S. 85, 95 (2007).

"Crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; it may also be mixed with water and injected," while "[c]rack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is divided into single-dose 'rocks' that users smoke." *Kimbrough*, 552 U.S. at 94 (internal citations omitted). The Anti–Drug Abuse Act of 1986 "created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing

and distribution offenses" based solely on the weight of the drugs involved in an offense. *Kimbrough*, at 95. Despite crack and powder cocaine being chemically identical, "the 1986 Act adopted a '100-to-1 ratio' that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Id.* at 96. As an example, the Act's ten-year mandatory minimum applie[d] to any defendant accountable for 50 grams of crack or 5,000 grams of powder, 21 U.S.C. § 841(b)(1)(A)(ii), (iii)." *Id.* This sentencing scheme mandated that courts impose sentences for crack cocaine offenses that were "three to six times longer than those for powder offenses involving equal amounts of drugs." *Id.* at 94. "This disparity mean[t] that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who [bought] powder from the supplier but then convert[ed] it to crack." *Id.*

Following Congress's lead, the U.S. Sentencing Commission abandoned its reliance on empirical evidence and amended the Guidelines Drug Quantity Table to reflect the 100-to-1 crack/powder disparity. *Id.* at 96. "It did so by setting a base offense level for a first-time drug offender that corresponded to the lowest Guidelines range above the applicable mandatory minimum." *Dorsey v. United States*, 567 U.S. 260, 267 (2012). The Guidelines Drug Quantity Table associated 500 grams of powder cocaine and 5 grams of crack cocaine with offense level 26, which corresponded to a sentencing range of 63 to 78 months for a first time offender. Meanwhile 5,000 grams of powder cocaine and 50 grams of crack cocaine corresponded to offense level 32 and a sentencing range of 121 to 151 months for a first time offender. *Dorsey*, 567 U.S. at 267. "[N]o matter what range the Guidelines set forth, a sentencing judge [was

required to] sentence an offender to at least the minimum prison term set forth [by the 1986 Act's] statutory mandatory minimum[s]." *Id.*

"Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity [was] generally unwarranted" and "'fail[ed] to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.'" *Kimbrough*, 552 U.S. at 97-98. "During the next two decades, the Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1. The Commission issued four separate reports telling Congress that the ratio was too high and unjustified." *Dorsey*, 567 U.S. at 268–69. The Commission proposed multiple amendments to the Guidelines that reduced the ratio and "asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id.* at 268–69; *Kimbrough,* 552 U.S. at 99 -100.

On August 3, 2010, Congress accepted the Commission's recommendations to address the 100-to-1 inequity and enacted the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372 (2010). "The Fair Sentencing Act described itself as intended '[t]o restore fairness to Federal cocaine sentencing.'" *Wirsing*, 943 F.3d at 178 (citing 124 Stat. at 2372). It "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the 10-year minimum," which "had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-

to-1." *Dorsey*, 567 U.S. at 269–70. Subsequently, this Court held in *Dorsey* that the Fair Sentencing Act applied to all crack cocaine offenders sentenced on or after August 3, 2010, even if they committed their offenses before that date. *Id.* at 281-82.

The Fair Sentencing Act instructed the Commission to promulgate "conforming amendments" within 90 days of the Act's effective date. *Dorsey*, 567 U.S. at 269-70. "[T]he Sentencing Commission promulgated amendments to 'lower[ ] the base offense levels assigned to different amounts of cocaine base,' including Amendments 750 and 782." *Wirsing*, 943 F.3d at 179 (*citing* U.S. Sentencing Guidelines Manual app. C, amend. 750 and amend. 782). "The Commission provided that these Guidelines amendments applied retroactively." *Id.* (*citing* U.S. Sentencing Guidelines Manual § 1B1.10(d)). While some defendants sentenced before August 3, 2010 obtained sentence reductions after filing 18 U.S.C. § 3582(c)(2) motions, similar defendants with Guideline ranges not lowered by the retroactive amendments had no way to access the benefits of the Fair Sentencing Act because it was not retroactive. *Wirsing*, 943 F.3d at 179.

"Against this background, Congress enacted the First Step Act [o]n December [21,] 2018, . . . [which] filled some gaps left by the Fair Sentencing Act." *Id.* The First Step Act created a freestanding remedy to remediate all of the unjust sentences imposed under the 100-to-1 crack/powder disparity for all crack cocaine offenders via the retroactive application of the Fair Sentencing Act. *Id.* at 180; see 164 Cong. Rec. S7020-02, S7021 (daily ed. Nov. 15, 2018) (statement of Sen. Durbin) (describing the bill as an opportunity "to give a chance to thousands of people who are still serving

sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 rul[e] to petition individually' for a sentencing reduction.").

Section 404(a) and (b) of the First Step Act permits district courts to reduce sentences for crack cocaine offenses, i.e. "covered offenses," which were committed before August 3, 2010.

> SEC. 404. APPLICATION OF FAIR SENTENCING ACT.
>
> (a) DEFINITION OF COVERED OFFENSE. -- In this section, the term "covered offense" means a violation of a Federal Criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED. -- A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

Section 404(c) of the First Step Act limits a district court's authority to reduce a sentence under three circumstances: (1) if the defendant was initially sentenced under the Fair Sentencing Act; (2) if the defendant's sentence has already been reduced under the First Step Act; or (3) when the sentencing court has already denied a defendant's First Step Act motion "after a complete review of the motion on the merits."

> (c) LIMITATIONS. -- No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section

shall be construed to require a court to reduce any sentence pursuant to this section.

B. Proceedings Below

In 1994, a grand jury charged Mr. Steven Jones, then 22 years old, and four codefendants, with "aiding and abetting" and conspiring to distribute "more than sixteen (16) kilograms" and "more than 600 grams" "of cocaine and of a mixture and substance containing a detectable amount of cocaine which contains cocaine base," in violation of 18 U.S.C. § 1952(a), 21 U.S.C. §§ 841(a)(1) and 846. Pet. App. 4a-5a. At the end of a five day trial, the district court notified counsel that it would not instruct the jury to make any drug amount findings because that was not legally required. Trial Tr., pp. 707, 708. The court instructed the jury, in part, that it "need not establish that the amount or quantity of cocaine, powder or crack, was as alleged in the indictment but only that a measurable amount of cocaine was in fact the subject of the acts charged in the indictment." Trial Tr., p. 873. "[T]he jury made no specific drug quantity finding because [Mr.] Jones was prosecuted before *Apprendi v. New Jersey* made clear that drug-quantity findings that increase a defendant's punishment must be made by a jury based on a standard of proof of beyond a reasonable doubt." Pet. App. 5a.

At sentencing, the district court judge adopted the Presentence Investigation Report's sentence calculations that attributed 75 kilograms of crack cocaine to Mr. Jones. Pet. App. 5a. Based on that drug amount, and with other Guidelines increases, the Presentence Investigation Report set the total offense level at 43. Pet. App. 5a. Mr. Jones fell within the lowest criminal history category – category I. Pet. App. 5A.

The district court found that Mr. Jones's statutory range for counts one and two was 10 years to life imprisonment, under U.S.C. § 841(b)(1)(A)(iii) (1994), and his Guidelines range was life imprisonment. Pet. App. 5a. During the sentencing hearing, Mr. Jones's defense counsel objected to the sentence calculations, in part, on the grounds that the 100-to-1 crack/powder cocaine ratio was disproportionately punitive on African-American communities. Doc. 429-2, p. 63. In response, the sentencing judge commented that Mr. Jones's situation was "a tragedy in the Court's opinion," but "[w]hether [the court] agree[d] or disagree[d] with it the Court [was] bound by those rules." Doc. 429-2, p. 63. The district court imposed a term of life imprisonment for counts one and two, and a term of 60 months' imprisonment for count three, all to run concurrently. Pet. App. 5a.

All of Mr. Jones's subsequent challenges to his conviction and sentence were denied, including his motions for sentence reductions under subsequent Guideline amendments. *See, e.g., United States v. Davis*, 105 F.3d 671 (11th Cir. 1996); *Jones v. United States*, 520 U.S. 1132 (1997).

On December 21, 2018, Congress passed the First Step Act of 2018. § 404(b), 132 Stat. at 5222. In 2019, Mr. Jones filed a First Step Act motion arguing that his "drug offenses are 'covered offenses' because Section 2 of the 2010 FSA 'modified' the 'statutory penalties' under [21 U.S.C. §] 841(b) for 'violation' of 21 U.S.C. §§ 841(a) and 846, and he committed such offenses before August 3, 2010." *United States v. Jones,* Case No. Case 1:94-cr-00067-WS, Doc. 429, p. 4 (S.D. Ala. Mar. 22, 2019). He also argued that his statutory penalties under the First Step Act could not be based

on prior, unconstitutional drug quantity findings made by the sentencing judge. Pet. App. 5a-6a.

Mr. Jones is 49 years old. He has been in federal custody for more than half of his life. His rehabilitation was documented in multiple exhibits filed with his First Step Act motion, including letters of recommendation for executive clemency from federal prison employees at FCC Coleman. Doc. 429-1. For example, Lieutenant William Thompson's letter stated that Mr. Jones "has proven himself to be someone worthy of a second chance at becoming a productive law abiding, tax paying U.S. citizen," because he personally observed Mr. Jones "focus[] on improving himself and his environment through positive actions, deeds, speech, and education." Doc. 429-1, p. 3 of 21. Lieutenant T. Smith's letter detailed the multiple times Mr. Jones was "called on several occasions as a positive mediator between inmate gangs and other Florida inmates, [and] that [he] has stopped major incidents that could [have] result[ed] in death or serious body harm to other inmates." Doc. 429-1, p. 6 of 21.

Nevertheless, the district court issued a one paragraph order denying First Step Act relief on the grounds that Mr. Jones was "ineligible for relief under the [First Step] Act" because "[t]he sentencing court expressly found that [he] was responsible for at least 75 kilograms of crack cocaine" and "nothing in the First Step Act of 2018 or the Fair Sentencing Act of 2010 would authorize, much less compel, th[e] court to review and overturn drug quantity findings used at the original sentencing hearing." Pet. App. 36a.

Mr. Jones filed a motion for reconsideration that asserted he had been convicted of a § 404(a) "covered offense" because the penalties for his convictions for conspiracy to distribute powder and crack cocaine under 21 U.S.C. §§ 841(a)(1) and 846 had been modified by the Fair Sentencing Act of 2010. *United States v. Jones,* Case No. Case 1:94-cr-00067-WS, Doc. 436, pp.4-5 (S.D. Ala. Apr. 8, 2019). He also argued that application of section 2 of the Fair Sentencing Act of 2010 would effectively reduce his statutory sentence from 10 years to life to 0 to 20 years. *Id.* at 6. The district court denied Mr. Jones's motion for reconsideration, concluding that "[u]nder Jones's theory of 'no specific quantity,' the relevant statutory minimum and maximum sentences he faced for Count One would be exactly the same in the pre-FSA world as they were in the post-FSA world." Pet. App. 39a.

Mr. Jones appealed. His appeal focused on the interpretation of the First Step Act's plain language. He argued that his conviction under § 841(b)(1)(A)(iii) qualified as a "covered offense" under Section 404(a) of the First Step Act, and, for that reason, he was eligible for relief. He further argued that his actual conduct and Guideline range was irrelevant to that determination. *United States v. Jones*, 2019 WL 2285803, *14-15 (11th Cir. May 23, 2019) ("Thus, proving eligibility under the First Step Act is straightforward. A defendant is eligible if he is continuing to serve a pre-FSA sentence for a crack cocaine offense. Mr. Jones meets this criteria because he was convicted of engaging in conspiracy to distribute powder cocaine and crack cocaine between July 1, 1993 and April 19, 1994. He was sentence to Life imprisonment in 1994, and he continues to serve that sentence."); *United States v.*

Steven Jones, 2019 WL 3318303, *13-15 (11th Cir. July 22, 2019). He also asserted that when the district court conducts its § 404(b) review, it would not be bound by prior judicial drug quantity determinations because his statutory penalty range had to comply with current constitutional restraints requiring that the range be based on the jury's drug quantity finding or lack thereof. *Jones*, 2019 WL 2285803, at *16-21; *Jones*, 2019 WL 3318303, at *16-20. After hearing oral argument in his case and three others like his, the Eleventh Circuit published an opinion that addressed all four cases. It affirmed the denial of relief to Mr. Jones. Pet. App. A.

The Eleventh Circuit held that Mr. Jones had a "covered offense" under § 404(a), but did so via reference to Mr. Jones's "violation," rather than his statute of conviction. Pet. App. 26a. The Eleventh Circuit reasoned that the term "statutory penalties" in § 404(a) modified the phrase "'violation of a Federal criminal statute,'" and not the last antecedent -- a "'Federal criminal statute.'" Pet. App. 15a. In so holding, the Eleventh Circuit knowingly created a conflict within the Circuits on this issue. Pet. App. 16a-17a.

Despite holding that it was rejecting the government's argument that the "covered offense" determination should be based on consideration of "the specific quantity of crack cocaine involved in the movant's violation," Pet. App. 22a, the Eleventh Circuit held that "district courts *must* consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment" to determine if he committed a covered offense. Pet. App. 22a. (emphasis added). The Eleventh Circuit held Mr. Jones had been convicted of a

"covered offense" because the record established the district court treated his counts of convictions as crack cocaine offenses when it imposed his sentence. Pet. App. 26a.

The Eleventh Circuit rejected Mr. Jones's argument that his eligibility for First Step Act relief could not be based on unconstitutional drug quantity findings made by his sentencing judge in 1994. Pet. App. 24a-25a. Despite acknowledging that only the jury could make the drug quantity findings that increased Mr. Jones's statutory penalties, the court held Mr. Jones could not rely on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) "for purposes of a First Step Act motion." Pet. App. 25a.

The Eleventh Circuit interpreted the "as if" language in § 404 (b) as imposing the two limitations against relief (1) "if [a defendant] received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act," and (2) when "determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." Pet. App. 28a. The court held "the Constitution does not prohibit district courts, in deciding motions for reduced sentences under the First Step Act, from relying on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified." Pet. App. 29a.

The Eleventh Circuit affirmed the district court's order denying relief to Mr. Jones because it found the judicial drug quantity determination that Mr. Jones's offense involved 75 kilograms of crack cocaine "subjected [him] to a statutory range of 10 years to life imprisonment." Pet. App. 30a. The court further held that since

"[t]he only argument [Mr.] Jones made" in the district court was that he was entitled to First Step Act relief because his jury made no drug-quantity finding and thus his statutory range was 0 to 20 years of imprisonment, "[t]he district court did not err in refusing to allow [him] to relitigate his drug-quantity finding." Pet. App. 30a.

On July 7, 2020, Mr. Jones filed a petition for rehearing en banc, which the Eleventh Circuit summarily denied. Pet. App. 35a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's interpretation of "covered offense" in § 404(a) conflicts with other circuits.

The Eleventh Circuit held that the phrase "statutory penalties" in § 404(a) modifies the phrase "a violation of a Federal criminal statute." For this reason, the Eleventh Circuit looked beyond Mr. Jones's statute of conviction, finding him ineligible for First Step Act relief because of judge-found facts at sentencing holding him accountable for 75 kilograms of crack cocaine. In contrast, every other court of appeals to consider this issue – the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and DC Circuits – has held the phrase "statutory penalties" in § 404(a) modifies the last antecedent "a Federal criminal statute." *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020); *United States v. Davis*, 961 F.3d 181, 188-191 (2d Cir. 2020); *United States v. Jackson*, 964 F.3d 197, 206 (3d Cir. 2020); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. Beamus*, 943 F.3d 789, 791–92 (6th Cir. 2019); *United States v. Shaw*, 957 F.3d 734, 738–39 (7th Cir. 2020); *United States v.*

McDonald, 944 F.3d 769, 772 (8th Cir. 2019); and *United States v. White*, __ F.3d __, 2020 WL 7702705, at *6 (D.C. Cir. Dec. 29, 2020). In these Circuits, it is the statute of conviction, not the defendant's underlying offense conduct, that controls. In any other Circuit but the Eleventh, Mr. Jones is eligible for a reduced sentence because he was convicted of a crack cocaine offense under § 841(b)(1)(A)(iii).

For example, in *United States v. Davis*, the Second Circuit agreed with the other circuits that eligibility for First Step Act relief was not based on actual offense conduct. 961 F.3d 181, 187 (2d Cir. 2020) ("Several of our sister circuits have recently confronted the meaning of 'covered offense' in precedential opinions. In one way or another, each has concluded that it is the statute under which a defendant was convicted, not the defendant's actual conduct that determines whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a). For the reasons explained below, we agree.") (internal citations omitted).

When the Third Circuit vacated a district court's denial of First Step Act relief to two defendants, it concluded that "§ 404 eligibility turns on a defendant's statute of conviction, not on his possession of a certain quantity of drugs." *United States v. Jackson*, 964 F.3d 197, 206 (3d Cir. 2020). And when considering whether it had the authority to grant First Step Act relief to a career offender, the Sixth Circuit in "*Beamus* did not look beyond the amount of crack cocaine found by the jury to ask whether the record reflected a greater quantity." *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) (*citing United States v. Beamus,* 943 F.3d 789 (6th Cir. 2019). In *United States v. McDonald*, 944 F.3d 769 (8th Cir. 2019), the Eighth Circuit

reviewed denial of a First Step Act motion for a defendant who, like Mr. Jones, was convicted and sentenced before this Court held, in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In 1999, a jury convicted Maurice McDonald of distributing powder cocaine and 2 ounces of crack cocaine. He filed a *pro se* First Step Act motion, but it was denied by a district court that found he was "ineligible for relief because his sentence was based on 150 kilograms of powder cocaine rather than cocaine base." *McDonald*, 944 F.3d at 771. The Eighth Circuit disagreed, finding that "the First Step Act applies to offenses, not conduct, and it is McDonald's statute of conviction that determine[d] his eligibility for relief." *Id.* at 772. The Eighth Circuit remanded the case for discretionary review under Section 404(b) of the First Step Act.

In *United States v. White,* the District of Columbia Circuit vacated a lower court's denial of First Step Act motions for two defendants convicted and sentenced before *Apprendi* was decided. Like the Eleventh Circuit in *Jones*, the lower court denied relief based, in part, on a finding that although the defendants had been convicted of "covered offenses," relief was not "available" to them under § 404(b) because "the Fair Sentencing Act would have had no effect on [their] sentences . . . based on the judge-found quantities of crack cocaine attributed to [them]. . . ." __ F.3d __, 2020 WL 7702705, at *4 (D.C. Cir. Dec. 29, 2020). The D.C. Circuit rejected this finding, reasoning that the lower court's "limitation has no basis in the text of section

404(b) [because] [t]he plain language of section 404(b) does not require the court to determine what effect the Fair Sentencing Act 'would have had' on a defendant's sentence at the time it was originally imposed." *Id.* at *7. The D.C. Circuit remanded the case for § 404(b) discretionary review, holding that "[i]f a defendant committed a 'covered offense' under section 404(a) and neither of the limitations in section 404(c) apply, relief under section 404(b) is available even if the Fair Sentencing Act did not modify the statutory range for the specific drug quantity attributed to the defendant." *Id.* Had Mr. Jones's case been litigated in any other circuit, it would have been remanded for discretionary review. For that reason alone, review by this Court is necessary.

II. The Eleventh Circuit's interpretation of eligibility conflicts with other circuits.

The Eleventh Circuit's decision exacerbates a second conflict within the Circuits. The Eleventh Circuit held that Mr. Jones was ineligible for relief under § 404(b)'s "as if" clause because, at the time he was sentenced, this Court had not yet decided *Apprendi*. For this reason, the Eleventh Circuit held the district court's factual findings at sentencing, rather than the underlying statute of conviction, somehow controlled the eligibility determination under the First Step Act.

In direct conflict, the Sixth and D.C. Circuits have expressly held that pre-*Apprendi* defendants are eligible for First Step Act relief even where the district court's drug quantity findings at sentencing exceeded the Fair Sentencing Act's new threshold amounts. *United States v. White*, 2020 WL 7702705, at *6-*7; *United States v. Ware*, 964 F.3d 482 (6th Cir. 2020).

In 1994, a jury found the defendants in *United States v. White*, __ F.3d __, 2020 WL 7702705 (D.C. Cir. Dec. 29, 2020) guilty on charges of conspiracy to distribute 50 grams or more of crack cocaine, Racketeer Influenced and Corrupt Organization (RICO) conspiracy, distribution of 5 grams or more of a substance containing crack cocaine, and distribution of a detectable amount of crack cocaine. The jury did not make any drug quantity findings. "At sentencing, the trial judge determined the statutory penalties using drug quantities found by the preponderance of the evidence." *White*, at *3. The judge found, in part, that 21.87 kilograms of crack cocaine was involved in the offense. Both defendants' mandatory Guidelines ranges were life, and both were sentenced to life imprisonment.

In 2019, the defendants filed First Step Act motions. The district court denied relief based, in part, on a finding that although the defendants had been convicted of "covered offenses," relief was not "available" to them under § 404(b) because "the Fair Sentencing Act would have had no effect on [their] sentences . . . based on the judge-found quantities of crack cocaine attributed to [them]. . . ." __ F.3d __, 2020 WL 7702705, at *4 (D.C. Cir. Dec. 29, 2020). The district court also denied relief because the defendants' Guideline ranges did not change after the First Step Act. And, after focusing on the offense without consideration of the defendants' mitigation evidence, the lower court found, in the alternative, that sentence relief was not warranted.

The defendants appealed. On appeal, the government "disagreed with the District Court's conclusion 'that relief [is] unavailable to appellants under [s]ection 404(b) because of the actual quantity of crack cocaine involved in their offenses.'"

White, at *5. The D.C. Circuit rejected the lower court's "unavailability of relief" finding, explaining that the lower court had "construed section 404(b) incorrectly" because "section 404(b) does not create such an availability test." *White*, at *6.

The D.C. Circuit found that the lower court's "limitation ha[d] no basis in the text of section 404(b) [because] [t]he plain language of section 404(b) does not require the court to determine what effect the Fair Sentencing Act 'would have had' on a defendant's sentence at the time it was originally imposed." *Id.* at *7. "Rather, it simply authorizes the district court to 'impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed." *Id.* Thus, "[a] court cannot determine, using judge- or jury-found drug quantities, what effect the Fair Sentencing Act 'would have had' on a defendant's sentence." *Id.* After noting that "[t]he Government agree[d] that relief cannot be made 'unavailable to appellants under [s]ection 404(b) because of the actual quantity of crack cocaine involved in their offenses,'" the D.C. Circuit vacated denial of First Step Act relief and remanded the case to the lower court for § 404(b) discretionary review, holding that "[i]f a defendant committed a 'covered offense' under section 404(a) and neither of the limitations in section 404(c) apply, relief under section 404(b) is available even if the Fair Sentencing Act did not modify the statutory range for the specific drug quantity attributed to the defendant." *Id.* The D.C. Circuit instructed that the lower "court may consider both judge-found and jury-found drug quantities as part of its exercise of discretion," [b]ut [it] may not deem relief

categorically unavailable due to defendant-specific drug quantities." *Id.* at *7,*8 (*citing United States v. Ware*, 964 F.3d 482, 488-89 (6th Cir. 2020)).

Consider the Sixth Circuit's decision in *Ware*. In 1997, a jury convicted Mr. Robert Ware of conspiring to distribute and possess powder and crack cocaine. "The jury did not make any specific findings as to the drug quantities associated with Ware's crimes." *Id.* at 484. At sentencing, a judge found that the Presentence Report, which contained an estimation that his offense involved 3.6 grams of crack cocaine and 26.6 kilograms of powder cocaine, correctly calculated that Mr. Ware's mandatory Guideline range was 360 months to life imprisonment. The district court sentenced Mr. Ware to 360 months' imprisonment.

In 2019, Mr. Ware filed a First Step Act motion. Although the district court found him eligible for relief under Section 404(a), it exercised its discretion to deny relief under Section 404(b), based on its reasoning that since "the legislative purpose of § 404 of the First Step Act was to make retroactive the Fair Sentencing Act's reduction in the sentencing disparity between powder-cocaine and cocaine-base offenses," Mr. Ware's "case was 'not an appropriate [one] for relief under the First Step Act," since the small amount of crack involved in his case did not affect the calculation of his sentence Guidelines. *Id.* at 486.

On appeal, Mr. Ware argued, in part, that since a jury did not make any specific drug quantity findings in his case "under today's law he could be lawfully sentenced only under 21 U.S.C. § 841(b)(1)(C), which would impose a statutory cap of 20 years per count—10 years less than Ware's current sentence." *Id.* at 488. "In [his] view, the

higher sentencing ranges in §§ 841(b)(1)(A) and (B) could not be applied . . . under both *Apprendi* and recent statutory interpretation of these provisions." *Id.* The Sixth Circuit "focus[ed] on this argument as an alleged *Apprendi* error." *Id.* The government argued that since *Apprendi* was not retroactive to cases on collateral review, it was not applicable in the First Step Act context - the Sixth Circuit disagreed.

In rejecting the government's position, the Sixth Circuit relied on this Court's analysis of "retroactivity" in *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) and reasoned that "the term 'retroactivity' is a bit of a misnomer, as this doctrine in fact concerns the 'redressability' of a constitutional violation. Because 'the source of a 'new rule' is the Constitution itself,' 'the underlying right necessarily pre-exist[ed] [the Supreme Court's] articulation of the new rule.'" *Id.* at 488 "Thus, Ware's Sixth Amendment rights were violated when judge-found facts were used to raise his statutory maximum sentence, even though this occurred before *Apprendi* was decided." *Id.* at 488.

The Sixth Circuit reasoned that for defendants sentenced before *Apprendi*, "consideration of the impact that *Apprendi* would have [ ] on [their] statutory sentencing range is a factor that the district court may consider when deciding whether, in its discretion, to grant relief to a defendant whom Congress has made eligible for relief." *Id.* at 488 (*citing United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020)). Therefore, "a 'district court ... err[s] as a matter of law' if it restricts itself to consideration of 'the law and facts as they existed at the time of [the defendant's]

original sentencing.'" *Id.* (*citing United States v. Martin*, 817 Fed. Appx. 180, 184-85 (6th Cir. June 16, 2020); *Allen*, 956 F.3d at 357).

The Sixth Circuit held that consideration of *Apprendi* in deciding whether to grant an eligible defendant's First Step Act motion was consistent with holdings "that courts cannot apply *Apprendi* retroactively as an independent basis for disturbing a defendant's finalized sentence" because "[i]n the First Step Act, Congress [ ] provided express authority to disturb the finality of [a] sentence and has done so without limiting the considerations that the court may contemplate in utilizing this authority." *Ware*, 964 F.3d at 488–89. The Sixth Circuit held that the district court did not abuse its discretion when it considered *Apprendi* in the context of Ware's First Step Act proceeding. *Id.* at 489.

Although other Circuits have not addressed this specific conflict, they have weighed in on intervening law and the First Step Act. Consistent with the Eleventh Circuit's decision below, the Fifth, and Ninth Circuits have held that intervening changes in the law are irrelevant in First Step Act proceedings. *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019).

For instance in *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020), the Ninth Circuit reasoned that "the First Step Act asks the court to consider a counterfactual situation where only a single variable is altered, [and] it does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense." The Ninth Circuit noted that its holding

"deepen a circuit split" because it was "join[ing] the well-reasoned opinions of the Fifth and Sixth Circuits,[1] which have interpreted the First Step Act as not permitting a plenary resentencing hearing but instead allowing a court to engage in the limited counterfactual inquiry we have described." *Id.* at 475-76 (*citing United States v. Hegwood,* 934 F.3d 414, 418 (5th Cir. 2019); *United States v. Smith*, 958 F.3d 494, 498 (6th Cir. 2020)).

"The Fourth Circuit, by contrast, has concluded that the First Step Act permits a court to consider at least some intervening changes in case law in recalculating a prisoner's sentence." *Kelley*, 962 F.3d at 476 (*citing United States v. Chambers*, 956 F.3d 667, 672–73 (4th Cir. 2020)). *Chambers* holds that "unlike under § 3582(c)(2) and its corresponding policy statement (U.S.S.G. § 1B1.10), there is no limiting language to preclude the court from applying intervening case law" in First Step Act proceedings because "[t]he only express limitations arrive in § 404(c), which prevents the court from 'entertain[ing] a motion' made by someone who filed a prior First Step Act motion that was denied on the merits, or whose sentence was already imposed or reduced [under] section 2 and 3 of the Fair Sentencing Act." 956 F.3d at 672 (*citing* § 404(c)). *Chambers* rejected the Fifth Circuit's holding in *Hegwood*, explaining, in relevant part, that the Fifth Circuit had "compared § 404(b) of the First Step Act to 18 U.S.C. § 3582(c)(2), the stricter mechanism by which prisoners modify sentences

[1] In referencing the Sixth Circuit, the Ninth Circuit fails to note that the Sixth Circuit held, in *United States v. Ware*, 964 F.3d 482, 488–89 (6th Cir. 2020), that consideration of *Apprendi* in deciding whether to grant an eligible defendant's First Step Act motion is not an abuse of discretion.

after Guidelines amendments." *Id.* at 673. Since, however "the strictures of § 3582(c)(2) are irrelevant to § 3582(c)(1)(B), under which First Step Act motions are brought," the Fourth Circuit "look[ed] to the First Step Act itself, which expressly allows a court to 'impose' a reduced sentence, and not just to 'reduce' it. *Id.*

The Tenth Circuit has also held that intervening precedent can be considered in some circumstances. *United States v. Brown*, 974 F.3d 1137, 1139-40 (10th Cir. 2020) (holding that the First Step Act "allows a district court to at least consider Mr. Brown's claim that sentencing him as a career offender would be error given subsequent decisional law that clarifies (not amends) the related career offender provision at issue."). More recently, the Tenth Circuit affirmed the grant of a reduction for a pre-*Apprendi* defendant accountable for 1.5 kilograms of crack cocaine in *Kirtman*, __ Fed. Appx. __, 2020 WL 7090692, at *1, *3. That decision conflicts with the Eleventh Circuit's decision below. Because this second conflict is established and entrenched, review is necessary.

III. The questions presented are extremely important.

The First Step Act of 2018 is a new statutory remedy aimed at correcting thousands of unjust sentences meted out under the 100-to-1 crack/powder ratio. It has affected thousands of people since its enactment. "In the year after passage of the First Step Act, courts have granted 2,387 reductions in sentences pursuant to section 404 of the Act. These offenders were originally sentenced between 1990 and 2013, with the majority sentenced between 2003 and 2011." United States Sentencing Commission, *The First Step Act of 2018 One Year of Implementation*, p. 43 (August

2020).[2] Of the 3,323 sentences reduced between January and June of 2020, 284 were sentences imposed before *Apprendi* was decided. *See* U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, Table 2: Year of Original Sentence of Offenders Receiving Sentence Reductions Due to Resentencing Provisions of First Step Act (October 2020).[3] The continued application of the Act will affect a significant amount of incarcerated people over the coming decade. *See* Sentence and Prison Impact Estimate Summary S. 1917, The Sentencing Reform and Corrections Act of 2017 (Data analysis conducted August 3, 2018).[4] Thus, this Court's guidance on the correct interpretation of the First Step Act is critically important.

Congress passed the First Step Act because it wanted to remediate, via the retroactive extension of the Fair Sentencing Act, over three decades of unjust sentencing disparity caused by the 100-to-1 crack/powder ratio. This remediation can only occur when there is uniformity in the interpretation and application of the First Step Act among the circuits. The current circuit splits show that the circuits have created their own standards. As a result, interpretation and application of the Act

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[2] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.
[3] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf.
[4] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August_2018_Impact_Analysis_for_CBO.pdf; Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME, available at http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/.

vary among the circuits. This Court's guidance to the lower courts is absolutely necessary.

When Mr. Jones was sentenced in 1994, his Guidelines range of life imprisonment was mandatory. Today, the Guidelines are not mandatory, and it is unlikely that a district judge would impose life under the First Step Act. Mr. Jones has been in federal prison for more than 26 years. The Federal Bureau of Prison estimates that it costs $37,449.00 ($102.60 per day) to house a person in a federal facility. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 84 FR 223, pp. 63891-92 (Nov. 19, 2019). Since Mr. Jones has been completely rehabilitated, his continued incarceration for life is no longer in the interest of justice and represents a grossly unreasonable financial burden on taxpayers. Had his case been reviewed by any circuit other than the Eleventh, these issues would have been addressed via First Step Act review.

IV. The Eleventh Circuit erred.

Mr. Jones argued below that since § 404(a)'s penalties clause modified "Federal Criminal statute," § 404(a) eligibility was based solely on whether a defendant's statute of conviction was for a crack offense for which the penalties had been modified by the Fair Sentencing Act. Disagreeing with him, the Eleventh Circuit relied exclusively on *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061 (2018) to find that "[t]he better reading is that the penalties clause modifies the whole phrase 'violation of a Federal criminal statute,'" and "[a] movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified . . . the statutory

penalties for crack-cocaine offenses that have as an element the quantity of crack cocaine provided in subsections 841(b)(1)(A)(iii) and (B)(iii)." Pet. App. 16a. To reach this conclusion, the Eleventh Circuit rejected the "nearest-reasonable-referent canon" or "last antecedent rule," based on *Cyan*'s holding that it did not apply "'when the modifier directly follows a concise and integrated clause,'" and reasoned that the "penalties clause directly follow[ed] the concise and integrated clause 'a violation of a Federal criminal statute.'" Pet. App. 16a-19a. The Eleventh Circuit's analysis of § 404(a) gives no effect to the words "Federal criminal statute," which violates the anti-surplusage canon; makes § 404(a) eligibility contingent upon actual and/or relevant conduct drug amounts, and is contrary to the findings made by every other circuit.

The Second Circuit, in *United States v. Davis*, 961 F.3d 181 (2d Cir. 2020), explained that *Cyan*'s "caution[] against applying the last antecedent rule opportunistically by 'attaching the modifier to something more than the last thing before it'" was "particularly warranted here, as the phrase nearest to the limiting clause, 'Federal criminal statute,' is also 'concise and integrated,'" thus leaving readers to search for the "more *reasonable*" of "two grammatically permissible" "'closest noun or noun phrase that the modifier could reasonably reference." *Davis,* 961 F.3d at 188. Since the Eleventh Circuit's kind of "mechanical application" of the last antecedent rule "distort[s], the common-sense linguistic principles the canon is meant to embody," the Second Circuit found that it "necessitate[d] reliance on other statutory interpretation canons to resolve the issue, in this case, the "'anti-surplusage canon,'" which required that every word in § 404(a) be given effect and that courts

""avoid statutory interpretations that render provisions superfluous."" *Id.* at 188-89. The Second Circuit reasoned that the Eleventh Circuit's reading of § 404(a) "would [ ] attribute no meaning to Congress's decision to include the words 'of a Federal criminal statute.'" *Davis*, at 189. "By contrast, treating 'Federal criminal statute' as the antecedent of the limiting clause gives effect to all of the words Congress used." *Id.*

At least seven circuits have held that drug quantities attributed to a defendant at sentencing do not control First Step Act eligibility. None of these circuits have found that § 404(a) includes additional criteria for eligibility beyond the categorical question of whether the underlying statute of conviction was a crack cocaine offense. *See United States v. Davis*, 961 F.3d 181 (2d Cir. 2020); *United States v. Jackson*, 964 F.3d 197, 202 (3d Cir. 2020)("Although § 404(a) is reasonably susceptible to these different interpretations, textual indicia lead us to concur with other courts of appeals that have already resolved this issue: Congress intended eligibility to turn on a defendant's statute of conviction rather than his conduct."); *United States v. Boulding*, 960 F.3d 774, 779, 781 (6th Cir. 2020) ("Quantity is simply not part of the statutory test for eligibility under the First Step Act. Eligibility turns entirely on the categorical nature of the prior conviction."); *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020)("Accordingly, we hold that the statute of conviction alone determines eligibility for First Step Act relief."); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019)("The First Step Act applies to offenses, not conduct, *see* First Step Act § 404(a), and it is McDonald's statute of conviction that determines his eligibility for relief, *see,*

e.g., United States v. Beamus, No. 19-5533, 943 F.3d 789, 792, 2019 WL 6207955, at *3 (6th Cir. Nov. 21, 2019); *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019)."); *United States v. White*, No. 19-3058, 2020 WL 7702705, at *6 (D.C. Cir. Dec. 29, 2020) ("Thus, whether an offense is 'covered' does not depend on the actual drug amounts attributed to a defendant, whether by a judge or a jury.").

If Congress intended "violation" to refer to a defendant's "relevant conduct," for purpose of eligibility under the First Step Act, it would have defined a "covered offense" as a "violation of Section 841 or Section 960 that involved a quantity modified by section 2 of the FSA of 2010, such quantity to be determined under the relevant conduct provisions of the United States Sentencing Guidelines." It obviously did not do so. *See United States v. Rose*, 379 F. Supp. 3d 223, 228 (S.D.N.Y. 2019). Thus, it must be assumed that when Congress enacted the First Step Act, it expected courts to interpret "violation of a Federal criminal statute" to mean the elements of the statute of conviction. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (It is presumed "that Congress was thoroughly familiar with . . . important precedents from [the Supreme Court] and other federal courts and that it expected its enactment to be interpreted in conformity with them.").

While there is no ambiguity in Mr. Jones's reading of the statute, any ambiguity in the meaning of "violation," must be resolved in his favor under the rule of lenity. *United States v. Rose*, 379 F. Supp. 3d 223, 229 (S.D.N.Y. 2019) ("Both the Fair Sentencing Act and the First Step Act have the remedial purpose of mitigating the unfairness created by the crack-to-powder cocaine ratio, and the statutes should

be construed in favor of broader coverage"); *United States v. Martin*, 2019 WL 2571148, at *2 (E.D.N.Y. June 20, 2019) (rejecting government's view that "violation" refers to relevant conduct admitted in a plea agreement based in part on the rule of lenity).

Section 404(b)'s "as if" language governs the district court's discretionary authority to impose a new sentence for First Step Act eligible defendants. In *Jones,* the Eleventh Circuit held the "as-if" language imposes two limitations: (1) it prohibits a defendant that received the lowest statutory penalty available under the Fair Sentencing Act from getting additional relief, and (2) "in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." Pet. App. 28a.

A plain reading of § 404(b) makes clear that these limitations are neither explicitly or implicitly included in the text of the First Step Act. When the Eleventh Circuit found these limitations, it failed to cite any legal authority in support of them. In *United States v. White*, _ F. 3d_, 2020 WL 7702705 (D.C. Cir. Dec. 29, 2020), the D.C. Circuit rejected a similar interpretation of § 404(b) where First Step Act relief was denied because a lower court found that although the pre- *Apprendi* defendants had "covered offenses" under § 404(a), relief was not "available" to them under § 404(b) because of the judge found drug quantities attributed to them. The D.C. Circuit held that "section 404(b) does not create such an availability test," and that the "limitation ha[d] no basis in the text of section 404(b)." *Id.* at *6, *7. The D.C. Circuit

held that "[i]f a defendant committed a 'covered offense' under section 404(a) and neither of the limitations in section 404(c) apply, relief under section 404(b) is available even if the Fair Sentencing Act did not modify the statutory range for the specific drug quantity attributed to the defendant." *Id.*

Because the First Step Act is its own statutory remedy "any limits on relief that [it] authorizes must come from interpretation of the First Step Act itself." *United States v. Sutton,* 962 F.3d 979, 985 (7th Cir. 2020) (*citing United States v. Kelley*, 962 F.3d 470, 476-77 (9th Cir. 2020); *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020); and *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020)). Section 404(c) provides the only express limitations on a district court's authority to grant relief: when the defendant was initially sentenced under the Fair Sentencing Act; if the defendant's sentence has already been reduced under the First Step Act; or when the sentencing court has already denied a defendant's First Step Act motion "after a complete review of the motion on the merits." As long as these limitations do not exist "[d]istrict courts have wide latitude to determine whether and how to exercise their discretion" under § 404(b). Pet. App. 31a. The Eleventh Circuit erroneously imposes additional limitations that are not mandated by the statute.

Although the Eleventh Circuit acknowledges that the use of judge found drug amounts to determine statutory penalties is unconstitutional, it nevertheless reasons that, in First Step Act proceedings, the Constitution does not prohibit reliance "on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified" because "the district court is not increasing the movant's penalty.

It is either maintaining the movant's penalty or *decreasing* it." Pet. App. 25a-26a (emphasis in original). But this reasoning leads to an absurd result.

"The very purpose of the First Step Act is to make the Fair Sentencing Act retroactive." *United States v. Wirsing*, 943 F.3d 175, 184 (4th Cir. 2019). Requiring courts to leave intact drug quantity findings and the resultant unfair statutory penalties, which the Eleventh Circuit has acknowledged is as wrong and unconstitutional today as it was when originally imposed, severely undermines the purpose of the First Step Act. *See United States v. Chambers*, 956 F.3d 667, 673 (4th Cir. 2020) ("It would pervert Congress's intent to maintain a career-offender designation that is as wrong today as it was in 2005, and under which Chambers is subject to a Guidelines range that is four times the correct range and that even at the low end is much greater than the new statutory minimum of 10 years.").

Furthermore, the "as if" language in § 404(b) means that it is part of the district court's discretionary call on whether to impose a reduced sentence on an eligible defendant. When exercising its discretion, a court can consider many things, such as Guidelines calculations, 18 U.S.C. § 3553(a) factors, and the defendant's post-sentencing conduct. *Chambers,* at 674 ("District courts across the country are applying the § 3553(a) factors in these First Step Act cases, and our peer circuits are also treating the factors as if they must apply . . . . In line with our peer circuits, we also agree that the court may vary from the Guidelines and may consider post-sentencing conduct."). But that does not mean it has discretion to miscalculate or disregard the correct statutory penalties by relying on unconstitutional drug findings.

Simply put, granting a sentence reduction under the First Step Act is discretionary, but calculating the applicable statutory range in accordance with the statutory text, controlling Supreme Court precedent, and congressional intent is not discretionary.

The Eleventh Circuit erroneously equated Mr. Jones's reliance on *Apprendi* with a collateral attack on his sentence. Pet. App. 25a. But the doctrine under which courts have held that the *Apprendi* line of cases are not retroactive on collateral review does not apply to the relief sought here because the First Step Act is a new statutory remedy that Congress expressly made retroactive. *See United States v. Ware*, 964 F.3d 482, 488–89 (6th Cir. 2020) ("Consideration of *Apprendi* in deciding whether to grant an eligible defendant's First Step Act motion is therefore consistent with our prior holding that courts cannot apply *Apprendi* retroactively as an independent basis for disturbing a defendant's finalized sentence. In the First Step Act, Congress has provided express authority to disturb the finality of Ware's sentence and has done so without limiting the considerations that the court may contemplate in utilizing this authority.") (internal citation omitted). The Eleventh Circuit held as much in *Jones* when it concluded that, under 18 U.S.C. § 3582(c)(1)(B), the First Step Act "expressly permits district courts to reduce a previously imposed term of imprisonment." Pet. App. 14a.

Section 404(b)'s mandate that district courts "may, on motion of the defendant . . . impose a reduced sentence" means that any sentence imposed under the First Step Act must comport with Constitutional constraints. (emphasis added). The Eleventh Circuit's holding that district courts are "bound" by prior judicial drug

quantity findings treats First Step Act motions as if a court's authority is limited by the restrictions and policy statements in 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10, which mandate that a court only substitute the amended Guideline range, leaving all prior Guidelines decisions unchanged, and precluding application of intervening case law. U.S.S.G. § 1B1.10(b)(2)(A); *Dillion v. United States*, 560 U.S. 817, 821 (2010); *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020). Congress did not include similar limitations within the First Step Act's text. See, e.g., *Chambers*, at 671. Section 404(b) does not expressly limit a court's authority based on prior, unconstitutional drug quantity findings.

By construing the First Step Act to only allow for a mechanical application of the Fair Sentencing Act while leaving intact sentencing errors, the Eleventh Circuit effectively strips the district court of its discretion to reduce a sentence at all since the sentence becomes "effectively irreducible." *Chambers*, at 673-74 (holding that "self-circumscrib[ing] a sentencing court's authority under the First Step Act [ ] not only subvert[s] Congress's will but also undermine[s] judicial integrity [because] [i]t is one thing to ignore an error when [courts] are explicitly told to do so, such as in the § 3582(c)(2) context; it is quite another to maintain error when . . . not so told.").

V. This case is an excellent vehicle.

This case is an excellent vehicle to resolve the circuits' conflicts over the interpretation of the First Step Act of 2018. Despite the inaccurate characterization of Mr. Jones's appellate arguments in *United States v. Taylor*, No. 19-12872, 2020 WL 7239632 (11th Cir. Dec. 9, 2020), Mr. Jones raised all of the instant issues below,

and the Eleventh Circuit reviewed them on the merits. The Eleventh Circuit published a decision that conflicts with published decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits. There are no procedural hurdles to this Court's review.

During Mr. Jones's 1994 sentencing hearing, the judge commented that the harmful effects caused by the 100-to-1 crack/powder disparity on African-American defendants like Mr. Jones was "a tragedy" that the court was powerless to correct because it was "bound by those rules" "[w]hether [it] agree[d] or disagree[d] with it." Doc. 429-2, p. 63. The First Step Act was legislated by Congress to remediate this tragedy. There is no reason to think that a district judge, with a correct understanding of First Step Act eligibility, would not impose a sentence less than life. But without this Court's guidance, Mr. Jones will die in prison solely because his case was reviewed by the Eleventh Circuit. Since the First Step Act of 2018 is a new statute affecting thousands of incarcerated people like Mr. Jones, review from this Court is critical and necessary.

VI. Alternatively, this Court could grant, vacate, and remand to the Eleventh Circuit in light of *United States v. Taylor*, __F.3d __, 2020 WL 7239632 (11th Cir. Dec. 9, 2020).

In *United States v. Taylor*, --F.3d--, 2020 WL 7239632 (11th Cir. Dec. 9, 2020), the Eleventh Circuit vacated a district court's denial of a First Step Act motion and remanded the case for review under § 404(b) of the First Step Act where the district court denied relief because the defendant's convictions under 21 U.S.C. §§ 841 (b)(1)(A) and 846 involved 5 kilograms of powder cocaine and 50 grams of crack

cocaine. The Eleventh Circuit considered whether "a federal drug crime involving both crack cocaine and another controlled substance can be a 'covered offense' as that term is defined in the [First Step] Act." *Taylor*, 2020 WL 7239632, at *1. It held that mixed drug offenses were "covered offenses" because "the 'statutory penalties for' an offense involving one of the crack-cocaine drug-quantity elements previously specified in the federal drug-trafficking statute 'were modified by' § 2 of the Fair Sentencing Act, even if the movant ultimately would be subject to the same statutory sentencing range as a consequence of another drug-quantity element of the offense." *Taylor*, 2020 WL 7239632, at *4. In reaching this holding, the Eleventh Circuit distinguished *Taylor* from Mr. Jones's case by reasoning that Mr. Jones "was eligible for relief as an initial matter because his offense was a violation of the federal drug conspiracy statute with a drug-quantity element of 50 grams or more of crack cocaine," but his case was not remanded for Section 404(b) review because Mr. Jones never argued that his conviction was a covered offense regardless of the judicial drug quantity finding. *Taylor*, 2020 WL 7239632, at *4, n3 ("The reason Jones ultimately did not get the relief he sought was that he did not preserve the right argument. He contended not that his conviction should count as a covered offense as a general matter, but that the judge's pre-*Apprendi* 75-kilogram finding should be set aside so that he could be resentenced without a statutory minimum based on the charge to the jury, which was that any amount of crack at all was sufficient for a guilty verdict. *See Jones*, 962 F.3d at 1304. His case was not remanded because he never argued

that he would have a covered offense even if we accepted the judge's 75-kilogram drug quantity finding. *See id.* at 1304, 1305.").

Taylor cannot be reconciled with *Jones.* First, Mr. Jones asserted in his appellate briefs and at oral argument that his underlying 21 U.S.C. § 841(b)(1)(A) conviction was a "covered offense" as a general matter and that his actual conduct and Guideline range was irrelevant to the "covered offense" determination. *United States v. Steven Jones*, 2019 WL 2285803, *14-15 (C.A.11); *United States v. Steven Jones*, 2019 WL 3318303, *13-15 (C.A.11).

Second, the Eleventh Circuit reasoned in *Taylor* that "[b]y conditioning eligibility on the movant's offense, rather than on his actual conduct or the applicable sentencing range, the First Step Act casts a wide net at the eligibility stage." 2020 WL 7239632, at *4. But in *Jones,* the court plainly determined eligibility by looking at Mr. Jones's actual/relevant offense conduct and whether it triggered a reduced statutory penalty range under the Fair Sentencing Act. The court explicitly "reject[ed] [Mr. Jones's] argument that district courts may not, in making the 'covered offense' determination, consider a previous drug-quantity finding that was necessary to trigger the statutory penalty if it was made by a judge." Pet. App. 24a-25a.

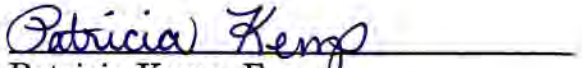
Third, the Eleventh Circuit reasoned in *Taylor* that "the First Step Act gives a movant like Taylor who was sentenced for a covered offense the opportunity to make his case for a reduction in his sentence." *Taylor*, 2020 WL 7239632 at *5. But the Eleventh Circuit summarily denied Mr. Jones's petition for rehearing en banc, which asserted that [s]ince the district court only held that Mr. Jones' offense was not a

'covered offense,' the panel should have remanded the case for further determination under § 404(b) of the First Step Act," instead of affirming denial of relief by finding that § 404(b)'s "as-if" language required that the district court was bound by prior judicial drug quantity findings. *United States v. Steven* Jones, Case No. 19-1105-V, pp. 13-14 (C.A. 11); Pet. App. 35a. Since Mr. Jones's case is identical to *Taylor*, while the outcomes are different, if this Court does not grant this petition to resolve the various conflicts, it should, at a minimum, grant this petition, vacate the judgment below, and remand to the Eleventh Circuit for consideration of Mr. Jones's case in light of *Taylor*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition. Alternatively, this Court should grant Mr. Jones's petition, vacate the Eleventh Circuit's judgment, and remand to the Eleventh Circuit for consideration in light of *Taylor*.

Respectfully Submitted,



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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11505

D.C. Docket No. 1:94-cr-00067-WS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN JONES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

No. 19-10758

D.C. Docket No. 1:05-cr-20916-WPD-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFONSO ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 19-11955

D.C. Docket No. 2:99-cr-14021-DMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WARREN LAVELL JACKSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 19-12847

D.C. Docket No. 1:08-cr-20190-JEM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 16, 2020)

Before WILLIAM PRYOR, Chief Judge, GRANT, Circuit Judge, and JUNG,* District Judge.

WILLIAM PRYOR, Chief Judge:

These appeals require us to determine whether the district courts erred in denying four motions for reduced sentences under the First Step Act of 2018. That Act permits district courts to apply retroactively the reduced statutory penalties for

* Honorable William F. Jung, United States District Judge for the Middle District of Florida, sitting by designation.

crack-cocaine offenses in the Fair Sentencing Act of 2010 to movants sentenced before those penalties became effective. Steven Jones, Alfonso Allen, Warren Jackson, and Thomas Johnson were sentenced for crack-cocaine offenses before the effective date of the Fair Sentencing Act and sought reduced sentences under the First Step Act. The district courts denied their motions. We affirm the denials of relief to Jones and Jackson, and we vacate the denials of relief to Allen and Johnson and remand because their orders do not make clear that the district court understood that it could reduce the movants' sentences.

I. BACKGROUND

Steven Jones, Alfonso Allen, Warren Jackson, and Thomas Johnson each relied on the First Step Act of 2018 to seek a sentence reduction in the district courts. The district courts denied their motions. Because these appeals raise common issues of first impression in our Circuit, we resolve them in one opinion.

In 1994, a grand jury charged Jones with conspiracy to possess with intent to distribute "more than sixteen . . . kilograms of cocaine and of a mixture and substance containing a detectable amount of [crack cocaine]," 21 U.S.C. §§ 841(a)(1), 846, aiding and abetting possession with intent to distribute "more than 600 grams of cocaine and of a mixture and substance containing a detectable amount of [crack cocaine]," *id.* § 841(a)(1), and traveling in interstate commerce with the intent to commit the crimes of "possession with intent to distribute and

distribution of crack cocaine," *id.*, and later did perform an unlawful activity of distributing crack cocaine, 18 U.S.C. § 1952(a). A jury returned a general verdict that found him guilty of all three counts. But the jury made no specific drug-quantity finding because Jones was prosecuted before *Apprendi v. New Jersey* made clear that drug-quantity findings that increase a defendant's punishment must be made by a jury based on a standard of proof of beyond a reasonable doubt. 530 U.S. 466, 490 (2000).

At sentencing, the district court found that Jones was responsible for at least 75 kilograms of crack cocaine. Jones's statutory range for counts one and two was 10 years to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (1994). His guideline range, with a total offense level of 43 and a criminal history category of I, was life imprisonment. The district court imposed a term of life imprisonment for counts one and two, and a term of 60 months of imprisonment for count three, all to run concurrently. It also imposed a five-year term of supervised release. Jones later filed several unsuccessful challenges of his convictions and sentence.

In 2019, Jones filed a motion for a reduced sentence under the First Step Act. He argued that he was eligible for a sentence reduction based on the statutory penalties in section 841(b)(1)(C) because the district court could consider only the drug quantity that a jury found beyond a reasonable doubt based on *Alleyne v. United States*, which held that *Apprendi* applies to facts that increase a defendant's

statutory mandatory-minimum sentence. 570 U.S. 99, 116 (2013). The district court denied his motion. It ruled that Jones was responsible for at least 75 kilograms of crack cocaine, and the First Step Act did not allow him to relitigate that finding. Jones filed a motion for reconsideration that again argued only that he was entitled to relief because the district court must apply the reduced penalties in section 841(b)(1)(C), and the district court denied that motion.

In 2006, a grand jury charged Allen with one count of conspiracy to distribute 50 grams or more of crack cocaine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii), 846 (2006), two counts of distributing a detectable amount of crack cocaine, *id.* § 841(a)(1), (b)(1)(C); 18 U.S.C. § 2, one count of possession with intent to distribute a detectable amount of powder cocaine, crack cocaine, and marijuana, 21 U.S.C. § 841(a)(1), (b)(1)(C)–(D); 18 U.S.C. § 2, possession of a short-barreled shotgun in furtherance of a felony drug offense, 18 U.S.C. §§ 2, 924(c)(1)(A), (c)(1)(B)(i), possession of a firearm and ammunition by a convicted felon, *id.* §§ 2, 922(g)(1), and possession of an unregistered short-barreled shotgun, 26 U.S.C. § 5861(d); 18 U.S.C. § 2. Before trial, the government filed notice of its intent to rely on Allen's two prior felony drug convictions to enhance his sentence. *See* 21 U.S.C. § 851(a). A jury convicted Allen on all counts and made a drug-quantity finding of 50 grams or more of crack cocaine for count one.

At sentencing, Allen's conviction for conspiracy to distribute 50 grams or more of crack cocaine carried a statutory mandatory sentence of life imprisonment because of his two prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (2006). Allen's criminal history classified him as a career offender under the Guidelines. *See* United Sates Sentencing Guidelines Manual § 4B1.1(a) (Nov. 2008). With a total offense level of 37 and a criminal history category of VI, *id.* § 4B1.1(b)(A), Allen's guideline range would have been 360 months to life imprisonment, but because of his statutory mandatory sentence of life imprisonment, his guideline sentence became life imprisonment, *id.* § 5G1.1(b). The district court sentenced Allen to a term of life imprisonment for the count involving the 50 grams of crack cocaine, 30 years of imprisonment for the other three drug counts, 10 years of imprisonment for two of the firearm counts, all to run concurrently, and a consecutive term of 10 years of imprisonment for the final firearm count. The district court also imposed a 10-year term of supervised release. After Allen filed several unsuccessful challenges to his convictions and sentence, the President commuted his sentence to 360 months of imprisonment in 2016.

In 2019, Allen filed a motion for a reduced sentence under the First Step Act. He argued that with the retroactive application of the Fair Sentencing Act and his commutation, his statutory and guideline ranges would be lower than when he was sentenced. The district court denied the motion and ruled that "[t]he

retroactive change in the law does not benefit Allen" because he had been "responsible for selling between 420 and 784 grams of crack cocaine per week" and would still be subject to a guideline range of 360 months to life imprisonment.

In 1999, a grand jury charged Jackson with one count of possessing with intent to distribute more than 50 grams of crack cocaine, 21 U.S.C. § 841(a)(1). Before trial, the government filed notice of its intent to rely on Jackson's three prior felony drug convictions to enhance Jackson's sentence. *See id.* § 851(a). A jury convicted Jackson without making a drug-quantity finding.

At sentencing, the district court found that Jackson was responsible for 287 grams of crack cocaine. Jackson faced a statutory mandatory sentence of life imprisonment because of the drug quantity and his prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (1994). His guideline range would have been 235 to 293 months of imprisonment based on his total offense level of 34 and criminal history category of V, but his statutory mandatory sentence of life imprisonment mandated a guideline sentence of life imprisonment. *See* U.S.S.G. § 5G1.1(b) (1998). The district court sentenced Jackson to life imprisonment. After Jackson filed multiple unsuccessful challenges to his conviction and sentence, the President commuted his sentence to 300 months of imprisonment in 2016.

In 2019, Jackson filed a motion for a reduced sentence under the First Step Act. He argued that he was entitled to a reduced statutory range because the district

court set his statutory penalties based on a drug-quantity finding that the jury had not found beyond a reasonable doubt. The district court relied on the drug-quantity finding of 287 grams of crack cocaine to conclude that the Fair Sentencing Act "would have had no impact on [Jackson's] sentence," and it denied the motion.

In 2008, a grand jury charged Johnson with possession with intent to distribute five grams or more of crack cocaine, 21 U.S.C. § 841(a)(1), (b)(1)(B) (2006), possession with intent to distribute a detectable amount of powder cocaine, *id.* § 841(a)(1), (b)(1)(C), possession of a firearm and ammunition as a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(e), and knowingly using and carrying a firearm in furtherance of drug-trafficking felonies, *id.* § 924(c)(1)(A). Before trial, the government filed notice of its intent to rely on Johnson's four prior felony drug convictions to seek higher statutory penalties. *See* 21 U.S.C. § 851(a). A jury convicted Johnson of each count other than the count for using a firearm in furtherance of drug-trafficking felonies, and the jury found that his crack-cocaine offense involved five or more grams of crack cocaine.

At sentencing, Johnson's crack-cocaine count carried a statutory range of 10 years to life imprisonment because of the enhancement for his prior felony drug convictions. *See id.* § 841(b)(1)(B)(iii) (2006). Those prior convictions also meant the statutory range for his powder-cocaine count was zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C). His felon-in-possession count carried a

statutory range of 15 years to life imprisonment. *See* 18 U.S.C. § 924(e)(1). As a career offender under the Guidelines, his guideline range was 360 months to life imprisonment based on a total offense level of 37 and a criminal history category of VI. *See* U.S.S.G. § 4B1.1(a), (b) (2007). The district court imposed three concurrent 360-month terms of imprisonment, followed by an eight-year term of supervised release. After Johnson filed several unsuccessful challenges to his convictions and sentence, the President commuted his sentence to a term of 240 months of imprisonment in 2017.

In 2019, Johnson filed a motion for a reduced sentence under the First Step Act in which he stressed the ways in which he has improved while in prison. The district court denied his motion. It rejected arguments by the government that Johnson was ineligible for a reduction because he was sentenced as a career offender and received a commutation, and it concluded that his statutory penalties would have been lower under the Fair Sentencing Act. But it ruled that "the First Step Act affords no further relief to" Johnson because he "is already serving a sentence below the bottom of the guideline range."

II. STANDARD OF REVIEW

We review *de novo* questions of statutory interpretation, *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009), and whether a district court had the authority to modify a term of imprisonment, *United States v. Phillips*, 597 F.3d

1190, 1194 & n.9 (11th Cir. 2010). We review for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act. *See* First Step Act of 2018, Pub. L. No. 115-391, § 404(b)–(c), 132 Stat. 5194, 5222 (stating that a district court "may" reduce a sentence but is not "require[d]" to do so).

III. DISCUSSION

We divide our discussion in three parts. First, we describe how the disparity in penalties for crack- and powder-cocaine offenses led Congress to enact the Fair Sentencing Act. Second, we discuss the authority of a district court to reduce a sentence under the First Step Act. Third, we conclude that the district courts did not err in denying the motions of Jones and Jackson but that we must vacate the orders denying Allen's and Johnson's motions and remand for further proceedings. The parties now agree, as do we, that the movants who received an executive grant of clemency—Allen, Jackson, and Johnson—are not ineligible for a reduction on that basis, so we need not discuss that issue further.

A. The 100-to-1 Ratio for Crack- and Powder-Cocaine Offenses.

When the movants were sentenced, the statutory penalties for drug-trafficking offenses involving crack cocaine were the same as the statutory penalties for drug-trafficking offenses involving 100 times as much powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (citing 21 U.S.C.

§ 841 (2006)). A statutory range of 10 years to life imprisonment applied to drug traffickers dealing in 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine. 21 U.S.C. § 841(b)(1)(A) (2006). A statutory range of five to 40 years of imprisonment applied to drug traffickers dealing in at least five grams of crack cocaine or at least 500 grams of powder cocaine. *Id.* § 841(b)(1)(B). And a statutory range of zero to 20 years of imprisonment applied to drug traffickers dealing in less than five grams of crack cocaine or less than 500 grams of powder cocaine. *Id.* § 841(b)(1)(C). Each subsection of the statute also provided for increased statutory penalties based on certain factual predicates, such as prior felony drug convictions. *See id.* § 841(b)(1)(A)–(C).

The United States Sentencing Commission condemned the disparity between the penalties for crack- and powder-cocaine offenses. *See, e.g.*, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2, 7–8 (May 2007); U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1–2, 9 (Apr. 1997). "[T]o keep similar drug-trafficking sentences proportional," the Commission based the offense levels in the Guidelines on the mandatory-minimum penalties in the statute, which, of course, included the 100-to-1 ratio. *Dorsey v. United States*, 567 U.S. 260, 267–68 (2012). But the Commission spent the next two decades urging Congress to amend those penalties. *Id.* at 268; *see also Kimbrough*, 552 U.S. at 97–98. The Commission

argued that the harsher penalties for offenses involving crack instead of powder cocaine were unjustified and undermined respect for the criminal justice system because of the "widely-held perception" that the disparate penalties "promote[d] unwarranted disparity based on race." *Kimbrough*, 552 U.S. at 97–98 (internal quotation marks omitted); *accord Dorsey*, 567 U.S. at 268; Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 215–16 (2019).

Congress amended the penalties for crack-cocaine offenses when it enacted the Fair Sentencing Act of 2010. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). The Act increased the quantity of crack cocaine necessary to trigger the higher penalties in subsections (b)(1)(A)(iii) and (B)(iii). Fair Sentencing Act § 2(a). A defendant now must traffic at least 280 grams of crack cocaine to trigger the highest penalties, 21 U.S.C. § 841(b)(1)(A)(iii) (2012), and 28 grams of crack cocaine to trigger the intermediate penalties, *id.* § 841(b)(1)(B)(iii). *See* Fair Sentencing Act § 2(a). These amended penalties reduced the crack-to-powder-cocaine ratio from 100-to-1 to 18-to-1. *Dorsey*, 567 U.S. at 269. The Act also eliminated the five-year mandatory-minimum sentence that had applied to simple possession of crack cocaine. Fair Sentencing Act § 3; *see also* 21 U.S.C. § 844(a) (2006). But the amended penalties applied only to

defendants who were sentenced on or after the effective date of the Fair Sentencing Act. *Dorsey*, 567 U.S. at 264.

B. The First Step Act Permits District Courts to Reduce the Term of Imprisonment for Certain Previously Sentenced Crack-Cocaine Offenders.

When Congress enacted the First Step Act of 2018, it granted district courts discretion to reduce the sentences of crack-cocaine offenders in accordance with the amended penalties in the Fair Sentencing Act. *See* First Step Act § 404. A district court lacks the inherent authority to modify a term of imprisonment. 18 U.S.C. § 3582(c); *United States v. Puentes*, 803 F.3d 597, 606 (11th Cir. 2015). But it may do so, as relevant here, to the extent that a statute expressly permits. 18 U.S.C. § 3582(c)(1)(B). And the First Step Act expressly permits district courts to reduce a previously imposed term of imprisonment.

The First Step Act permits a district "court that imposed a sentence for a covered offense" to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." First Step Act § 404(b). It defines "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010." *Id.* § 404(a). A district court may not "entertain a motion" from a defendant who already benefitted from the Fair Sentencing Act by having his sentence imposed or reduced "in accordance with" sections two or three of the Fair Sentencing Act. *Id.*

§ 404(c). Nor may a district court "entertain a motion" from a defendant who already had a motion under section 404 of the First Step Act "denied after a complete review of the motion on the merits." *Id.* The Act makes clear that the relief in subsection (b) is discretionary: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Id.*

To be eligible for a reduction, the district court must have "imposed a sentence" on the movant for a "covered offense." *Id.* § 404(a)–(b). The First Step Act defines covered offense as "a violation of a Federal criminal statute, *the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act* . . . , that was committed before August 3, 2010." *Id.* § 404(a) (emphasis added). The meaning of "covered offense" depends on what the clause in italics—the "penalties clause"—modifies.

We see two possibilities. The penalties clause could modify the phrase "violation of a Federal criminal statute." Or it could modify only the shorter phrase "Federal criminal statute." *See United States v. Johnson*, 19-874, 2020 WL 3023063, at *7 (2d Cir. June 5, 2020); *United States v. Boulding*, No. 19-1590, 19-1706, 2020 WL 2832110, at *6 (6th Cir. June 1, 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020); *United States v. Smith*, 954 F.3d 446, 448–49 (1st Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United*

States v. McDonald, 944 F.3d 769, 771–72 (8th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175, 185–86 (4th Cir. 2019).

The better reading is that the penalties clause modifies the whole phrase "violation of a Federal criminal statute." A violation of a federal criminal statute is commonly called an "offense." *Offense*, *Black's Law Dictionary* (11th ed. 2019) ("A violation of the law; a crime . . . ."). This definition makes sense because the term we are defining is "covered offense." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 36, at 232 (2012) ("[T]he word being defined is the most significant element of the definition's context."); *id.* (explaining that there is a presumption that legal drafters give defined words their "general meaning" (internal quotation marks omitted)). A movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified its statutory penalties. Section two of the Fair Sentencing Act, the only section applicable in these appeals, modified the statutory penalties for crack-cocaine offenses that have as an element the quantity of crack cocaine provided in subsections 841(b)(1)(A)(iii) and (B)(iii). It did so by increasing the quantity of crack cocaine necessary to trigger those penalty provisions. *See* Fair Sentencing Act § 2(a). So a movant has a "covered offense" if his offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act.

The alternative interpretation primarily relies on the nearest-reasonable-referent canon, which provides that a "modifier normally applies only to the nearest reasonable referent." Scalia & Garner, *Reading Law* § 20, at 152. The relevant modifier in the definition of "covered offense" is the penalties clause. The movants argue that this canon suggests that the penalties clause modifies only the phrase "Federal criminal statute" because that is the referent that immediately precedes the penalties clause. *See, e.g.*, *Jackson*, 945 F.3d at 320; *Wirsing*, 943 F.3d at 185. But that reading ignores the fact that the canon does "not appl[y]" when a "modifier directly follows a concise and integrated clause," *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018) (internal quotation marks omitted), such as "a violation of a Federal criminal statute," *see* Scalia & Garner, *Reading Law* § 20, at 152 (explaining that a modifier "applies only to the nearest *reasonable* referent" (emphasis added)).

The decision of the Supreme Court in *Cyan* is instructive. In *Cyan*, the Court interpreted a statutory provision that stated: "Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b) of this section*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section." 138 S. Ct. at 1075 (emphasis added) (quoting 15 U.S.C. § 77p(c)). Subsection (b) requires dismissal of certain class actions—namely, those premised on state law that allege

misconduct related to securities—whether the class action is brought in state or federal court. *Id.* at 1067, 1075 (citing 15 U.S.C. § 77p(b)). The Supreme Court explained that the natural reading of the relevant statutory provision is that when a class action set forth in subsection (b) is filed in state court, the defendant may remove it to federal court to ensure compliance with the mandatory-dismissal provision. *Id.* at 1075.

The Supreme Court rejected the government's argument that the "rule of the last antecedent" mandated a different interpretation. *Id.* at 1076 (internal quotation marks omitted). The government contended that the "as-set-forth" clause did not refer to the entire preceding clause but instead referred only to the immediately preceding phrase "involving a covered security." *Id.* (internal quotation marks omitted). It argued that subsections (b)(1) and (b)(2) set forth specific types of misconduct related to the sale of a covered security. *Id.* So the government argued a covered class action that alleged the kind of misconduct in those subsections was subject to removal, regardless of whether it was premised on state law, that is, regardless of whether the class action was the type set forth in subsection (b). *Id.* In rejecting that argument, the Supreme Court explained that the "as-set-forth" clause "goes back to the beginning of the preceding clause" because the clause "hangs together as a unified whole, referring to a single thing (a type of class action)." *Id.* at 1077. The rule of the last antecedent was not to the contrary because that rule

does not apply "when the modifier directly follows a concise and integrated clause." *Id.* (internal quotation marks omitted). *Contra Mellouli v. Lynch*, 135 S. Ct. 1980, 1989–90 (2015) (applying the canon to the long and segmented phrase "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section] 802)" to conclude that "relating to a controlled substance" did not reach all the way back to modify "violation" (alteration adopted) (quoting 8 U.S.C. § 1227 (a)(2)(B)(i))).

In the definition of "covered offense," the penalties clause directly follows the concise and integrated clause "a violation of a Federal criminal statute." The clause refers to a single thing—a type of violation. Indeed, this clause functions as a unified phrase elsewhere in the definition of covered offense. Recall, "covered offense" means "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . , *that was committed before August 3, 2010*." First Step Act § 404(a) (emphasis added). The final clause modifies the unified phrase because one cannot "commit" a "Federal criminal statute," only a "*violation* of a Federal criminal statute."

The alternative interpretation—that the penalties clause modifies only "Federal criminal statute"—would mean that any movant sentenced for a drug-trafficking offense would have a covered offense even if his offense did not involve crack cocaine. Section 841 is the applicable drug-trafficking statute.

Subsection (a) provides that it is unlawful to traffic a variety of controlled or counterfeit substances. *See* 21 U.S.C. § 841(a). Subsection (b) provides the penalties for the various offenses involving those substances. *See id.* § 841(b). The Fair Sentencing Act modified some of the penalties that apply to this statute—whether defined as subsection (a) or the entire statute—by amending the quantity of crack cocaine necessary to trigger the higher penalties in two provisions of subsection (b). *See* Fair Sentencing Act § 2(a). So this alternative interpretation would mean that a movant with *any* drug-trafficking offense—even, say, a heroin offense—would have a "covered offense" because the movant violated section 841 and the Fair Sentencing Act modified some of the penalties that apply to section 841, even though the Act did not alter the penalties for heroin offenses. *See Smith*, 954 F.3d at 450 & n.5. In other words, this alternative interpretation would mean that the First Step Act covers offenses unaffected by the Fair Sentencing Act.

Interpreting "Federal criminal statute" to mean "statutory provision" is not a viable alternative. Some of our sister circuits have held that a movant has a covered offense if he violated section 841(b)(1)(A)(iii) or (B)(iii). *See Johnson*, 2020 WL 3023063, at 7 n.6; *Wirsing*, 943 F.3d at 186. But it is unnatural to read these subsections, which provide the *penalties* for violations of section 841(a) involving crack cocaine, as being the "statute" to which the penalties clause refers, especially because doing so requires concluding that the Fair Sentencing Act modified the

penalties that apply to these "statutes" by modifying the provisions themselves. Our sister circuits attempt to avoid application of the First Step Act to movants with offenses involving a controlled substance other than crack cocaine by ignoring that drug-trafficking defendants who "violate" a penalty provision in subsection 841(b) *also* violate section 841, a statute for which the Fair Sentencing Act modified the statutory penalties.

Reading the penalties clause as modifying the unified phrase "violation of a Federal criminal statute" avoids these oddities. It makes clear that the clause refers to the crack-cocaine offenses for which sections 841(b)(1)(A)(iii) and (B)(iii) provide the penalties. Those provisions are two of the statutory penalty provisions that apply to violations of section 841(a), and they are the only provisions that the Fair Sentencing Act modified. *See* 21 U.S.C. § 841(b); Fair Sentencing Act § 2(a); *see also* Scalia & Garner, *Reading Law* § 2, at 56 ("[W]ords are given meaning by their context, and context includes the purpose of the text[, which, of course,] . . . must be derived from the text."). Our interpretation leads to the same end result as the interpretation by our sister circuits, but it does so in a way that is consistent with the text and structure of section 404 of the First Step Act.

To be sure, the penalties clause uses the past tense—"were modified"—to describe the effect that the Fair Sentencing Act had on the statutory penalties. And the Fair Sentencing Act did not modify the penalties for any movant's earlier

statutory violation because the Act did not apply retroactively. *See Jackson*, 945 F.3d at 320 (citing *United States v. Rose*, 379 F. Supp. 3d 223, 229 (S.D.N.Y. 2019)). But even so, the Fair Sentencing Act modified the statutory penalties for certain crack-cocaine offenses (that is, covered offenses), which means the First Step Act permits courts to review whether the Fair Sentencing Act altered the penalties for the movant's category of offense.

To determine the offense for which the district court imposed a sentence, district courts must consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment. From these sources, the district court must determine whether the movant's offense triggered the higher penalties in section 841(b)(1)(A)(iii) or (B)(iii). If so, the movant committed a covered offense.

We reject the argument by the government that a district court must determine a movant's "covered offense" by considering the specific quantity of crack cocaine involved in the movant's violation. The government argues that because Congress used the term "violation" instead of "conviction," "covered offense" means all the movant's conduct underlying the statutory violation, not only the finding of drug quantity that triggered the statutory penalty. The government would have courts consider a finding of drug quantity anywhere in the

record, such as a finding that was necessary for determining only relevant conduct under the Sentencing Guidelines or a finding in a postsentencing proceeding.

That argument impermissibly isolates the word "violation" from its context, which establishes that a covered offense is an *offense*. *See* First Step Act § 404(a). Offenses are made up of elements. *See Elements of Crime, Black's Law Dictionary* (11th ed. 2019). The elements for the movants' offenses are found in section 841. And the specific elements in that statute that matter for eligibility under the First Step Act are the two drug-quantity elements in sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii) because section two of the Fair Sentencing modified only offenses that include one of those drug-quantity elements. When the movants committed their offenses, the drug-quantity element in section 841(b)(1)(A)(iii) was 50 grams or more of crack cocaine, and the drug-quantity element in section 841(b)(1)(B)(iii) was five grams or more of crack cocaine. The range for each element meant that the movants did not need to be responsible for *exactly* 50 grams or five grams of crack cocaine—any quantity in the range sufficed and the offense would have as an element either 50 grams or more or five grams or more of crack cocaine, respectively. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (explaining that some statutes "enumerate[] various factual means of committing a single element"). The ranges did *not* create an infinite number of crack-cocaine offenses based on the specific means by which the elements may be satisfied, such

as distribution of 750.25 grams of crack cocaine. The actual drug-quantity involved in the movant's offense is irrelevant as far as the element and the *offense* are concerned. The actual quantity is only the *means* of satisfying the drug-quantity element. *See id.* That quantity constitutes relevant conduct under the Sentencing Guidelines, *see* U.S.S.G. § 1B1.3 (2018), but it does not define the offense.

Although we reject the argument that a movant's covered offense is determined by the actual quantity of crack cocaine involved in his violation, we acknowledge that a district court, of course, could consider its previous findings of relevant conduct in deciding whether to exercise its discretion to reduce an eligible movant's sentence under section 404(b) of the First Step Act. *See* First Step Act § 404(b). The actual quantity of crack cocaine involved in a violation is a key factor for a sentence modification just as it is when a district court imposes a sentence. *See* 18 U.S.C. § 3553(a)(1) (instructing district courts to consider the nature and circumstances of the offense when imposing a sentence). But we do not read the Act as allowing the district court to use its earlier findings of relevant conduct that were unrelated to the movant's statutory penalty to conclude that he did not commit a covered offense. These determinations of whether a movant is eligible for relief and whether to grant the movant relief are separate.

We also reject the movants' argument that district courts may not, in making the "covered offense" determination, consider a previous drug-quantity finding that

was necessary to trigger the statutory penalty if it was made by a judge. The movants argue that when a jury did not make a drug-quantity finding, a district court should consider only that the offense involved a detectable amount of crack cocaine—punishable by section 841(b)(1)(C)—regardless of the statutory penalty that the district court applied at sentencing. To be sure, we now understand that a jury was constitutionally required to find the nature and quantity of the controlled substance involved in the offense if that finding increased the statutory penalty. *See Apprendi*, 530 U.S. at 490; *see also Danforth v. Minnesota*, 552 U.S. 264, 271 (2008) ("[T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule."); *cf. Lester v. United States*, 921 F.3d 1306, 1312–15 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc) (explaining that the Guidelines were never truly mandatory because that practice *always* violated the Sixth Amendment). But just as a movant may not use *Apprendi* to collaterally attack his sentence, *see McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion. Moreover, taken to its logical end, the movants' argument would mean that a movant convicted before *Apprendi* is ineligible for relief under the First Step Act because the Fair Sentencing Act did

not modify the statutory penalties for offenses involving only a detectable amount of crack cocaine.

All four of the movants were sentenced for a covered offense. The district court sentenced Jones for, among others, the offenses of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine and possession with intent to distribute 50 grams or more of crack cocaine. Those offenses were charged in his superseding indictment as conspiracy to possess with intent to distribute more than 16 kilograms of powder and crack cocaine and possession with intent to distribute more than 600 grams of powder and crack cocaine. But the final judgment lists both offenses as solely crack-cocaine offenses, and the district court's drug-quantity finding involved only crack cocaine. The record establishes that the district court treated both counts as crack-cocaine offenses when it "imposed a sentence" on Jones. *See* First Step Act § 404(b) (explaining that the district court must have "imposed a sentence for a covered offense"). The Fair Sentencing Act modified the statutory penalties for offenses like Jones's that involve 50 grams or more of crack cocaine from 10 years to life imprisonment to five to 40 years of imprisonment. *Compare* 21 U.S.C. § 841(b)(1)(A)(iii) (1994), *with id.* § 841(b)(1)(B)(iii) (2012). Jones's offenses qualify as covered offenses.

The district court sentenced Allen for, among others, the offense of conspiracy to distribute 50 grams or more of crack cocaine. That offense was

charged in his indictment and found by a jury. The statutory penalty for that offense was originally life imprisonment because of Allen's two prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (2006). Under the Fair Sentencing Act, that same offense would lead to a statutory range of 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2012). The larger quantity of crack cocaine that the district court found—"between 420 and 784 grams of crack cocaine per week"—did not trigger the statutory penalty for Allen's offense. Because the Fair Sentencing Act modified the statutory penalties for Allen's offense, he has a "covered offense."

The district court sentenced Jackson for the offense of possession with intent to distribute 50 grams or more of crack cocaine. Jackson's indictment charged him with that offense, and although the jury did not make a drug-quantity finding, the district court found at sentencing a drug quantity of at least 50 grams of crack cocaine. The statutory penalty for Jackson's offense was originally life imprisonment because of Jackson's drug quantity and three prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii) (1994). The Fair Sentencing Act modified the penalties for his offense to be 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2012). Jackson has a covered offense.

The district court sentenced Johnson for, among others, the offense of possession with intent to distribute five grams or more of crack cocaine. That is the offense in his indictment and found by a jury. Because of Johnson's four prior

felony drug convictions, the statutory penalty for his offense was 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2006). After the Fair Sentencing Act, the statutory range for that same offense changed to zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C) (2012). Because the Fair Sentencing Act modified the statutory penalties for Johnson's offense, he too has a "covered offense."

The movants all have a "covered offense" because the district court sentenced them for violations of section 841 for which the Fair Sentencing Act modified the statutory penalties. But a movant's satisfaction of the "covered offense" requirement does not necessarily mean that a district court can reduce his sentence. Any reduction must be "as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." First Step Act § 404(b).

This "as-if" requirement imposes two limits relevant to these appeals. First, it does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act. Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing.

If the movant's sentence would have necessarily remained the same had the Fair Sentencing Act been in effect, then the district court lacks the authority to reduce the movant's sentence. Any reduction the district court would grant would not be "as if" the Fair Sentencing Act had been in effect. That is, the First Step Act does not permit a reduction when the Fair Sentencing Act could not have benefitted the movant.

To be clear, the Constitution does not prohibit district courts, in deciding motions for reduced sentences under the First Step Act, from relying on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified. In determining what a movant's statutory penalties would be under the Fair Sentencing Act, the district court is not increasing the movant's penalty. It is either maintaining the movant's penalty or *decreasing* it. *See Alleyne*, 570 U.S. at 103 ("[A]ny fact that *increases* the mandatory minimum is an 'element' that must be submitted to the jury." (emphasis added)); *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that *increases* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)); *cf. Dillon v. United States*, 560 U.S. 817, 825, 828–29 (2010) (holding that the Sixth Amendment does not bar a district court from finding facts that determine a mandatory guideline range in a section 3582(c)(2) proceeding). And unlike the statutory penalties that applied

when the movants were originally sentenced, the amended statutory penalties in the First Step Act apply to the movants as an act of legislative grace left to the discretion of the district court.

C. The District Courts Did Not Err in Denying the Motions of Jones and Jackson but May Have Erred in Denying the Motions of Allen and Johnson.

The district courts did not err in denying the motions of Jones and Jackson. When the district court sentenced Jones, its drug-quantity finding of 75 kilograms of crack cocaine subjected Jones to a statutory range of 10 years to life imprisonment. The only argument Jones made that the First Step Act entitled him to a reduced sentence was that the absence of a drug-quantity finding by the jury meant that his statutory range should be zero to 20 years of imprisonment. The district court did not err in refusing to allow Jones to relitigate his drug-quantity finding. Jackson was sentenced to a statutory mandatory sentence of life imprisonment based on a drug-quantity finding of 287 grams of crack cocaine and his three prior felony drug convictions. The district court correctly concluded that it could not reduce Jackson's sentence because his drug-quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2012).

The district court had the discretion to reduce the sentences of Allen and Johnson. At their sentencings, the district court determined their statutory penalties based on the drug quantities that the juries found beyond a reasonable doubt. The

jury in Allen's trial found a drug quantity of 50 grams or more of crack cocaine. And Johnson's jury found a drug quantity of five grams or more of crack cocaine. Allen's and Johnson's statutory ranges would have been lower if the Fair Sentencing Act had been in effect when they committed their offenses. Allen's statutory range would have been 10 years to life imprisonment instead of a mandatory sentence of life imprisonment. *Compare id.* § 841(b)(1)(A)(iii) (2006), *with id.* § 841(b)(1)(B)(iii) (2012). And Johnson's statutory range would have been zero to 30 years of imprisonment instead of 10 years to life imprisonment. *Compare id.* § 841(b)(1)(B)(iii) (2006), *with id.* § 841(b)(1)(C) (2012).

The district court had the authority to reduce Allen's and Johnson's sentences, but it was not required to do so. The First Step Act states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." First Step Act § 404(c). District courts have wide latitude to determine whether and how to exercise their discretion in this context. In exercising their discretion, they may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a). *See United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020). A district court abuses its discretion when it "applies an incorrect legal standard." *Diveroli v. United States*, 803 F.3d 1258, 1262 (11th Cir. 2015) (internal quotation marks omitted).

The order denying relief to Allen is ambiguous as to whether the district court understood that it could reduce Allen's sentence. As a reminder, the district court sentenced Allen to a statutory mandatory sentence of life imprisonment, and the President later commuted his sentence to 360 months of imprisonment. In denying Allen's motion, the district court explained that "[t]he retroactive change in the law does not benefit Allen" because it "found that Allen was responsible for selling between 420 and 784 grams of crack cocaine per week. As a career offender, Allen would still score out to a Level 37, with a Criminal History Category Six for a range of 360 months-life."

The district court might have incorrectly concluded that Allen was ineligible for a reduction either because of the drug-quantity finding or because of his designation as a career offender. The government stated at oral argument that it viewed the district court as ruling that it lacked the authority to reduce Allen's sentence. Allen's commuted sentence is at the bottom of the guideline range, which may have caused the district court to conclude that Allen was ineligible for a further reduction to his sentence. So we vacate the order and remand for further consideration.

The order denying relief to Johnson is also ambiguous as to whether the district court understood its authority to reduce Johnson's sentence below the revised guideline range. As a reminder, the district court sentenced Johnson as a

career offender to 360 months of imprisonment, and the President later commuted his sentence to 240 months of imprisonment. In denying Johnson's motion, the district court correctly rejected arguments by the government that Johnson was ineligible for a reduced sentence because of his commutation and career-offender status. It then explained that Johnson "appear[ed] eligible for relief" but that "[n]otwithstanding the statutory revisions, all parties appear to agree" that because of the commutation, Johnson's sentence is already nearly two years less than the bottom of his revised guideline range. The district court concluded by "find[ing] that the First Step Act affords no further relief to [Johnson] in this case."

We cannot be sure that the district court understood its authority to reduce Johnson's sentence below the revised guideline range. The ambiguous phrase that the First Step Act "affords no further relief" leaves us unsure of the grounds for the ruling. The government erroneously argued in the district court that Johnson was ineligible for a reduction because his sentence was already below the revised guideline range. If the district court ruled that it could not grant Johnson's motion, that ruling would be erroneous because neither the First Step Act nor section 3582(c)(1)(B) barred the district court from reducing Johnson's sentence below the revised guideline range. It is also possible that the district court correctly understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what it believed to be sufficient

relief. We cannot tell which of these readings is correct, so we vacate the order and remand for further proceedings.

IV. CONCLUSION

We **AFFIRM** the orders denying Jones's and Jackson's motions to reduce their sentences. We **VACATE** the orders denying Allen's and Johnson's motions and **REMAND** for further proceedings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11505-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

STEVEN JONES,
a.k.a. T,
a.k.a. T.Y.,
a.k.a. Y.T.,
a.k.a. Tyshawn,
a.k.a. New Jack,
a.k.a. Pepito,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, GRANT, Circuit Judge, and JUNG,* District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

*Honorable William F. Jung, United States District Judge for the Middle District of Florida, sitting by designation.

ORD-42

UNITED STATES DISTRICT COURT

for the

Southern District of Alabama

United States of America
v.
STEVEN JONES

Case No: 94-0067-WS

USM No:

Date of Original Judgment:

Date of Previous Amended Judgment:
(Use Date of Last Amended Judgment if Any)

Carlos A. Williams
Defendant's Attorney

ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the policy statement set forth at USSG §1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

☑ DENIED. ☐ GRANTED and the defendant's previously imposed sentence of imprisonment *(as reflected in the last judgment issued)* of _____ months **is reduced to** _____.

(Complete Parts I and II of Page 2 when motion is granted)

ADDITIONAL COMMENTS

Defendant filed a Motion for Sentence Reduction under the First Step Act (doc. 429). Jones is ineligible for relief under the Act. In July 1994, Jones was convicted of three counts of possession with intent to distribute cocaine and crack cocaine. The sentencing court expressly found that Jones was responsible for at least 75 kilograms of crack cocaine. (Doc. 396, at 25; doc. 429-2, at 61-62.) Relying on United States v. Alleyne, Jones now attempts to utilize the First Step Act of 2018 to relitigate that drug quantity finding made by the sentencing court a quarter century ago. But Alleyne does not apply retroactively to cases that have completed direct review. See Jeanty v. Warden, FCI-Miami, 757 F.3d 1283, 1285 (11th Cir. 2014). Moreover, a 3582(c) motion is not an appropriate vehicle to relitigate drug quantity findings used in making sentencing determinations. See United States v. Martinez, 735 Fed.Appx. 616, 618 (11th Cir. May 23, 2018). Nothing in the First Step Act of 2018 or the Fair Sentencing Act of 2010 would authorize, much less compel, this court to review and overturn drug quantity findings used at the original sentencing hearing. Jones' Motion ultimately does not turn on the narrow retroactive provisions of the First Step Act, but rather attempts to use that statute as a springboard for undoing drug-quantity determinations made by the sentencing court.

Except as otherwise provided, all provisions of the judgment dated _____ shall remain in effect.

IT IS SO ORDERED.

Order Date: April 3, 2019

s/ WILLIAM H. STEELE
Judge's signature

Effective Date: _____
(if different from order date)

UNITED STATES DISTRICT JUDGE
Printed name and title

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**CRIMINAL NO. 94-0067-WS**
	)	
STEVEN JONES,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant Steven Jones' Motion for Reconsideration (doc. 436).

On April 2, 2019, the undersigned entered an Order (doc. 433) denying Jones' Motion for Sentence Reduction under the First Step Act (doc. 429). The April 2 Order explained that 18 U.S.C. § 3582(c) does not empower a defendant to relitigate drug quantity findings made at the original sentencing hearing. Because Jones' First Step Act Motion sought to do precisely that – namely, to have this Court overturn, erase or reject the sentencing court's finding that Jones was responsible for at least 75 kilograms of crack cocaine – the Motion was denied.

Now, Jones files a Motion to Reconsider in which he makes two assignments of error with respect to the April 2 Order. First, he argues that his First Step Act Motion was governed not by 18 U.S.C. § 3582(c)(2), but by 18 U.S.C. § 3582(c)(1)(B). The Court agrees; in fact, Jones' First Step Act Motion, like every other First Step Act motion that has been referred to the undersigned, was processed, considered and evaluated pursuant to § 3582(c)(1)(B).[1] No aspect

[1] In arguing that the April 2 Order is erroneous in this regard, Jones makes much of the fact that the AO 247 Form on which the April 2 Order was entered bears the title "Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)." This Court, like all other federal district courts, has been specifically requested by the United States Bureau of Prisons to utilize this AO 247 Form (which was originally devised to set forth rulings on certain retroactive U.S. Sentencing Guidelines amendments in recent years) to record decisions on First Step Act Motions. However, the undersigned has always deemed First Step Act Motions to be filed under 18 U.S.C. § 3582(c)(1)(B), which provides that a "court may modify an imposed term of imprisonment to the extent otherwise expressly determined by statute." *Id.* The (Continued)

of the April 2 Order's reasoning or result hinged on § 3582(c)(2); therefore, reconsideration is unnecessary, inappropriate and unavailable on this ground.

Second, Jones unveils a brand-new argument (not presented in his original First Step Act Motion) for why he contends he is entitled to relief. Motions to reconsider are not properly utilized to raise new, previously available arguments;[2] nonetheless, in its discretion, the Court will consider the argument on its merits. In particular, Jones seizes on language from the superseding indictment to insist that his case actually falls within the ambit of the First Step Act. He observes that he was convicted of Count One, which charged conspiracy to possess with intent to distribute "more than sixteen (16) kilograms of cocaine and of a mixture and substance containing a detectable amount of cocaine which contains cocaine base, commonly known as crack cocaine." Jones' argument is that because the superseding indictment did not "specify an amount of crack cocaine …, application of the First Step Act would effectively reduce Jones' statutory range to 0-20 years," regardless of the sentencing court's relevant conduct findings holding him accountable for at least 75 kilograms of crack cocaine. (Doc. 436, at 6.)[3] His

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reference to subsection (c)(2) in the caption of the preprinted form had no bearing whatsoever on the analysis or conclusions presented in the April 2 Order. Jones cannot show otherwise.

[2] *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (motions to reconsider "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment") (citation omitted); *Mays v. United States Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997) ("a motion to reconsider should not be used by the parties to set forth new theories of law").

[3] As a threshold matter, Jones is incorrect in stating that Count One of the superseding indictment charged him with only a detectable quantity of crack cocaine; rather, on its face, the charging document's language charged him with more than 16 kilograms of cocaine and crack cocaine. Moreover, Jones does not dispute that Count One charged him with possessing with intent to distribute more than 16 kilograms of cocaine, which would give rise to the 10-life sentencing range under 21 U.S.C. § 841(b)(1)(A)(ii). Significantly, subsection (b)(1)(A)(ii) applies to offenses involving "5 kilograms or more of a mixture or substance containing a detectable amount of … cocaine." Crack cocaine is certainly such a mixture or substance. Again, Jones agrees that he was charged and convicted of conspiring to possess with intent to distribute more than 16 kilograms of cocaine (which, by statutory definition, includes mixtures and substances containing a detectable amount of cocaine, which crack cocaine would certainly qualify as being). His attempt to ignore the 16 kilograms of cocaine recited in Count One of the superseding indictment and to argue that Count One charged him with "no specific quantity" of any drug thus fails on its face.

position, then, is that the 10-life statutory sentencing range prescribed by 21 U.S.C. § 841(b)(1)(A), and pursuant to which he was sentenced, is inapplicable here and that his true statutory sentencing range was 0-20 years pursuant to § 841(b)(1)(C), because no quantity of crack cocaine was specified in the charging document.

Jones is certainly correct that the First Step Act retroactively applies certain reduced statutory penalties for crack cocaine offenses under the Fair Sentencing Act of 2010 (the "FSA") to "covered offenses" committed before August 3, 2010. In particular, Section 404(b) of the Act provides as follows: "A court that imposed a sentence for a covered offense may … impose a reduced sentence as if sections 2 and 3 of the [FSA] were in effect at the time the covered offense was committed." *Id.* Section 2 of the FSA increased the quantity of crack cocaine that triggered mandatory minimum penalties from 5 grams to 28 grams (for the 5 year minimum, 40 year maximum), and from 50 grams to 280 grams (for 10 year minimum, life maximum). The fundamental problem with Jones' argument is twofold. First, as noted in footnote 3, *supra*, Jones cannot discount, ignore, or strike through the 16 kilograms of cocaine with which he was charged in Count One, which is certainly enough to trigger the 10-life statutory sentencing scheme pursuant to which he was sentenced. Second, even if Jones' argument were accepted at face value, it nonetheless founders because Section 2 of the FSA did not change anything about the relevant statutory minimum and maximum sentences for offenses as to which no amount of crack cocaine was charged. Under Jones' theory of "no specific quantity," the relevant statutory minimum and maximum sentences he faced for Count One would be exactly the same in the pre-FSA world as they were in the post-FSA world. Simply put, nothing about the FSA would reduce the statutory minimum or maximum sentence to which Jones was exposed; therefore, retroactive application of Section 2 of the FSA cannot afford him any sentencing relief some 25 years after the fact. As in his original Motion, Jones' Motion for Reconsideration is seeking to litigate sentencing matters as to which the First Step Act and retroactive application of the FSA have no bearing or effect.

For all of the foregoing reasons, Jones' Motion for Reconsideration (doc. 436) is **denied**.

DONE and ORDERED this 9th day of April, 2019.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE

PL 115-391, December 21, 2018, 132 Stat 5194

UNITED STATES PUBLIC LAWS

115th Congress - Second Session

Convening January 06, 2018

Additions and Deletions are not identified in this database.
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

PL 115–391 [S 756]
December 21, 2018
FIRST STEP ACT OF 2018

An Act To reauthorize and amend the Marine Debris Act to promote international action to reduce marine debris, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 18 USCA § 1 NOTE >>

(a) SHORT TITLE.—This Act may be cited as the “First Step Act of 2018”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

***5195**

TITLE I—RECIDIVISM REDUCTION

SEC. 101. RISK AND NEEDS ASSESSMENT SYSTEM.

(a) IN GENERAL.—Chapter 229 of title 18, United States Code, is amended by inserting after subchapter C the following:

T. 18 pt. II ch. 229 subch. D prec. § 3631

"SUBCHAPTERD—RISK AND NEEDS ASSESSMENT SYSTEM

<< 18 USCA § 3631 >>

§ 3631. Duties of the Attorney General

"(a) IN GENERAL.—The Attorney General shall carry out this subchapter in consultation with—

"(1) the Director of the Bureau of Prisons;

"(2) the Director of the Administrative Office of the United States Courts;

"(3) the Director of the Office of Probation and Pretrial Services;

"(4) the Director of the National Institute of Justice;

"(5) the Director of the National Institute of Corrections; and

"(6) the Independent Review Committee authorized by the First Step Act of 2018

"(b) DUTIES.—The Attorney General shall—

"(1) conduct a review of the existing prisoner risk and needs assessment systems in operation on the date of enactment of this subchapter;

"(2) develop recommendations regarding evidence-based recidivism reduction programs and productive activities in accordance with section 3633;

"(3) conduct ongoing research and data analysis on—

"(A) evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools;

"(B) the most effective and efficient uses of such programs;

"(C) which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism; and

"(D) products purchased by Federal agencies that are manufactured overseas and could be manufactured by prisoners participating in a prison work program without ***5196** reducing job opportunities for other workers in the United States;

"(4) on an annual basis, review, validate, and release publicly on the Department of Justice website the risk and needs assessment system, which review shall include—

"(A) any subsequent changes to the risk and needs assessment system made after the date of enactment of this subchapter;

"(B) the recommendations developed under paragraph (2), using the research conducted under paragraph (3);

"(C) an evaluation to ensure that the risk and needs assessment system bases the assessment of each prisoner's risk of recidivism on indicators of progress and of regression that are dynamic and that can reasonably be expected to change while in prison;

"(D) statistical validation of any tools that the risk and needs assessment system uses; and

"(E) an evaluation of the rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates;

"(5) make any revisions or updates to the risk and needs assessment system that the Attorney General determines appropriate pursuant to the review under paragraph (4), including updates to ensure that any disparities identified in paragraph (4)(E) are reduced to the greatest extent possible; and

"(6) report to Congress in accordance with section 3634.

<< 18 USCA § 3632 >>

§ 3632. Development of risk and needs assessment system

"(a) IN GENERAL.—Not later than 210 days after the date of enactment of this subchapter, the Attorney General, in consultation with the Independent Review Committee authorized by the First Step Act of 2018, shall develop and release publicly on the

Department of Justice website a risk and needs assessment system (referred to in this subchapter as the 'System'), which shall be used to—

"(1) determine the recidivism risk of each prisoner as part of the intake process, and classify each prisoner as having minimum, low, medium, or high risk for recidivism;

"(2) assess and determine, to the extent practicable, the risk of violent or serious misconduct of each prisoner;

"(3) determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs, and in accordance with subsection (b);

"(4) reassess the recidivism risk of each prisoner periodically, based on factors including indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change while in prison;

"(5) reassign the prisoner to appropriate evidence-based recidivism reduction programs or productive activities based on the revised determination to ensure that—

"(A) all prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration;

***5197**

"(B) to address the specific criminogenic needs of the prisoner; and

"(C) all prisoners are able to successfully participate in such programs;

"(6) determine when to provide incentives and rewards for successful participation in evidence-based recidivism reduction programs or productive activities in accordance with subsection (e);

"(7) determine when a prisoner is ready to transfer into prerelease custody or supervised release in accordance with section 3624; and

"(8) determine the appropriate use of audio technology for program course materials with an understanding of dyslexia. In carrying out this subsection, the Attorney General may use existing risk and needs assessment tools, as appropriate.

"(b) ASSIGNMENT OF EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAMS.—The System shall provide guidance on the type, amount, and intensity of evidence-based recidivism reduction programming and productive activities that shall be assigned for each prisoner, including—

"(1) programs in which the Bureau of Prisons shall assign the prisoner to participate, according to the prisoner's specific criminogenic needs; and

"(2) information on the best ways that the Bureau of Prisons can tailor the programs to the specific criminogenic needs of each prisoner so as to most effectively lower each prisoner's risk of recidivism.

"(c) HOUSING AND ASSIGNMENT DECISIONS.—The System shall provide guidance on program grouping and housing assignment determinations and, after accounting for the safety of each prisoner and other individuals at the prison, provide that prisoners with a similar risk level be grouped together in housing and assignment decisions to the extent practicable.

"(d) EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAM INCENTIVES AND PRODUCTIVE ACTIVITIES REWARDS.—The System shall provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs as follows:

"(1) PHONE AND VISITATION PRIVILEGES.—A prisoner who is successfully participating in an evidence-based recidivism reduction program shall receive—

"(A) phone privileges, or, if available, video conferencing privileges, for up to 30 minutes per day, and up to 510 minutes per month; and

"(B) additional time for visitation at the prison, as determined by the warden of the prison.

"(2) TRANSFER TO INSTITUTION CLOSER TO RELEASE RESIDENCE.—A prisoner who is successfully participating in an evidence-based recidivism reduction program shall be considered by the Bureau of Prisons for placement in a facility closer to the prisoner's release residence upon request from the prisoner and subject to—

"(A) bed availability at the transfer facility;

"(B) the prisoner's security designation; and

"(C) the recommendation from the warden of the prison at which the prisoner is incarcerated at the time of making the request.

***5198**

"(3) ADDITIONAL POLICIES.—The Director of the Bureau of Prisons shall develop additional policies to provide appropriate incentives for successful participation and completion of evidence-based recidivism reduction programming. The incentives shall include not less than 2 of the following:

"(A) Increased commissary spending limits and product offerings.

"(B) Extended opportunities to access the email system.

"(C) Consideration of transfer to preferred housing units (including transfer to different prison facilities).

"(D) Other incentives solicited from prisoners and determined appropriate by the Director.

"(4) TIME CREDITS.—

"(A) IN GENERAL.—A prisoner, except for an ineligible prisoner under subparagraph (D), who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits as follows:

"(i) A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

"(ii) A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over 2 consecutive assessments, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

"(B) AVAILABILITY.—A prisoner may not earn time credits under this paragraph for an evidence-based recidivism reduction program that the prisoner successfully completed—

"(i) prior to the date of enactment of this subchapter; or

"(ii) during official detention prior to the date that the prisoner's sentence commences under section 3585(a).

"(C) APPLICATION OF TIME CREDITS TOWARD PRERELEASE CUSTODY OR SUPERVISED RELEASE.—Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release. The Director of the Bureau of Prisons shall transfer eligible prisoners, as determined under section 3624(g), into prerelease custody or supervised release.

"(D) INELIGIBLE PRISONERS.—A prisoner is ineligible to receive time credits under this paragraph if the prisoner is serving a sentence for a conviction under any of the following provisions of law:

"(i) Section 32, relating to destruction of aircraft or aircraft facilities.

"(ii) Section 33, relating to destruction of motor vehicles or motor vehicle facilities.

"(iii) Section 36, relating to drive-by shootings.

"(iv) Section 81, relating to arson within special maritime and territorial jurisdiction.

***5199**

"(v) Section 111(b), relating to assaulting, resisting, or impeding certain officers or employees using a deadly or dangerous weapon or inflicting bodily injury.

"(vi) Paragraph (1), (7), or (8) of section 113(a), relating to assault with intent to commit murder, assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, or assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate.

"(vii) Section 115, relating to influencing, impeding, or retaliating against a Federal official by injuring a family member, except for a threat made in violation of that section.

"(viii) Section 116, relating to female genital mutilation.

"(ix) Section 117, relating to domestic assault by a habitual offender.

"(x) Any section of chapter 10, relating to biological weapons.

"(xi) Any section of chapter 11B, relating to chemical weapons.

"(xii) Section 351, relating to Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault.

"(xiii) Section 521, relating to criminal street gangs.

"(xiv) Section 751, relating to prisoners in custody of an institution or officer.

"(xv) Section 793, relating to gathering, transmitting, or losing defense information.

"(xvi) Section 794, relating to gathering or delivering defense information to aid a foreign government.

"(xvii) Any section of chapter 39, relating to explosives and other dangerous articles, except for section 836 (relating to the transportation of fireworks into a State prohibiting sale or use).

"(xviii) Section 842(p), relating to distribution of information relating to explosives, destructive devices, and weapons of mass destruction, but only if the conviction involved a weapon of mass destruction (as defined in section 2332a(c)).

"(xix) Subsection (f)(3), (h), or (i) of section 844, relating to the use of fire or an explosive.

"(xx) Section 871, relating to threats against the President and successors to the Presidency.

"(xxi) Section 879, relating to threats against former Presidents and certain other persons.

"(xxii) Section 924(c), relating to unlawful possession or use of a firearm during and in relation to any crime of violence or drug trafficking crime.

"(xxiii) Section 1030(a)(1), relating to fraud and related activity in connection with computers.

"(xxiv) Section 1091, relating to genocide.

"(xxv) Any section of chapter 51, relating to homicide, except for section 1112 (relating to manslaughter), ***5200** 1113 (relating to attempt to commit murder or manslaughter, but only if the conviction was for an attempt to commit manslaughter), 1115 (relating to misconduct or neglect of ship officers), or 1122 (relating to protection against the human immunodeficiency virus).

"(xxvi) Any section of chapter 55, relating to kidnapping.

"(xxvii) Any offense under chapter 77, relating to peonage, slavery, and trafficking in persons, except for sections 1593 through 1596.

"(xxviii) Section 1751, relating to Presidential and Presidential staff assassination, kidnapping, and assault.

"(xxix) Section 1791, relating to providing or possessing contraband in prison.

"(xxx) Section 1792, relating to mutiny and riots.

"(xxxi) Section 1841(a)(2)(C), relating to intentionally killing or attempting to kill an unborn child.

"(xxxii) Section 1992, relating to terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air.

"(xxxiii) Section 2113(e), relating to bank robbery resulting in death.

"(xxxiv) Section 2118(c), relating to robberies and burglaries involving controlled substances resulting in assault, putting in jeopardy the life of any person by the use of a dangerous weapon or device, or death.

"(xxxv) Section 2119, relating to taking a motor vehicle (commonly referred to as 'carjacking').

"(xxxvi) Any section of chapter 105, relating to sabotage, except for section 2152.

"(xxxvii) Any section of chapter 109A, relating to sexual abuse.

"(xxxviii) Section 2250, relating to failure to register as a sex offender.

"(xxxix) Section 2251, relating to the sexual exploitation of children.

"(xl) Section 2251A, relating to the selling or buying of children.

"(xli) Section 2252, relating to certain activities relating to material involving the sexual exploitation of minors.

"(xlii) Section 2252A, relating to certain activities involving material constituting or containing child pornography.

"(xliii) Section 2260, relating to the production of sexually explicit depictions of a minor for importation into the United States.

"(xliv) Section 2283, relating to the transportation of explosive, biological, chemical, or radioactive or nuclear materials.

"(xlv) Section 2284, relating to the transportation of terrorists.

"(xlvi) Section 2291, relating to the destruction of a vessel or maritime facility, but only if the conduct ***5201** that led to the conviction involved a substantial risk of death or serious bodily injury.

"(xlvii) Any section of chapter 113B, relating to terrorism.

"(xlviii) Section 2340A, relating to torture.

"(xlix) Section 2381, relating to treason.

"(l) Section 2442, relating to the recruitment or use of child soldiers.

"(li) An offense described in section 3559(c)(2)(F), for which the offender was sentenced to a term of imprisonment of more than 1 year, if the offender has a previous conviction, for which the offender served a term of imprisonment of more than 1 year, for a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111), voluntary manslaughter (as described in section 1112), assault with intent to commit murder (as described in section 113(a)), aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242), abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)), kidnapping (as described in chapter 55), carjacking (as described in section 2119), arson (as described in section 844(f)(3), (h), or (i)), or terrorism (as described in chapter 113B).

"(lii) Section 57(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)), relating to the engagement or participation in the development or production of special nuclear material.

"(liii) Section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122), relating to prohibitions governing atomic weapons.

"(liv) Section 101 of the Atomic Energy Act of 1954 (42 U.S.C. 2131), relating to the atomic energy license requirement.

"(lv) Section 224 or 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275), relating to the communication or receipt of restricted data.

"(lvi) Section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), relating to the sabotage of nuclear facilities or fuel.

"(lvii) Section 60123(b) of title 49, relating to damaging or destroying a pipeline facility, but only if the conduct which led to the conviction involved a substantial risk of death or serious bodily injury.

"(lviii) Section 401(a) of the Controlled Substances Act (21 U.S.C. 841), relating to manufacturing or distributing a controlled substance in the case of a conviction for an offense described in subparagraph (A), (B), or (C) of subsection (b)(1) of that section for which death or serious bodily injury resulted from the use of such substance.

"(lix) Section 276(a) of the Immigration and Nationality Act (8 U.S.C. 1326), relating to the reentry of a removed alien, but only if the alien is described in paragraph (1) or (2) of subsection (b) of that section.

***5202**

"(lx) Section 277 of the Immigration and Nationality Act (8 U.S.C. 1327), relating to aiding or assisting certain aliens to enter the United States.

"(lxi) Section 278 of the Immigration and Nationality Act (8 U.S.C. 1328), relating to the importation of an alien into the United States for an immoral purpose.

"(lxii) Any section of the Export Administration Act of 1979 (50 U.S.C. 4611 et seq.)

"(lxiii) Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705).

"(lxiv) Section 601 of the National Security Act of 1947 (50 U.S.C. 3121), relating to the protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

"(lxv) Subparagraph (A)(i) or (B)(i) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1)(A) or (2)(A) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, dispense, or knowingly importing or exporting, a mixture or substance containing a detectable amount of heroin if the sentencing court finds that the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.

"(lxvi) Subparagraph (A)(vi) or (B)(vi) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1)(F) or (2)(F) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, or any analogue thereof.

"(lxvii) Subparagraph (A)(viii) or (B)(viii) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1)(H) or (2)(H) of section 1010(b) the Controlled Substances Import and Export Act (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, or knowingly importing or exporting, a mixture of substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, if the sentencing court finds that the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.

"(lxviii) Subparagraph (A) or (B) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) or paragraph (1) or (2) of section 1010(b) of the Controlled Substances Import and Export Act ***5203** (21 U.S.C. 960(b)), relating to manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance, or knowingly importing or exporting a controlled substance, if the sentencing court finds that—

"(I) the offense involved a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, or any analogue thereof; and

"(II) the offender was an organizer, leader, manager, or supervisor of others in the offense, as determined under the guidelines promulgated by the United States Sentencing Commission.

"(E) DEPORTABLE PRISONERS INELIGIBLE TO APPLY TIME CREDITS.—

"(i) IN GENERAL.—A prisoner is ineligible to apply time credits under subparagraph (C) if the prisoner is the subject of a final order of removal under any provision of the immigration laws (as such term is defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17))).

"(ii) PROCEEDINGS.—The Attorney General, in consultation with the Secretary of Homeland Security, shall ensure that any alien described in section 212 or 237 of the Immigration and Nationality Act (8 U.S.C. 1182, 1227)

who seeks to earn time credits are subject to proceedings described in section 238(a) of that Act (8 U.S.C. 1228(a)) at a date as early as practicable during the prisoner's incarceration.

"(5) RISK REASSESSMENTS AND LEVEL ADJUSTMENT.—A prisoner who successfully participates in evidence-based recidivism reduction programming or productive activities shall receive periodic risk reassessments not less often than annually, and a prisoner determined to be at a medium or high risk of recidivating and who has less than 5 years until his or her projected release date shall receive more frequent risk reassessments. If the reassessment shows that the prisoner's risk of recidivating or specific needs have changed, the Bureau of Prisons shall update the determination of the prisoner's risk of recidivating or information regarding the prisoner's specific needs and reassign the prisoner to appropriate evidence-based recidivism reduction programming or productive activities based on such changes.

"(6) RELATION TO OTHER INCENTIVE PROGRAMS.—The incentives described in this subsection shall be in addition to any other rewards or incentives for which a prisoner may be eligible.

"(e) PENALTIES.—The Director of the Bureau of Prisons shall develop guidelines for the reduction of rewards and incentives earned under subsection (d) for prisoners who violate prison rules or evidence-based recidivism reduction program or productive activity rules, which shall provide—

"(1) general levels of violations and resulting reductions;

"(2) that any reduction that includes the loss of time credits shall require written notice to the prisoner, shall be limited to time credits that a prisoner earned as of the date of the prisoner's rule violation, and shall not include any future time credits that the prisoner may earn; and

***5204**

"(3) for a procedure to restore time credits that a prisoner lost as a result of a rule violation, based on the prisoner's individual progress after the date of the rule violation.

"(f) BUREAU OF PRISONS TRAINING.—The Attorney General shall develop and implement training programs for Bureau of Prisons officers and employees responsible for administering the System, which shall include—

"(1) initial training to educate officers and employees on how to use the System in an appropriate and consistent manner, as well as the reasons for using the System;

"(2) continuing education;

"(3) periodic training updates; and

"(4) a requirement that such officers and employees demonstrate competence in administering the System, including interrater reliability, on a biannual basis.

"(g) QUALITY ASSURANCE.—In order to ensure that the Bureau of Prisons is using the System in an appropriate and consistent manner, the Attorney General shall monitor and assess the use of the System, which shall include conducting annual audits of the Bureau of Prisons regarding the use of the System.

"(h) DYSLEXIA SCREENING.—

"(1) SCREENING.—The Attorney General shall incorporate a dyslexia screening program into the System, including by screening for dyslexia during—

"(A) the intake process; and

"(B) each periodic risk reassessment of a prisoner.

"(2) TREATMENT.—The Attorney General shall incorporate programs designed to treat dyslexia into the evidence-based recidivism reduction programs or productive activities required to be implemented under this section. The Attorney General may also incorporate programs designed to treat other learning disabilities.

<< 18 USCA § 3633 >>

§ 3633. Evidence-based recidivism reduction program and recommendations

"(a) IN GENERAL.—Prior to releasing the System, in consultation with the Independent Review Committee authorized by the First Step Act of 2018, the Attorney General shall—

"(1) review the effectiveness of evidence-based recidivism reduction programs that exist as of the date of enactment of this subchapter in prisons operated by the Bureau of Prisons;

"(2) review available information regarding the effectiveness of evidence-based recidivism reduction programs and productive activities that exist in State-operated prisons throughout the United States;

"(3) identify the most effective evidence-based recidivism reduction programs;

"(4) review the policies for entering into evidence-based recidivism reduction partnerships described in section 3621(h)(5); and

"(5) direct the Bureau of Prisons regarding—

"(A) evidence-based recidivism reduction programs;

"(B) the ability for faith-based organizations to function as a provider of educational evidence-based programs outside of the religious classes and services provided through the Chaplaincy; and

***5205**

"(C) the addition of any new effective evidence-based recidivism reduction programs that the Attorney General finds.

"(b) REVIEW AND RECOMMENDATIONS REGARDING DYSLEXIA MITIGATION.—In carrying out subsection (a), the Attorney General shall consider the prevalence and mitigation of dyslexia in prisons, including by—

"(1) reviewing statistics on the prevalence of dyslexia, and the effectiveness of any programs implemented to mitigate the effects of dyslexia, in prisons operated by the Bureau of Prisons and State-operated prisons throughout the United States; and

"(2) incorporating the findings of the Attorney General under paragraph (1) of this subsection into any directives given to the Bureau of Prisons under paragraph (5) of subsection (a).

<< 18 USCA § 3634 >>

§ 3634. Report

"Beginning on the date that is 2 years after the date of enactment of this subchapter, and annually thereafter for a period of 5 years, the Attorney General shall submit a report to the Committees on the Judiciary of the Senate and the House of Representatives and the Subcommittees on Commerce, Justice, Science, and Related Agencies of the Committees on Appropriations of the Senate and the House of Representatives that contains the following:

"(1) A summary of the activities and accomplishments of the Attorney General in carrying out this Act.

"(2) A summary and assessment of the types and effectiveness of the evidence-based recidivism reduction programs and productive activities in prisons operated by the Bureau of Prisons, including—

"(A) evidence about which programs have been shown to reduce recidivism;

"(B) the capacity of each program and activity at each prison, including the number of prisoners along with the recidivism risk of each prisoner enrolled in each program; and

"(C) identification of any gaps or shortages in capacity of such programs and activities.

"(3) Rates of recidivism among individuals who have been released from Federal prison, based on the following criteria:

"(A) The primary offense of conviction.

"(B) The length of the sentence imposed and served.

"(C) The Bureau of Prisons facility or facilities in which the prisoner's sentence was served.

"(D) The evidence-based recidivism reduction programming that the prisoner successfully completed, if any.

"(E) The prisoner's assessed and reassessed risk of recidivism.

"(F) The productive activities that the prisoner successfully completed, if any.

"(4) The status of prison work programs at facilities operated by the Bureau of Prisons, including—

"(A) a strategy to expand the availability of such programs without reducing job opportunities for workers in the United States who are not in the custody of the Bureau ***5206** of Prisons, including the feasibility of prisoners manufacturing products purchased by Federal agencies that are manufactured overseas;

"(B) an assessment of the feasibility of expanding such programs, consistent with the strategy required under subparagraph (A), with the goal that 5 years after the date of enactment of this subchapter, not less than 75 percent of eligible minimum- and low-risk offenders have the opportunity to participate in a prison work program for not less than 20 hours per week; and

"(C) a detailed discussion of legal authorities that would be useful or necessary to achieve the goals described in subparagraphs (A) and (B).

"(5) An assessment of the Bureau of Prisons' compliance with section 3621(h).

"(6) An assessment of progress made toward carrying out the purposes of this subchapter, including any savings associated with—

"(A) the transfer of prisoners into prerelease custody or supervised release under section 3624(g), including savings resulting from the avoidance or deferral of future construction, acquisition, and operations costs; and

"(B) any decrease in recidivism that may be attributed to the System or the increase in evidence-based recidivism reduction programs required under this subchapter.

"(7) An assessment of budgetary savings resulting from this subchapter, including—

"(A) a summary of the amount of savings resulting from the transfer of prisoners into prerelease custody under this chapter, including savings resulting from the avoidance or deferral of future construction, acquisition, or operations costs;

"(B) a summary of the amount of savings resulting from any decrease in recidivism that may be attributed to the implementation of the risk and needs assessment system or the increase in recidivism reduction programs and productive activities required by this subchapter;

"(C) a strategy to reinvest the savings described in subparagraphs (A) and (B) in other—

"(i) Federal, State, and local law enforcement activities; and

"(ii) expansions of recidivism reduction programs and productive activities in the Bureau of Prisons; and

"(D) a description of how the reduced expenditures on Federal corrections and the budgetary savings resulting from this subchapter are currently being used and will be used to—

"(i) increase investment in law enforcement and crime prevention to combat gangs of national significance and high-level drug traffickers through the High Intensity Drug Trafficking Areas Program and other task forces;

"(ii) hire, train, and equip law enforcement officers and prosecutors; and

***5207**

"(iii) promote crime reduction programs using evidence-based practices and strategic planning to help reduce crime and criminal recidivism.

"(8) Statistics on—

"(A) the prevalence of dyslexia among prisoners in prisons operated by the Bureau of Prisons; and

"(B) any change in the effectiveness of dyslexia mitigation programs among such prisoners that may be attributed to the incorporation of dyslexia screening into the System and of dyslexia treatment into the evidence-based recidivism reduction programs, as required under this chapter.

<< 18 USCA § 3635 >>

§ 3635. Definitions

"In this subchapter the following definitions apply:

"(1) DYSLEXIA.—The term 'dyslexia' means an unexpected difficulty in reading for an individual who has the intelligence to be a much better reader, most commonly caused by a difficulty in the phonological processing (the appreciation of the individual sounds of spoken language), which affects the ability of an individual to speak, read, and spell.

"(2) DYSLEXIA SCREENING PROGRAM.—The term 'dyslexia screening program' means a screening program for dyslexia that is—

"(A) evidence-based (as defined in section 8101(21) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801(21))) with proven psychometrics for validity;

"(B) efficient and low-cost; and

"(C) readily available.

"(3) EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAM.—The term 'evidence-based recidivism reduction program' means either a group or individual activity that—

"(A) has been shown by empirical evidence to reduce recidivism or is based on research indicating that it is likely to be effective in reducing recidivism;

"(B) is designed to help prisoners succeed in their communities upon release from prison; and

"(C) may include—

"(i) social learning and communication, interpersonal, anti-bullying, rejection response, and other life skills;

"(ii) family relationship building, structured parent-child interaction, and parenting skills;

"(iii) classes on morals or ethics;

"(iv) academic classes;

"(v) cognitive behavioral treatment;

"(vi) mentoring;

"(vii) substance abuse treatment;

"(viii) vocational training;

"(ix) faith-based classes or services;

"(x) civic engagement and reintegrative community services;

"(xi) a prison job, including through a prison work program;

"(xii) victim impact classes or other restorative justice programs; and

"(xiii) trauma counseling and trauma-informed support programs.

***5208**

"(4) PRISONER.—The term 'prisoner' means a person who has been sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons.

"(5) PRODUCTIVE ACTIVITY.—The term 'productive activity' means either a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of the programs described in paragraph (1) to other prisoners.

"(6) RISK AND NEEDS ASSESSMENT TOOL.—The term 'risk and needs assessment tool' means an objective and statistically validated method through which information is collected and evaluated to determine—

"(A) as part of the intake process, the risk that a prisoner will recidivate upon release from prison;

"(B) the recidivism reduction programs that will best minimize the risk that the prisoner will recidivate upon release from prison; and

"(C) the periodic reassessment of risk that a prisoner will recidivate upon release from prison, based on factors including indicators of progress and of regression, that are dynamic and that can reasonably be expected to change while in prison.".

<< 18 USCA T. 18 pt. II ch. 229 subch. A prec. § 3601 >>

(b) CLERICAL AMENDMENT.—The table of subchapters for chapter 229 of title 18, United States Code, is amended by adding at the end the following:

"D. Risk and Needs Assessment 3631"......

SEC. 102. IMPLEMENTATION OF SYSTEM AND RECOMMENDATIONS BY BUREAU OF PRISONS.

(a) IMPLEMENTATION OF SYSTEM GENERALLY.—Section 3621 of title 18, United States Code, is amended by adding at the end the following:

<< 18 USCA § 3621 >>

"(h) IMPLEMENTATION OF RISK AND NEEDS ASSESSMENT SYSTEM.—

"(1) IN GENERAL.—Not later than 180 days after the Attorney General completes and releases the risk and needs assessment system (referred to in this subsection as the 'System') developed under subchapter D, the Director of the Bureau of Prisons shall, in accordance with that subchapter—

"(A) implement and complete the initial intake risk and needs assessment for each prisoner (including for each prisoner who was a prisoner prior to the effective date of this subsection), regardless of the prisoner's length of imposed term of imprisonment, and begin to assign prisoners to appropriate evidence-based recidivism reduction programs based on that determination;

"(B) begin to expand the effective evidence-based recidivism reduction programs and productive activities it offers and add any new evidence-based recidivism reduction programs and productive activities necessary to effectively implement the System; and

"(C) begin to implement the other risk and needs assessment tools necessary to effectively implement the System over time, while prisoners are participating in and ***5209** completing the effective evidence-based recidivism reduction programs and productive activities.

"(2) PHASE-IN.—In order to carry out paragraph (1), so that every prisoner has the opportunity to participate in and complete the type and amount of evidence-based recidivism reduction programs or productive activities they need, and be reassessed for recidivism risk as necessary to effectively implement the System, the Bureau of Prisons shall—

"(A) provide such evidence-based recidivism reduction programs and productive activities for all prisoners before the date that is 2 years after the date on which the Bureau of Prisons completes a risk and needs assessment for each prisoner under paragraph (1)(A); and

"(B) develop and validate the risk and needs assessment tool to be used in the reassessments of risk of recidivism, while prisoners are participating in and completing evidence-based recidivism reduction programs and productive activities.

"(3) PRIORITY DURING PHASE-IN.—During the 2-year period described in paragraph (2)(A), the priority for such programs and activities shall be accorded based on a prisoner's proximity to release date.

"(4) PRELIMINARY EXPANSION OF EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAMS AND AUTHORITY TO USE INCENTIVES.—Beginning on the date of enactment of this subsection, the Bureau of Prisons may begin to expand any evidence-based recidivism reduction programs and productive activities that exist at a prison as of such date, and may offer to prisoners who successfully participate in such programs and activities the incentives and rewards described in subchapter D.

"(5) RECIDIVISM REDUCTION PARTNERSHIPS.—In order to expand evidence-based recidivism reduction programs and productive activities, the Attorney General shall develop policies for the warden of each prison of the Bureau of Prisons to enter into partnerships, subject to the availability of appropriations, with any of the following:

"(A) Nonprofit and other private organizations, including faith-based, art, and community-based organizations that will deliver recidivism reduction programming on a paid or volunteer basis.

"(B) Institutions of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) that will deliver instruction on a paid or volunteer basis.

"(C) Private entities that will—

"(i) deliver vocational training and certifications;

"(ii) provide equipment to facilitate vocational training or employment opportunities for prisoners;

"(iii) employ prisoners; or

"(iv) assist prisoners in prerelease custody or supervised release in finding employment.

"(D) Industry-sponsored organizations that will deliver workforce development and training, on a paid or volunteer basis.

"(6) REQUIREMENT TO PROVIDE PROGRAMS TO ALL PRISONERS; PRIORITY.—The Director of the Bureau of Prisons shall provide all prisoners with the opportunity to actively participate ***5210** in evidence-based recidivism reduction programs or productive activities, according to their specific criminogenic needs, throughout their entire term of incarceration. Priority for participation in recidivism reduction programs shall be given to medium-risk and high-risk prisoners, with access to productive activities given to minimum-risk and low-risk prisoners.

"(7) DEFINITIONS.—The terms in this subsection have the meaning given those terms in section 3635.".

(b) PRERELEASE CUSTODY.—

(1) IN GENERAL.—Section 3624 of title 18, United States Code, is amended—

(A) in subsection (b)(1)—

<< 18 USCA § 3624 >>

(i) by striking ", beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term," and inserting "of up to 54 days for each year of the prisoner's sentence imposed by the court,"; and

<< 18 USCA § 3624 >>

(ii) by striking "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence" and inserting "credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment"; and

(B) by adding at the end the following:

<< 18 USCA § 3624 >>

"(g) PRERELEASE CUSTODY OR SUPERVISED RELEASE FOR RISK AND NEEDS ASSESSMENT SYSTEM PARTICIPANTS.—

"(1) ELIGIBLE PRISONERS.—This subsection applies in the case of a prisoner (as such term is defined in section 3635) who—

"(A) has earned time credits under the risk and needs assessment system developed under subchapter D (referred to in this subsection as the 'System') in an amount that is equal to the remainder of the prisoner's imposed term of imprisonment;

"(B) has shown through the periodic risk reassessments a demonstrated recidivism risk reduction or has maintained a minimum or low recidivism risk, during the prisoner's term of imprisonment;

"(C) has had the remainder of the prisoner's imposed term of imprisonment computed under applicable law; and

"(D)(i) in the case of a prisoner being placed in prerelease custody, the prisoner—

"(I) has been determined under the System to be a minimum or low risk to recidivate pursuant to the last 2 reassessments of the prisoner; or

"(II) has had a petition to be transferred to prerelease custody or supervised release approved by the warden of the prison, after the warden's determination that—

"(aa) the prisoner would not be a danger to society if transferred to prerelease custody or supervised release;

"(bb) the prisoner has made a good faith effort to lower their recidivism risk through participation in recidivism reduction programs or productive activities; and

***5211**

"(cc) the prisoner is unlikely to recidivate; or

"(ii) in the case of a prisoner being placed in supervised release, the prisoner has been determined under the System to be a minimum or low risk to recidivate pursuant to the last reassessment of the prisoner.

"(2) TYPES OF PRERELEASE CUSTODY.—A prisoner shall be placed in prerelease custody as follows:

"(A) HOME CONFINEMENT.—

"(i) IN GENERAL.—A prisoner placed in prerelease custody pursuant to this subsection who is placed in home confinement shall—

"(I) be subject to 24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time, in the case of any violation of subclause (II);

"(II) remain in the prisoner's residence, except that the prisoner may leave the prisoner's home in order to, subject to the approval of the Director of the Bureau of Prisons—

"(aa) perform a job or job-related activities, including an apprenticeship, or participate in job-seeking activities;

"(bb) participate in evidence-based recidivism reduction programming or productive activities assigned by the System, or similar activities;

"(cc) perform community service;

"(dd) participate in crime victim restoration activities;

"(ee) receive medical treatment;

"(ff) attend religious activities; or

"(gg) participate in other family-related activities that facilitate the prisoner's successful reentry such as a family funeral, a family wedding, or to visit a family member who is seriously ill; and

"(III) comply with such other conditions as the Director determines appropriate.

"(ii) ALTERNATE MEANS OF MONITORING.—If the electronic monitoring of a prisoner described in clause (i)(I) is infeasible for technical or religious reasons, the Director of the Bureau of Prisons may use alternative means of monitoring a prisoner placed in home confinement that the Director determines are as effective or more effective than the electronic monitoring described in clause (i)(I).

"(iii) MODIFICATIONS.—The Director of the Bureau of Prisons may modify the conditions described in clause (i) if the Director determines that a compelling reason exists to do so, and that the prisoner has demonstrated exemplary compliance with such conditions.

"(iv) DURATION.—Except as provided in paragraph (4), a prisoner who is placed in home confinement shall remain in home confinement until the prisoner has served not less than 85 percent of the prisoner's imposed term of imprisonment.

***5212**

"(B) RESIDENTIAL REENTRY CENTER.—A prisoner placed in prerelease custody pursuant to this subsection who is placed at a residential reentry center shall be subject to such conditions as the Director of the Bureau of Prisons determines appropriate.

"(3) SUPERVISED RELEASE.—If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to section 3583, the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632.

"(4) DETERMINATION OF CONDITIONS.—In determining appropriate conditions for prisoners placed in prerelease custody pursuant to this subsection, the Director of the Bureau of Prisons shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody, so as to most effectively prepare such prisoners for reentry.

"(5) VIOLATIONS OF CONDITIONS.—If a prisoner violates a condition of the prisoner's prerelease custody, the Director of the Bureau of Prisons may impose such additional conditions on the prisoner's prerelease custody as the Director of the Bureau of Prisons determines appropriate, or revoke the prisoner's prerelease custody and require the prisoner to serve the remainder of the term of imprisonment to which the prisoner was sentenced, or any portion thereof, in prison. If the violation is nontechnical in nature, the Director of the Bureau of Prisons shall revoke the prisoner's prerelease custody.

"(6) ISSUANCE OF GUIDELINES.—The Attorney General, in consultation with the Assistant Director for the Office of Probation and Pretrial Services, shall issue guidelines for use by the Bureau of Prisons in determining—

"(A) the appropriate type of prerelease custody or supervised release and level of supervision for a prisoner placed on prerelease custody pursuant to this subsection; and

"(B) consequences for a violation of a condition of such prerelease custody by such a prisoner, including a return to prison and a reassessment of evidence-based recidivism risk level under the System.

"(7) AGREEMENTS WITH UNITED STATES PROBATION AND PRETRIAL SERVICES.—The Director of the Bureau of Prisons shall, to the greatest extent practicable, enter into agreements with United States Probation and Pretrial Services to supervise prisoners placed in home confinement under this subsection. Such agreements shall—

"(A) authorize United States Probation and Pretrial Services to exercise the authority granted to the Director pursuant to paragraphs (3) and (4); and

"(B) take into account the resource requirements of United States Probation and Pretrial Services as a result of the transfer of Bureau of Prisons prisoners to prerelease custody or supervised release.

***5213**

"(8) ASSISTANCE.—United States Probation and Pretrial Services shall, to the greatest extent practicable, offer assistance to any prisoner not under its supervision during prerelease custody under this subsection.

"(9) MENTORING, REENTRY, AND SPIRITUAL SERVICES.—Any prerelease custody into which a prisoner is placed under this subsection may not include a condition prohibiting the prisoner from receiving mentoring, reentry, or spiritual services from a person who provided such services to the prisoner while the prisoner was incarcerated, except that the warden of the facility at which the prisoner was incarcerated may waive the requirement under this paragraph if the warden finds that the provision of such services would pose a significant security risk to the prisoner, persons who provide such services, or any other person. The warden shall provide written notice of any such waiver to the person providing such services and to the prisoner.

"(10) TIME LIMITS INAPPLICABLE.—The time limits under subsections (b) and (c) shall not apply to prerelease custody under this subsection.

"(11) PRERELEASE CUSTODY CAPACITY.—The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.".

<< 18 USCA § 3624 NOTE >>

(2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act.

<< 18 USCA § 3624 NOTE >>

(3) APPLICABILITY.—The amendments made by this subsection shall apply with respect to offenses committed before, on, or after the date of enactment of this Act, except that such amendments shall not apply with respect to offenses committed before November 1, 1987.

<< 18 USCA § 3621 NOTE >>

SEC. 103. GAO REPORT.

Not later than 2 years after the Director of the Bureau of Prisons implements the risk and needs assessment system under section 3621 of title 18, United States Code, and every 2 years thereafter, the Comptroller General of the United States shall conduct an audit of the use of the risk and needs assessment system at Bureau of Prisons facilities. The audit shall include analysis of the following:

(1) Whether inmates are being assessed under the risk and needs assessment system with the frequency required under such section 3621 of title 18, United States Code.

(2) Whether the Bureau of Prisons is able to offer recidivism reduction programs and productive activities (as such terms are defined in section 3635 of title 18, United States Code, as added by section 101(a) of this Act).

(3) Whether the Bureau of Prisons is offering the type, amount, and intensity of recidivism reduction programs and productive activities for prisoners to earn the maximum amount of time credits for which they are eligible.

(4) Whether the Attorney General is carrying out the duties under section 3631(b) of title 18, United States Code, as added by section 101(a) of this Act.

***5214**

(5) Whether officers and employees of the Bureau of Prisons are receiving the training described in section 3632(f) of title 18, United States Code, as added by section 101(a) of this Act.

(6) Whether the Bureau of Prisons offers work assignments to all prisoners who might benefit from such an assignment.

(7) Whether the Bureau of Prisons transfers prisoners to prerelease custody or supervised release as soon as they are eligible for such a transfer under section 3624(g) of title 18, United States Code, as added by section 102(b) of this Act.

(8) The rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates.

SEC. 104. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There is authorized to be appropriated to carry out this title $75,000,000 for each of fiscal years 2019 through 2023. Of the amount appropriated under this subsection, 80 percent shall be reserved for use by the Director of the Bureau of Prisons to implement the system under section 3621(h) of title 18, United States Code, as added by section 102(a) of this Act.

(b) SAVINGS.—It is the sense of Congress that any savings associated with reductions in recidivism that result from this title should be reinvested—

(1) to supplement funding for programs that increase public safety by providing resources to State and local law enforcement officials, including for the adoption of innovative technologies and information sharing capabilities;

(2) into evidence-based recidivism reduction programs offered by the Bureau of Prisons; and

(3) into ensuring eligible prisoners have access to such programs and productive activities offered by the Bureau of Prisons.

<< 18 USCA § 3621 NOTE >>

SEC. 105. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, may be construed to provide authority to place a prisoner in prerelease custody or supervised release who is serving a term of imprisonment pursuant to a conviction for an offense under the laws of one of the 50 States, or of a territory or possession of the United States or to amend or affect the enforcement of the immigration laws, as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101).

<< 18 USCA § 3621 NOTE >>

SEC. 106. FAITH-BASED CONSIDERATIONS.

(a) IN GENERAL.—In considering any program, treatment, regimen, group, company, charity, person, or entity of any kind under any provision of this Act, or the amendments made by this Act, the fact that it may be or is faith-based may not be a basis for any discrimination against it in any manner or for any purpose.

(b) ELIGIBILITY FOR EARNED TIME CREDIT.—Participation in a faith-based program, treatment, or regimen may qualify a prisoner for earned time credit under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act, however, the Director of the Bureau of Prisons shall ensure that non-faith-based programs that qualify for earned time credit are ***5215** offered at each Bureau of Prisons facility in addition to any such faith-based programs.

(c) LIMITATION ON ACTIVITIES.—A group, company, charity, person, or entity may not engage in explicitly religious activities using direct financial assistance made available under this title or the amendments made by this title.

(d) RULE OF CONSTRUCTION.—Nothing in this Act, or the amendments made by this Act, may be construed to amend any requirement under Federal law or the Constitution of the United States regarding funding for faith-based programs or activities.

<< 18 USCA § 3631 NOTE >>

SEC. 107. INDEPENDENT REVIEW COMMITTEE.

(a) IN GENERAL.—The Attorney General shall consult with an Independent Review Committee in carrying out the Attorney General's duties under sections 3631(b), 3632 and 3633 of title 18, United States Code, as added by section 101(a) of this Act.

(b) FORMATION OF INDEPENDENT REVIEW COMMITTEE.—The National Institute of Justice shall select a nonpartisan and nonprofit organization with expertise in the study and development of risk and needs assessment tools to host the Independent Review Committee. The Independent Review Committee shall be established not later than 30 days after the date of enactment of this Act.

(c) APPOINTMENT OF INDEPENDENT REVIEW COMMITTEE.—The organization selected by the National Institute of Justice shall appoint not fewer than 6 members to the Independent Review Committee.

(d) COMPOSITION OF THE INDEPENDENT REVIEW COMMITTEE.—The members of the Independent Review Committee shall all have expertise in risk and needs assessment systems and shall include—

(1) 2 individuals who have published peer-reviewed scholarship about risk and needs assessments in both corrections and community settings;

(2) 2 corrections practitioners who have developed and implemented a risk assessment tool in a corrections system or in a community supervision setting, including 1 with prior experience working within the Bureau of Prisons; and

(3) 1 individual with expertise in assessing risk assessment implementation.

(e) DUTIES OF THE INDEPENDENT REVIEW COMMITTEE.—The Independent Review Committee shall assist the Attorney General in carrying out the Attorney General's duties under sections 3631(b), 3632 and 3633 of title 18, United States Code, as added by section 101(a) of this Act, including by assisting in—

(1) conducting a review of the existing prisoner risk and needs assessment systems in operation on the date of enactment of this Act;

(2) developing recommendations regarding evidence-based recidivism reduction programs and productive activities;

(3) conducting research and data analysis on—

(A) evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools;

(B) the most effective and efficient uses of such programs; and

(C) which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and ***5216** the type, amount, and intensity of programming that most effectively reduces the risk of recidivism; and

(4) reviewing and validating the risk and needs assessment system.

(f) BUREAU OF PRISONS COOPERATION.—The Director of the Bureau of Prisons shall assist the Independent Review Committee in performing the Committee's duties and promptly respond to requests from the Committee for access to Bureau of Prisons facilities, personnel, and information.

(g) REPORT.—Not later than 2 years after the date of enactment of this Act, the Independent Review Committee shall submit to the Committee on the Judiciary and the Subcommittee on Commerce, Justice, Science, and Related Agencies of the Committee on Appropriations of the Senate and the Committee on the Judiciary and the Subcommittee on Commerce, Justice, Science, and Related Agencies of the Committee on Appropriations of the House of Representatives a report that includes—

(1) a list of all offenses of conviction for which prisoners were ineligible to receive time credits under section 3632(d)(4)(D) of title 18, United States Code, as added by section 101(a) of this Act, and for each offense the number of prisoners excluded, including demographic percentages by age, race, and sex;

(2) the criminal history categories of prisoners ineligible to receive time credits under section 3632(d)(4)(D) of title 18, United States Code, as added by section 101(a) of this Act, and for each category the number of prisoners excluded, including demographic percentages by age, race, and sex;

(3) the number of prisoners ineligible to apply time credits under section 3632(d)(4)(D) of title 18, United States Code, as added by section 101(a) of this Act, who do not participate in recidivism reduction programming or productive activities, including the demographic percentages by age, race, and sex;

(4) any recommendations for modifications to section 3632(d)(4)(D) of title 18, United States Code, as added by section 101(a) of this Act, and any other recommendations regarding recidivism reduction.

(h) TERMINATION.—The Independent Review Committee shall terminate on the date that is 2 years after the date on which the risk and needs assessment system authorized by sections 3632 and 3633 of title 18, United States Code, as added by section 101(a) of this Act, is released.

TITLE II—BUREAU OF PRISONS SECURE FIREARMS STORAGE

SEC. 201. SHORT TITLE.

<< 18 USCA § 1 NOTE >>

This title may be cited as the "Lieutenant Osvaldo Albarati Correctional Officer Self-Protection Act of 2018".

SEC. 202. SECURE FIREARMS STORAGE.

(a) IN GENERAL.—Chapter 303 of title 18, United States Code, is amended by adding at the end the following:

<< 18 USCA § 4050 >>

§ 4050. Secure firearms storage

"(a) DEFINITIONS.—In this section—

***5217**

"(1) the term 'employee' means a qualified law enforcement officer employed by the Bureau of Prisons; and

"(2) the terms 'firearm' and 'qualified law enforcement officer' have the meanings given those terms under section 926B.

"(b) SECURE FIREARMS STORAGE.—The Director of the Bureau of Prisons shall ensure that each chief executive officer of a Federal penal or correctional institution—

"(1)(A) provides a secure storage area located outside of the secure perimeter of the institution for employees to store firearms; or

"(B) allows employees to store firearms in a vehicle lockbox approved by the Director of the Bureau of Prisons; and

"(2) notwithstanding any other provision of law, allows employees to carry concealed firearms on the premises outside of the secure perimeter of the institution.

<< 18 USCA T. 18 pt. III ch. 303 prec. § 4041 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 303 of title 18, United States Code, is amended by adding at the end the following:

"4050. Secure firearms storage.".

TITLE III—RESTRAINTS ON PREGNANT PRISONERS PROHIBITED

SEC. 301. USE OF RESTRAINTS ON PRISONERS DURING THE PERIOD OF PREGNANCY AND POSTPARTUM RECOVERY PROHIBITED.

(a) IN GENERAL.—Chapter 317 of title 18, United States Code, is amended by inserting after section 4321 the following:

<< 18 USCA § 4322 >>

§ 4322. Use of restraints on prisoners during the period of pregnancy, labor, and postpartum recovery prohibited

"(a) PROHIBITION.—Except as provided in subsection (b), beginning on the date on which pregnancy is confirmed by a healthcare professional, and ending at the conclusion of postpartum recovery, a prisoner in the custody of the Bureau of Prisons, or in the custody of the United States Marshals Service pursuant to section 4086, shall not be placed in restraints.

"(b) EXCEPTIONS.—

"(1) IN GENERAL.—The prohibition under subsection (a) shall not apply if—

"(A) an appropriate corrections official, or a United States marshal, as applicable, makes a determination that the prisoner —

"(i) is an immediate and credible flight risk that cannot reasonably be prevented by other means; or

"(ii) poses an immediate and serious threat of harm to herself or others that cannot reasonably be prevented by other means; or

"(B) a healthcare professional responsible for the health and safety of the prisoner determines that the use of restraints is appropriate for the medical safety of the prisoner.

***5218**

"(2) LEAST RESTRICTIVE RESTRAINTS.—In the case that restraints are used pursuant to an exception under paragraph (1), only the least restrictive restraints necessary to prevent the harm or risk of escape described in paragraph (1) may be used.

"(3) APPLICATION.—

"(A) IN GENERAL.—The exceptions under paragraph (1) may not be applied—

"(i) to place restraints around the ankles, legs, or waist of a prisoner;

"(ii) to restrain a prisoner's hands behind her back;

"(iii) to restrain a prisoner using 4-point restraints; or

"(iv) to attach a prisoner to another prisoner.

"(B) MEDICAL REQUEST.—Notwithstanding paragraph (1), upon the request of a healthcare professional who is responsible for the health and safety of a prisoner, a corrections official or United States marshal, as applicable, shall refrain from using restraints on the prisoner or shall remove restraints used on the prisoner.

"(c) REPORTS.—

"(1) REPORT TO THE DIRECTOR AND HEALTHCARE PROFESSIONAL.—If a corrections official or United States marshal uses restraints on a prisoner under subsection (b)(1), that official or marshal shall submit, not later than 30 days after placing the prisoner in restraints, to the Director of the Bureau of Prisons or the Director of the United States Marshals Service, as applicable, and to the healthcare professional responsible for the health and safety of the prisoner, a written report that describes the facts and circumstances surrounding the use of restraints, and includes—

"(A) the reasoning upon which the determination to use restraints was made;

"(B) the details of the use of restraints, including the type of restraints used and length of time during which restraints were used; and

"(C) any resulting physical effects on the prisoner observed by or known to the corrections official or United States marshal, as applicable.

"(2) SUPPLEMENTAL REPORT TO THE DIRECTOR.—Upon receipt of a report under paragraph (1), the healthcare professional responsible for the health and safety of the prisoner may submit to the Director such information as the healthcare professional determines is relevant to the use of restraints on the prisoner.

"(3) REPORT TO JUDICIARY COMMITTEES.—

"(A) IN GENERAL.—Not later than 1 year after the date of enactment of this section, and annually thereafter, the Director of the Bureau of Prisons and the Director of the United States Marshals Service shall each submit to the Judiciary Committee of the Senate and of the House of Representatives a report that certifies compliance with this section and includes the information required to be reported under paragraph (1).

"(B) PERSONALLY IDENTIFIABLE INFORMATION.—The report under this paragraph shall not contain any personally identifiable information of any prisoner.

***5219**

"(d) NOTICE.—Not later than 48 hours after the confirmation of a prisoner's pregnancy by a healthcare professional, that prisoner shall be notified by an appropriate healthcare professional, corrections official, or United States marshal, as applicable, of the restrictions on the use of restraints under this section.

"(e) VIOLATION REPORTING PROCESS.—The Director of the Bureau of Prisons, in consultation with the Director of the United States Marshals Service, shall establish a process through which a prisoner may report a violation of this section.

"(f) TRAINING.—

"(1) IN GENERAL.—The Director of the Bureau of Prisons and the Director of the United States Marshals Service shall each develop training guidelines regarding the use of restraints on female prisoners during the period of pregnancy, labor, and postpartum recovery, and shall incorporate such guidelines into appropriate training programs. Such training guidelines shall include—

"(A) how to identify certain symptoms of pregnancy that require immediate referral to a healthcare professional;

"(B) circumstances under which the exceptions under subsection (b) would apply;

"(C) in the case that an exception under subsection (b) applies, how to apply restraints in a way that does not harm the prisoner, the fetus, or the neonate;

"(D) the information required to be reported under subsection (c); and

"(E) the right of a healthcare professional to request that restraints not be used, and the requirement under subsection (b)(3)(B) to comply with such a request.

"(2) DEVELOPMENT OF GUIDELINES.—In developing the guidelines required by paragraph (1), the Directors shall each consult with healthcare professionals with expertise in caring for women during the period of pregnancy and postpartum recovery.

"(g) DEFINITIONS.—For purposes of this section:

"(1) POSTPARTUM RECOVERY.—The term 'postpartum recovery' means the 12-week period, or longer as determined by the healthcare professional responsible for the health and safety of the prisoner, following delivery, and shall include the entire period that the prisoner is in the hospital or infirmary.

"(2) PRISONER.—The term 'prisoner' means a person who has been sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons, including a person in a Bureau of Prisons contracted facility.

"(3) RESTRAINTS.—The term 'restraints' means any physical or mechanical device used to control the movement of a prisoner's body, limbs, or both.".

***5220**

<< 18 USCA T. 18 pt. III ch. 317 prec. § 4321 >>

(b) CLERICAL AMENDMENT.—The table of sections for chapter 317 of title 18, United States Code, is amended by adding after the item relating to section 4321 the following:

"4322. Use of restraints on prisoners during the period of pregnancy, labor, and postpartum recovery prohibited.".

TITLE IV—SENTENCING REFORM

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

<< 21 USCA § 802 >>

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

<< 21 USCA § 802 >>

"(58) The term 'serious violent felony' means—

"(A) an offense described in section 3559(c)(2) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; and

"(B) any offense that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months."; and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

<< 21 USCA § 841 >>

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

<< 21 USCA § 841 >>

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

<< 21 USCA § 841 >>

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits ***5221** such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT AMENDMENTS.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

<< 21 USCA § 960 >>

(1) in paragraph (1), in the matter following subparagraph (H), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

<< 21 USCA § 960 >>

(2) in paragraph (2), in the matter following subparagraph (H), by striking "felony drug offense" and inserting "serious drug felony or serious violent felony".

<< 21 USCA § 802 NOTE >>

(c) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) in the matter preceding paragraph (1)—

<< 18 USCA § 3553 >>

(i) by striking "or section 1010" and inserting ", section 1010"; and

<< 18 USCA § 3553 >>

(ii) by inserting ", or section 70503 or 70506 of title 46" after "963)";

(B) by striking paragraph (1) and inserting the following:

<< 18 USCA § 3553 >>

"(1) the defendant does not have—

"(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

"(B) a prior 3-point offense, as determined under the sentencing guidelines; and

"(C) a prior 2-point violent offense, as determined under the sentencing guidelines;"; and

(C) by adding at the end the following:

<< 18 USCA § 3553 >>

"Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."; and

(2) by adding at the end the following:

<< 18 USCA § 3553 >>

"(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term 'violent offense' means a crime of violence, as defined in section 16, that is punishable by imprisonment.".

<< 18 USCA § 3553 NOTE >>

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

SEC. 403. CLARIFICATION OF SECTION 924(C) OF TITLE 18, UNITED STATES CODE.

<< 18 USCA § 924 >>

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and ***5222** inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

<< 18 USCA § 924 NOTE >>

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

<< 21 USCA § 841 NOTE >>

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

TITLE V—SECOND CHANCE ACT OF 2007 REAUTHORIZATION

SEC. 501. SHORT TITLE.

<< 34 USCA § 10101 NOTE >>

This title may be cited as the "Second Chance Reauthorization Act of 2018".

SEC. 502. IMPROVEMENTS TO EXISTING PROGRAMS.

(a) REAUTHORIZATION OF ADULT AND JUVENILE OFFENDER STATE AND LOCAL DEMONSTRATION PROJECTS.—Section 2976 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10631) is amended —

(1) by striking subsection (a) and inserting the following:

<< 34 USCA § 10631 >>

"(a) GRANT AUTHORIZATION.—The Attorney General shall make grants to States, local governments, territories, or Indian tribes, or any combination thereof (in this section referred to as an 'eligible entity'), in partnership with interested persons (including Federal corrections and supervision agencies), service providers, and nonprofit organizations for the purpose of strategic planning and implementation of adult and juvenile offender reentry projects.";

(2) in subsection (b)—

<< 34 USCA § 10631 >>

(A) in paragraph (3), by inserting "or reentry courts," after "community,";

<< 34 USCA § 10631 >>

(B) in paragraph (6), by striking "and" at the end;

<< 34 USCA § 10631 >>

(C) in paragraph (7), by striking the period at the end and inserting "; and"; and

***5223**

(D) by adding at the end the following:

<< 34 USCA § 10631 >>

"(8) promoting employment opportunities consistent with the Transitional Jobs strategy (as defined in section 4 of the Second Chance Act of 2007 (34 U.S.C. 60502))."; and

(3) by striking subsections (d), (e), and (f) and inserting the following:

<< 34 USCA § 10631 >>

"(d) COMBINED GRANT APPLICATION; PRIORITY CONSIDERATION.—

"(1) IN GENERAL.—The Attorney General shall develop a procedure to allow applicants to submit a single application for a planning grant under subsection (e) and an implementation grant under subsection (f).

"(2) PRIORITY CONSIDERATION.—The Attorney General shall give priority consideration to grant applications under subsections (e) and (f) that include a commitment by the applicant to partner with a local evaluator to identify and analyze data that will—

"(A) enable the grantee to target the intended offender population; and

"(B) serve as a baseline for purposes of the evaluation.

<< 34 USCA § 10631 >>

"(e) PLANNING GRANTS.—

"(1) IN GENERAL.—Except as provided in paragraph (3), the Attorney General may make a grant to an eligible entity of not more than $75,000 to develop a strategic, collaborative plan for an adult or juvenile offender reentry demonstration project as described in subsection (h) that includes—

"(A) a budget and a budget justification;

"(B) a description of the outcome measures that will be used to measure the effectiveness of the program in promoting public safety and public health;

"(C) the activities proposed;

"(D) a schedule for completion of the activities described in subparagraph (C); and

"(E) a description of the personnel necessary to complete the activities described in subparagraph (C).

"(2) MAXIMUM TOTAL GRANTS AND GEOGRAPHIC DIVERSITY.—

"(A) MAXIMUM AMOUNT.—The Attorney General may not make initial planning grants and implementation grants to 1 eligible entity in a total amount that is more than a $1,000,000.

"(B) GEOGRAPHIC DIVERSITY.—The Attorney General shall make every effort to ensure equitable geographic distribution of grants under this section and take into consideration the needs of underserved populations, including rural and tribal communities.

"(3) PERIOD OF GRANT.—A planning grant made under this subsection shall be for a period of not longer than 1 year, beginning on the first day of the month in which the planning grant is made.

<< 34 USCA § 10631 >>

"(f) IMPLEMENTATION GRANTS.—

"(1) APPLICATIONS.—An eligible entity desiring an implementation grant under this subsection shall submit to the Attorney General an application that—

"(A) contains a reentry strategic plan as described in subsection (h), which describes the long-term strategy and incorporates a detailed implementation schedule, including ***5224** the plans of the applicant to fund the program after Federal funding is discontinued;

"(B) identifies the local government role and the role of governmental agencies and nonprofit organizations that will be coordinated by, and that will collaborate on, the offender reentry strategy of the applicant, and certifies the involvement of such agencies and organizations;

"(C) describes the evidence-based methodology and outcome measures that will be used to evaluate the program funded with a grant under this subsection, and specifically explains how such measurements will provide valid measures of the impact of that program; and

"(D) describes how the project could be broadly replicated if demonstrated to be effective.

"(2) REQUIREMENTS.—The Attorney General may make a grant to an applicant under this subsection only if the application—

"(A) reflects explicit support of the chief executive officer, or their designee, of the State, unit of local government, territory, or Indian tribe applying for a grant under this subsection;

"(B) provides discussion of the role of Federal corrections, State corrections departments, community corrections agencies, juvenile justice systems, and tribal or local jail systems in ensuring successful reentry of offenders into their communities;

"(C) provides evidence of collaboration with State, local, or tribal government agencies overseeing health, housing, child welfare, education, substance abuse, victims services, and employment services, and with local law enforcement agencies;

"(D) provides a plan for analysis of the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community;

"(E) includes the use of a State, local, territorial, or tribal task force, described in subsection (i), to carry out the activities funded under the grant;

"(F) provides a plan for continued collaboration with a local evaluator as necessary to meeting the requirements under subsection (h); and

"(G) demonstrates that the applicant participated in the planning grant process or engaged in comparable planning for the reentry project.

"(3) PRIORITY CONSIDERATIONS.—The Attorney General shall give priority to grant applications under this subsection that best—

"(A) focus initiative on geographic areas with a disproportionate population of offenders released from prisons, jails, and juvenile facilities;

"(B) include—

"(i) input from nonprofit organizations, in any case where relevant input is available and appropriate to the grant application;

"(ii) consultation with crime victims and offenders who are released from prisons, jails, and juvenile facilities;

"(iii) coordination with families of offenders;

***5225**

"(iv) input, where appropriate, from the juvenile justice coordinating council of the region;

"(v) input, where appropriate, from the reentry coordinating council of the region; or

"(vi) input, where appropriate, from other interested persons;

"(C) demonstrate effective case assessment and management abilities in order to provide comprehensive and continuous reentry, including—

"(i) planning for prerelease transitional housing and community release that begins upon admission for juveniles and jail inmates, and, as appropriate, for prison inmates, depending on the length of the sentence;

"(ii) establishing prerelease planning procedures to ensure that the eligibility of an offender for Federal, tribal, or State benefits upon release is established prior to release, subject to any limitations in law, and to ensure that offenders obtain all necessary referrals for reentry services, including assistance identifying and securing suitable housing; or

"(iii) delivery of continuous and appropriate mental health services, drug treatment, medical care, job training and placement, educational services, vocational services, and any other service or support needed for reentry;

"(D) review the process by which the applicant adjudicates violations of parole, probation, or supervision following release from prison, jail, or a juvenile facility, taking into account public safety and the use of graduated, community-based sanctions for minor and technical violations of parole, probation, or supervision (specifically those violations that are not otherwise, and independently, a violation of law);

"(E) provide for an independent evaluation of reentry programs that include, to the maximum extent possible, random assignment and controlled studies to determine the effectiveness of such programs;

"(F) target moderate and high-risk offenders for reentry programs through validated assessment tools; or

"(G) target offenders with histories of homelessness, substance abuse, or mental illness, including a prerelease assessment of the housing status of the offender and behavioral health needs of the offender with clear coordination with mental health, substance abuse, and homelessness services systems to achieve stable and permanent housing outcomes with appropriate support service.

"(4) PERIOD OF GRANT.—A grant made under this subsection shall be effective for a 2-year period—

"(A) beginning on the date on which the planning grant awarded under subsection (e) concludes; or

"(B) in the case of an implementation grant awarded to an eligible entity that did not receive a planning grant, beginning on the date on which the implementation grant is awarded.";

(4) in subsection (h)—

***5226**

<< 34 USCA § 10631 >>

(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and

(B) by striking paragraph (1) and inserting the following:

<< 34 USCA § 10631 >>

"(1) IN GENERAL.—As a condition of receiving financial assistance under subsection (f), each application shall develop a comprehensive reentry strategic plan that—

"(A) contains a plan to assess inmate reentry needs and measurable annual and 3-year performance outcomes;

"(B) uses, to the maximum extent possible, randomly assigned and controlled studies, or rigorous quasi-experimental studies with matched comparison groups, to determine the effectiveness of the program funded with a grant under subsection (f); and

"(C) includes as a goal of the plan to reduce the rate of recidivism for offenders released from prison, jail or a juvenile facility with funds made available under subsection (f).

<< 34 USCA § 10631 >>

"(2) LOCAL EVALUATOR.—A partnership with a local evaluator described in subsection (d)(2) shall require the local evaluator to use the baseline data and target population characteristics developed under a subsection (e) planning grant to derive a target goal for recidivism reduction during the 3-year period beginning on the date of implementation of the program.";

(5) in subsection (i)(1)—

<< 34 USCA § 10631 >>

(A) in the matter preceding subparagraph (A), by striking "under this section" and inserting "under subsection (f)"; and

<< 34 USCA § 10631 >>

(B) in subparagraph (B), by striking "subsection (e)(4)" and inserting "subsection (f)(2)(D)";

(6) in subsection (j)—

<< 34 USCA § 10631 >>

(A) in paragraph (1), by inserting "for an implementation grant under subsection (f)" after "applicant";

(B) in paragraph (2)—

<< 34 USCA § 10631 >>

(i) in subparagraph (E), by inserting ", where appropriate" after "support"; and

(ii) by striking subparagraphs (F), (G), and (H), and inserting the following:

<< 34 USCA § 10631 >>

"(F) increased number of staff trained to administer reentry services;

<< 34 USCA § 10631 >>

"(G) increased proportion of individuals served by the program among those eligible to receive services;

<< 34 USCA § 10631 >>

"(H) increased number of individuals receiving risk screening needs assessment, and case planning services;

<< 34 USCA § 10631 >>

"(I) increased enrollment in, and completion of treatment services, including substance abuse and mental health services among those assessed as needing such services;

<< 34 USCA § 10631 >>

"(J) increased enrollment in and degrees earned from educational programs, including high school, GED, vocational training, and college education;

<< 34 USCA § 10631 >>

"(K) increased number of individuals obtaining and retaining employment;

<< 34 USCA § 10631 >>

"(L) increased number of individuals obtaining and maintaining housing;

***5227**

<< 34 USCA § 10631 >>

"(M) increased self-reports of successful community living, including stability of living situation and positive family relationships;

<< 34 USCA § 10631 >>

"(N) reduction in drug and alcohol use; and

<< 34 USCA § 10631 >>

"(O) reduction in recidivism rates for individuals receiving reentry services after release, as compared to either baseline recidivism rates in the jurisdiction of the grantee or recidivism rates of the control or comparison group.";

<< 34 USCA § 10631 >>

(C) in paragraph (3), by striking "facilities." and inserting "facilities, including a cost-benefit analysis to determine the cost effectiveness of the reentry program.";

<< 34 USCA § 10631 >>

(D) in paragraph (4), by striking "this section" and inserting "subsection (f)"; and

<< 34 USCA § 10631 >>

(E) in paragraph (5), by striking "this section" and inserting "subsection (f)";

<< 34 USCA § 10631 >>

(7) in subsection (k)(1), by striking "this section" each place the term appears and inserting "subsection (f)";

(8) in subsection (l)—

<< 34 USCA § 10631 >>

(A) in paragraph (2), by inserting "beginning on the date on which the most recent implementation grant is made to the grantee under subsection (f)" after "2-year period"; and

<< 34 USCA § 10631 >>

(B) in paragraph (4), by striking "over a 2-year period" and inserting "during the 2-year period described in paragraph (2)";

<< 34 USCA § 10631 >>

(9) in subsection (o)(1), by striking "appropriated" and all that follows and inserting the following: "appropriated $35,000,000 for each of fiscal years 2019 through 2023."; and

(10) by adding at the end the following:

<< 34 USCA § 10631 >>

"(p) DEFINITION.—In this section, the term 'reentry court' means a program that—

"(1) monitors juvenile and adult eligible offenders reentering the community;

"(2) provides continual judicial supervision;

"(3) provides juvenile and adult eligible offenders reentering the community with coordinated and comprehensive reentry services and programs, such as—

"(A) drug and alcohol testing and assessment for treatment;

"(B) assessment for substance abuse from a substance abuse professional who is approved by the State or Indian tribe and licensed by the appropriate entity to provide alcohol and drug addiction treatment, as appropriate;

"(C) substance abuse treatment, including medication-assisted treatment, from a provider that is approved by the State or Indian tribe, and licensed, if necessary, to provide medical and other health services;

"(D) health (including mental health) services and assessment;

"(E) aftercare and case management services that—

"(i) facilitate access to clinical care and related health services; and

"(ii) coordinate with such clinical care and related health services; and

"(F) any other services needed for reentry;

***5228**

"(4) convenes community impact panels, victim impact panels, or victim impact educational classes;

"(5) provides and coordinates the delivery of community services to juvenile and adult eligible offenders, including—

"(A) housing assistance;

"(B) education;

"(C) job training;

"(D) conflict resolution skills training;

"(E) batterer intervention programs; and

"(F) other appropriate social services; and

"(6) establishes and implements graduated sanctions and incentives.".

(b) GRANTS FOR FAMILY-BASED SUBSTANCE ABUSE TREATMENT.—Part DD of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10591 et seq.) is amended—

<< 34 USCA § 10591 >>

(1) in section 2921 (34 U.S.C. 10591), in the matter preceding paragraph (1), by inserting "nonprofit organizations," before "and Indian";

(2) in section 2923 (34 U.S.C. 10593), by adding at the end the following:

<< 34 USCA § 10593 >>

"(c) PRIORITY CONSIDERATIONS.—The Attorney General shall give priority consideration to grant applications for grants under section 2921 that are submitted by a nonprofit organization that demonstrates a relationship with State and local criminal justice agencies, including—

"(1) within the judiciary and prosecutorial agencies; or

"(2) with the local corrections agencies, which shall be documented by a written agreement that details the terms of access to facilities and participants and provides information on the history of the organization of working with correctional populations."; and

(3) by striking section 2926(a) and inserting the following:

<< 42 USCA § 3797s–5 >>

<< 42 USCA § 3797s–5 >>

<< 34 USCA § 10595a >>

"(a) IN GENERAL.—There are authorized to be appropriated to carry out this part $10,000,000 for each of fiscal years 2019 through 2023.".

(c) GRANT PROGRAM TO EVALUATE AND IMPROVE EDUCATIONAL METHODS AT PRISONS, JAILS, AND JUVENILE FACILITIES.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended—

<< 34 USCA § 10681 >>

(1) by striking the second part designated as part JJ, as added by the Second Chance Act of 2007 (Public Law 110–199; 122 Stat. 677), relating to grants to evaluate and improve educational methods at prisons, jails, and juvenile facilities;

(2) by adding at the end the following:

T. 34 subt. I ch. 101 subch. XL prec. § 10741

"PART NN—GRANT PROGRAM TO EVALUATE AND IMPROVE EDUCATIONAL METHODS AT PRISONS, JAILS, AND JUVENILE FACILITIES

<< 34 USCA § 10741 >>

"SEC. 3041. GRANT PROGRAM TO EVALUATE AND IMPROVE EDUCATIONAL METHODS AT PRISONS, JAILS, AND JUVENILE FACILITIES.

"(a) GRANT PROGRAM AUTHORIZED.—The Attorney General may carry out a grant program under which the Attorney General may make grants to States, units of local government, territories, Indian Tribes, and other public and private entities to—

***5229**

"(1) evaluate methods to improve academic and vocational education for offenders in prisons, jails, and juvenile facilities;

"(2) identify, and make recommendations to the Attorney General regarding, best practices relating to academic and vocational education for offenders in prisons, jails, and juvenile facilities, based on the evaluation under paragraph (1);

"(3) improve the academic and vocational education programs (including technology career training) available to offenders in prisons, jails, and juvenile facilities; and

"(4) implement methods to improve academic and vocational education for offenders in prisons, jails, and juvenile facilities consistent with the best practices identified in subsection (c).

"(b) APPLICATION.—To be eligible for a grant under this part, a State or other entity described in subsection (a) shall submit to the Attorney General an application in such form and manner, at such time, and accompanied by such information as the Attorney General specifies.

"(c) BEST PRACTICES.—Not later than 180 days after the date of enactment of the Second Chance Reauthorization Act of 2018, the Attorney General shall identify and publish best practices relating to academic and vocational education for offenders in prisons, jails, and juvenile facilities. The best practices shall consider the evaluations performed and recommendations made under grants made under subsection (a) before the date of enactment of the Second Chance Reauthorization Act of 2018.

"(d) REPORT.—Not later than 90 days after the last day of the final fiscal year of a grant under this part, each entity described in subsection (a) receiving such a grant shall submit to the Attorney General a detailed report of the progress made by the entity using such grant, to permit the Attorney General to evaluate and improve academic and vocational education methods carried out with grants under this part."; and

(3) in section 1001(a) of part J of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10261(a)), by adding at the end the following:

<< 34 USCA § 10261 >>

"(28) There are authorized to be appropriated to carry out section 3031(a)(4) of part NN $5,000,000 for each of fiscal years 2019, 2020, 2021, 2022, and 2023.".

(d) CAREERS TRAINING DEMONSTRATION GRANTS.—Section 115 of the Second Chance Act of 2007 (34 U.S.C. 60511) is amended—

<< 34 USCA § 60511 >>

(1) in the heading, by striking "**TECHNOLOGY CAREERS**" and inserting "**CAREERS**";

(2) in subsection (a)—

<< 34 USCA § 60511 >>

(A) by striking "and Indian" and inserting "nonprofit organizations, and Indian"; and

<< 34 USCA § 60511 >>

(B) by striking "technology career training to prisoners" and inserting "career training, including subsidized employment, when part of a training program, to prisoners and reentering youth and adults";

(3) in subsection (b)—

<< 34 USCA § 60511 >>

(A) by striking "technology careers training";

<< 34 USCA § 60511 >>

(B) by striking "technology-based"; and

<< 34 USCA § 60511 >>

(C) by inserting ", as well as upon transition and reentry into the community" after "facility";

<< 34 USCA § 60511 >>

(4) by striking subsection (e);

***5230**

<< 34 USCA § 60511 >>

(5) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively;

(6) by inserting after subsection (b) the following:

<< 34 USCA § 60511 >>

"(c) PRIORITY CONSIDERATION.—Priority consideration shall be given to any application under this section that—

"(1) provides assessment of local demand for employees in the geographic areas to which offenders are likely to return;

"(2) conducts individualized reentry career planning upon the start of incarceration or post-release employment planning for each offender served under the grant;

"(3) demonstrates connections to employers within the local community; or

"(4) tracks and monitors employment outcomes."; and

(7) by adding at the end the following:

<< 34 USCA § 60511 >>

"(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $10,000,000 for each of fiscal years 2019, 2020, 2021, 2022, and 2023.".

(e) OFFENDER REENTRY SUBSTANCE ABUSE AND CRIMINAL JUSTICE COLLABORATION PROGRAM.—Section 201(f)(1) of the Second Chance Act of 2007 (34 U.S.C. 60521(f)(1)) is amended to read as follows:

<< 34 USCA § 60521 >>

"(1) IN GENERAL.—There are authorized to be appropriated to carry out this section $15,000,000 for each of fiscal years 2019 through 2023.".

(f) COMMUNITY-BASED MENTORING AND TRANSITIONAL SERVICE GRANTS TO NONPROFIT ORGANIZATIONS.—

(1) IN GENERAL.—Section 211 of the Second Chance Act of 2007 (34 U.S.C. 60531) is amended—

<< 34 USCA § 60531 >>

(A) in the header, by striking "**MENTORING GRANTS TO NONPROFIT ORGANIZATIONS**" and inserting "**COMMUNITY-BASED MENTORING AND TRANSITIONAL SERVICE GRANTS TO NONPROFIT ORGANIZATIONS**";

<< 34 USCA § 60531 >>

(B) in subsection (a), by striking "mentoring and other";

(C) in subsection (b), by striking paragraph (2) and inserting the following:

<< 34 USCA § 60531 >>

"(2) transitional services to assist in the reintegration of offenders into the community, including—

"(A) educational, literacy, and vocational, services and the Transitional Jobs strategy;

"(B) substance abuse treatment and services;

"(C) coordinated supervision and services for offenders, including physical health care and comprehensive housing and mental health care;

"(D) family services; and

"(E) validated assessment tools to assess the risk factors of returning inmates; and"; and

<< 34 USCA § 60531 >>

(D) in subsection (f), by striking "this section" and all that follows and inserting the following: "this section $15,000,000 for each of fiscal years 2019 through 2023.".

(2) TABLE OF CONTENTS AMENDMENT.—The table of contents in section 2 of the Second Chance Act of 2007 (Public Law 110–199; 122 Stat. 657) is amended by striking the item relating to section 211 and inserting the following:

"Sec. 211. Community-based mentoring and transitional service grants.".

(g) DEFINITIONS.—

***5231**

(1) IN GENERAL.—Section 4 of the Second Chance Act of 2007 (34 U.S.C. 60502) is amended to read as follows:

<< 34 USCA § 60502 >>

"SEC. 4. DEFINITIONS.

"In this Act—

"(1) the term 'exoneree' means an individual who—

"(A) has been convicted of a Federal, tribal, or State offense that is punishable by a term of imprisonment of more than 1 year;

"(B) has served a term of imprisonment for not less than 6 months in a Federal, tribal, or State prison or correctional facility as a result of the conviction described in subparagraph (A); and

"(C) has been determined to be factually innocent of the offense described in subparagraph (A);

"(2) the term 'Indian tribe' has the meaning given in section 901 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10251);

"(3) the term 'offender' includes an exoneree; and

"(4) the term 'Transitional Jobs strategy' means an employment strategy for youth and adults who are chronically unemployed or those that have barriers to employment that—

"(A) is conducted by State, tribal, and local governments, State, tribal, and local workforce boards, and nonprofit organizations;

"(B) provides time-limited employment using individual placements, team placements, and social enterprise placements, without displacing existing employees;

"(C) pays wages in accordance with applicable law, but in no event less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the applicable State or local minimum wage law, which are subsidized, in whole or in part, by public funds;

"(D) combines time-limited employment with activities that promote skill development, remove barriers to employment, and lead to unsubsidized employment such as a thorough orientation and individual assessment, job readiness and life skills training, case management and supportive services, adult education and training, child support-related services, job retention support and incentives, and other similar activities;

"(E) places participants into unsubsidized employment; and

"(F) provides job retention, re-employment services, and continuing and vocational education to ensure continuing participation in unsubsidized employment and identification of opportunities for advancement.".

(2) TABLE OF CONTENTS AMENDMENT.—The table of contents in section 2 of the Second Chance Act of 2007 (Public Law 110–199; 122 Stat. 657) is amended by striking the item relating to section 4 and inserting the following:

"Sec. 4. Definitions.".

<< 34 USCA § 60504 >>

(h) EXTENSION OF THE LENGTH OF SECTION 2976 GRANTS.—Section 6(1) of the Second Chance Act of 2007 (34 U.S.C. 60504(1)) is amended by inserting "or under section 2976 of the Omnibus ***5232** Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10631)" after "and 212".

<< 34 USCA § 60505 >>

SEC. 503. AUDIT AND ACCOUNTABILITY OF GRANTEES.

(a) DEFINITIONS.—In this section—

(1) the term "covered grant program" means grants awarded under section 115, 201, or 211 of the Second Chance Act of 2007 (34 U.S.C. 60511, 60521, and 60531), as amended by this title;

(2) the term "covered grantee" means a recipient of a grant from a covered grant program;

(3) the term "nonprofit", when used with respect to an organization, means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986, and is exempt from taxation under section 501(a) of such Code; and

(4) the term "unresolved audit finding" means an audit report finding in a final audit report of the Inspector General of the Department of Justice that a covered grantee has used grant funds awarded to that grantee under a covered grant program for an unauthorized expenditure or otherwise unallowable cost that is not closed or resolved during a 12-month period prior to the date on which the final audit report is issued.

(b) AUDIT REQUIREMENT.—Beginning in fiscal year 2019, and annually thereafter, the Inspector General of the Department of Justice shall conduct audits of covered grantees to prevent waste, fraud, and abuse of funds awarded under covered grant programs. The Inspector General shall determine the appropriate number of covered grantees to be audited each year.

(c) MANDATORY EXCLUSION.—A grantee that is found to have an unresolved audit finding under an audit conducted under subsection (b) may not receive grant funds under a covered grant program in the fiscal year following the fiscal year to which the finding relates.

(d) REIMBURSEMENT.—If a covered grantee is awarded funds under the covered grant program from which it received a grant award during the 1-fiscal-year period during which the covered grantee is ineligible for an allocation of grant funds under subsection (c), the Attorney General shall—

(1) deposit into the General Fund of the Treasury an amount that is equal to the amount of the grant funds that were improperly awarded to the covered grantee; and

(2) seek to recoup the costs of the repayment to the Fund from the covered grantee that was improperly awarded the grant funds.

(e) PRIORITY OF GRANT AWARDS.—The Attorney General, in awarding grants under a covered grant program shall give priority to eligible entities that during the 2-year period preceding the application for a grant have not been found to have an unresolved audit finding.

(f) NONPROFIT REQUIREMENTS.—

(1) PROHIBITION.—A nonprofit organization that holds money in offshore accounts for the purpose of avoiding the tax described in section 511(a) of the Internal Revenue Code of 1986, shall not be eligible to receive, directly or indirectly, any funds from a covered grant program.

***5233**

(2) DISCLOSURE.—Each nonprofit organization that is a covered grantee shall disclose in its application for such a grant, as a condition of receipt of such a grant, the compensation of its officers, directors, and trustees. Such disclosure shall include a description of the criteria relied on to determine such compensation.

(g) PROHIBITION ON LOBBYING ACTIVITY.—

(1) IN GENERAL.—Amounts made available under a covered grant program may not be used by any covered grantee to—

(A) lobby any representative of the Department of Justice regarding the award of grant funding; or

(B) lobby any representative of the Federal Government or a State, local, or tribal government regarding the award of grant funding.

(2) PENALTY.—If the Attorney General determines that a covered grantee has violated paragraph (1), the Attorney General shall—

(A) require the covered grantee to repay the grant in full; and

(B) prohibit the covered grantee from receiving a grant under the covered grant program from which it received a grant award during at least the 5-year period beginning on the date of such violation.

SEC. 504. FEDERAL REENTRY IMPROVEMENTS.

<< 34 USCA § 60532 >>

(a) RESPONSIBLE REINTEGRATION OF OFFENDERS.—Section 212 of the Second Chance Act of 2007 (34 U.S.C. 60532) is repealed.

(b) FEDERAL PRISONER REENTRY INITIATIVE.—Section 231 of the Second Chance Act of 2007 (434 U.S.C. 60541) is amended—

(1) in subsection (g)—

<< 34 USCA § 60541 >>

(A) in paragraph (3), by striking "carried out during fiscal years 2009 and 2010" and inserting "carried out during fiscal years 2019 through 2023"; and

<< 34 USCA § 60541 >>

(B) in paragraph (5)(A)(ii), by striking "the greater of 10 years or";

<< 34 USCA § 60541 >>

(2) by striking subsection (h);

<< 34 USCA § 60541 >>

(3) by redesignating subsection (i) as subsection (h); and

<< 34 USCA § 60541 >>

(4) in subsection (h), as so redesignated, by striking "2009 and 2010" and inserting "2019 through 2023".

(c) ENHANCING REPORTING REQUIREMENTS PERTAINING TO COMMUNITY CORRECTIONS.—Section 3624(c) of title 18, United States Code, is amended—

<< 18 USCA § 3624 >>

(1) in paragraph (5), in the second sentence, by inserting ", and number of prisoners not being placed in community corrections facilities for each reason set forth" before ", and any other information"; and

<< 18 USCA § 3624 >>

(2) in paragraph (6), by striking "the Second Chance Act of 2007" and inserting "the Second Chance Reauthorization Act of 2018".

<< 34 USCA § 60554 >>

(d) TERMINATION OF STUDY ON EFFECTIVENESS OF DEPOT NALTREXONE FOR HEROIN ADDICTION.—Section 244 of the Second Chance Act of 2007 (34 U.S.C. 60554) is repealed.

(e) AUTHORIZATION OF APPROPRIATIONS FOR RESEARCH.—Section 245 of the Second Chance Act of 2007 (34 U.S.C. 60555) is amended—

<< 42 USCA § 17555 >>

<< 42 USCA § 17555 >>

<< 34 USCA § 60555 >>

(1) by striking "243, and 244" and inserting "and 243"; and

***5234**

<< 42 USCA § 17555 >>

(2) by striking "$10,000,000 for each of the fiscal years 2009 and 2010" and inserting "$5,000,000 for each of the fiscal years 2019, 2020, 2021, 2022, and 2023".

(f) FEDERAL PRISONER RECIDIVISM REDUCTION PROGRAMMING ENHANCEMENT.—

(1) IN GENERAL.—Section 3621 of title 18, United States Code, as amended by section 102(a) of this Act, is amended—

<< 18 USCA § 3621 >>

(A) by redesignating subsection (g) as subsection (i); and

(B) by inserting after subsection (f) the following:

<< 18 USCA § 3621 >>

"(g) PARTNERSHIPS TO EXPAND ACCESS TO REENTRY PROGRAMS PROVEN TO REDUCE RECIDIVISM.—

"(1) DEFINITION.—The term 'demonstrated to reduce recidivism' means that the Director of Bureau of Prisons has determined that appropriate research has been conducted and has validated the effectiveness of the type of program on recidivism.

"(2) ELIGIBILITY FOR RECIDIVISM REDUCTION PARTNERSHIP.—A faith-based or community-based nonprofit organization that provides mentoring or other programs that have been demonstrated to reduce recidivism is eligible to enter into a recidivism reduction partnership with a prison or community-based facility operated by the Bureau of Prisons.

"(3) RECIDIVISM REDUCTION PARTNERSHIPS.—The Director of the Bureau of Prisons shall develop policies to require wardens of prisons and community-based facilities to enter into recidivism reduction partnerships with faith-based and community-based nonprofit organizations that are willing to provide, on a volunteer basis, programs described in paragraph (2).

"(4) REPORTING REQUIREMENT.—The Director of the Bureau of Prisons shall submit to Congress an annual report on the last day of each fiscal year that—

"(A) details, for each prison and community-based facility for the fiscal year just ended—

"(i) the number of recidivism reduction partnerships under this section that were in effect;

"(ii) the number of volunteers that provided recidivism reduction programming; and

"(iii) the number of recidivism reduction programming hours provided; and

"(B) explains any disparities between facilities in the numbers reported under subparagraph (A).".

<< 18 USCA § 3621 NOTE >>

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect 180 days after the date of enactment of this Act.

(g) REPEALS.—

<< 34 USCA § 10633 >>

(1) Section 2978 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10633) is repealed.

<< 34 USCA § 10581 >>

(2) Part CC of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10581 et seq.) is repealed.

<< 34 USCA § 60506 >>

SEC. 505. FEDERAL INTERAGENCY REENTRY COORDINATION.

(a) REENTRY COORDINATION.—The Attorney General, in consultation with the Secretary of Housing and Urban Development, the Secretary of Labor, the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Veterans Affairs, the Secretary of Agriculture, and the heads of such other agencies ***5235** of the Federal Government as the Attorney General considers appropriate, and in collaboration with interested persons, service providers, nonprofit organizations, and State, tribal, and local governments, shall coordinate on Federal programs, policies, and activities relating to the reentry of individuals returning from incarceration to the community, with an emphasis on evidence-based practices and protection against duplication of services.

(b) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Attorney General, in consultation with the Secretaries listed in subsection (a), shall submit to Congress a report summarizing the achievements under subsection (a), and including recommendations for Congress that would further reduce barriers to successful reentry.

SEC. 506. CONFERENCE EXPENDITURES.

(a) LIMITATION.—No amounts authorized to be appropriated to the Department of Justice under this title, or any amendments made by this title, may be used by the Attorney General, or by any individual or organization awarded discretionary funds under this title, or any amendments made by this title, to host or support any expenditure for conferences that uses more than $20,000 in Department funds, unless the Deputy Attorney General or such Assistant Attorney Generals, Directors, or principal deputies as the Deputy Attorney General may designate, provides prior written authorization that the funds may be expended to host a conference. A conference that uses more than $20,000 in such funds, but less than an average of $500 in such funds for each attendee of the conference, shall not be subject to the limitations of this section.

(b) WRITTEN APPROVAL.—Written approval under subsection (a) shall include a written estimate of all costs associated with the conference, including the cost of all food and beverages, audiovisual equipment, honoraria for speakers, and any entertainment.

(c) REPORT.—The Deputy Attorney General shall submit an annual report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on all approved conference expenditures referenced in this section.

<< 34 USCA § 60501 NOTE >>

SEC. 507. EVALUATION OF THE SECOND CHANCE ACT PROGRAM.

(a) EVALUATION OF THE SECOND CHANCE ACT GRANT PROGRAM.—Not later than 5 years after the date of enactment of this Act, the National Institute of Justice shall evaluate the effectiveness of grants used by the Department of Justice to support offender reentry and recidivism reduction programs at the State, local, Tribal, and Federal levels. The National Institute of Justice shall evaluate the following:

(1) The effectiveness of such programs in relation to their cost, including the extent to which the programs improve reentry outcomes, including employment, education, housing, reductions in recidivism, of participants in comparison to comparably situated individuals who did not participate in such programs and activities.

(2) The effectiveness of program structures and mechanisms for delivery of services.

(3) The impact of such programs on the communities and participants involved.

(4) The impact of such programs on related programs and activities.

***5236**

(5) The extent to which such programs meet the needs of various demographic groups.

(6) The quality and effectiveness of technical assistance provided by the Department of Justice to grantees for implementing such programs.

(7) Such other factors as may be appropriate.

(b) AUTHORIZATION OF FUNDS FOR EVALUATION.—Not more than 1 percent of any amounts authorized to be appropriated to carry out the Second Chance Act grant program shall be made available to the National Institute of Justice each year to evaluate the processes, implementation, outcomes, costs, and effectiveness of the Second Chance Act grant program in improving reentry and reducing recidivism. Such funding may be used to provide support to grantees for supplemental data collection, analysis, and coordination associated with evaluation activities.

(c) TECHNIQUES.—Evaluations conducted under this section shall use appropriate methodology and research designs. Impact evaluations conducted under this section shall include the use of intervention and control groups chosen by random assignment methods, to the extent possible.

(d) METRICS AND OUTCOMES FOR EVALUATION.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the National Institute of Justice shall consult with relevant stakeholders and identify outcome measures, including employment, housing, education, and public safety, that are to be achieved by programs authorized under the Second Chance Act grant program and the metrics by which the achievement of such outcomes shall be determined.

(2) PUBLICATION.—Not later than 30 days after the date on which the National Institute of Justice identifies metrics and outcomes under paragraph (1), the Attorney General shall publish such metrics and outcomes identified.

(e) DATA COLLECTION.—As a condition of award under the Second Chance Act grant program (including a subaward under section 3021(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10701(b))), grantees shall be required to collect and report to the Department of Justice data based upon the metrics identified under subsection (d). In accordance with applicable law, collection of individual-level data under a pledge of confidentiality shall be protected by the National Institute of Justice in accordance with such pledge.

(f) DATA ACCESSIBILITY.—Not later than 5 years after the date of enactment of this Act, the National Institute of Justice shall—

(1) make data collected during the course of evaluation under this section available in de-identified form in such a manner that reasonably protects a pledge of confidentiality to participants under subsection (e); and

(2) make identifiable data collected during the course of evaluation under this section available to qualified researchers for future research and evaluation, in accordance with applicable law.

(g) PUBLICATION AND REPORTING OF EVALUATION FINDINGS.—The National Institute of Justice shall—

(1) not later than 365 days after the date on which the enrollment of participants in an impact evaluation is completed, publish an interim report on such evaluation;

***5237**

(2) not later than 90 days after the date on which any evaluation is completed, publish and make publicly available such evaluation; and

(3) not later than 60 days after the completion date described in paragraph (2), submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on such evaluation.

(h) SECOND CHANCE ACT GRANT PROGRAM DEFINED.—In this section, the term "Second Chance Act grant program" means any grant program reauthorized under this title and the amendments made by this title.

SEC. 508. GAO REVIEW.

Not later than 3 years after the date of enactment of the First Step Act of 2018 the Comptroller General of the United States shall conduct a review of all of the grant awards made under this title and amendments made by this title that includes—

(1) an evaluation of the effectiveness of the reentry programs funded by grant awards under this title and amendments made by this title at reducing recidivism, including a determination of which reentry programs were most effective;

(2) recommendations on how to improve the effectiveness of reentry programs, including those for which prisoners may earn time credits under the First Step Act of 2018; and

(3) an evaluation of the effectiveness of mental health services, drug treatment, medical care, job training and placement, educational services, and vocational services programs funded under this title and amendments made by this title.

TITLE VI—MISCELLANEOUS CRIMINAL JUSTICE

SEC. 601. PLACEMENT OF PRISONERS CLOSE TO FAMILIES.

Section 3621(b) of title 18, United States Code, is amended—

<< 18 USCA § 3621 >>

(1) by striking "shall designate the place of the prisoner's imprisonment." and inserting "shall designate the place of the prisoner's imprisonment, and shall, subject to bed availability, the prisoner's security designation, the prisoner's programmatic needs, the prisoner's mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns of the Bureau of Prisons, place the prisoner in a facility as close as practicable to the prisoner's primary residence, and to the extent practicable, in a facility within 500 driving miles of that residence. The Bureau shall, subject to consideration of the factors described in the preceding sentence and the prisoner's preference for staying at his or her current facility or being transferred, transfer prisoners to facilities that are closer to the prisoner's primary residence even if the prisoner is already in a facility within 500 driving miles of that residence."; and

<< 18 USCA § 3621 >>

(2) by adding at the end the following: "Notwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court.".

***5238**

SEC. 602. HOME CONFINEMENT FOR LOW-RISK PRISONERS.

<< 18 USCA § 3624 >>

Section 3624(c)(2) of title 18, United States Code, is amended by adding at the end the following: "The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.".

SEC. 603. FEDERAL PRISONER REENTRY INITIATIVE REAUTHORIZATION; MODIFICATION OF IMPOSED TERM OF IMPRISONMENT.

(a) FEDERAL PRISONER REENTRY INITIATIVE REAUTHORIZATION.—Section 231(g) of the Second Chance Act of 2007 (34 U.S.C. 60541(g)) is amended—

(1) in paragraph (1)—

<< 34 USCA § 60541 >>

(A) by inserting “and eligible terminally ill offenders” after “elderly offenders” each place the term appears;

<< 34 USCA § 60541 >>

(B) in subparagraph (A), by striking “a Bureau of Prisons facility” and inserting “Bureau of Prisons facilities”;

(C) in subparagraph (B)—

<< 34 USCA § 60541 >>

(i) by striking “the Bureau of Prisons facility” and inserting “Bureau of Prisons facilities”; and

<< 34 USCA § 60541 >>

(ii) by inserting “, upon written request from either the Bureau of Prisons or an eligible elderly offender or eligible terminally ill offender” after “to home detention”; and

<< 34 USCA § 60541 >>

(D) in subparagraph (C), by striking “the Bureau of Prisons facility” and inserting “Bureau of Prisons facilities”;

<< 34 USCA § 60541 >>

(2) in paragraph (2), by inserting “or eligible terminally ill offender” after “elderly offender”;

<< 34 USCA § 60541 >>

(3) in paragraph (3), as amended by section 504(b)(1)(A) of this Act, by striking “at least one Bureau of Prisons facility” and inserting “Bureau of Prisons facilities”; and

(4) in paragraph (4)—

<< 34 USCA § 60541 >>

(A) by inserting “or eligible terminally ill offender” after “each eligible elderly offender”; and

<< 34 USCA § 60541 >>

(B) by inserting “and eligible terminally ill offenders” after “eligible elderly offenders”; and

(5) in paragraph (5)—

(A) in subparagraph (A)—

<< 34 USCA § 60541 >>

(i) in clause (i), striking “65 years of age” and inserting “60 years of age”; and

<< 34 USCA § 60541 >>

(ii) in clause (ii), as amended by section 504(b)(1)(B) of this Act, by striking "75 percent" and inserting " $^{2}/_{3}$ "; and

(B) by adding at the end the following:

<< 34 USCA § 60541 >>

"(D) ELIGIBLE TERMINALLY ILL OFFENDER.—The term 'eligible terminally ill offender' means an offender in the custody of the Bureau of Prisons who—

"(i) is serving a term of imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16(a) of title 18, United States Code), sex offense (as defined in section 111(5) of the Sex Offender Registration and Notification Act (34 U.S.C. 20911(5))), offense described in section 2332b(g)(5)(B) of title 18, United States Code, or offense under chapter 37 of title 18, United States Code;

***5239**

"(ii) satisfies the criteria specified in clauses (iii) through (vii) of subparagraph (A); and

"(iii) has been determined by a medical doctor approved by the Bureau of Prisons to be—

"(I) in need of care at a nursing home, intermediate care facility, or assisted living facility, as those terms are defined in section 232 of the National Housing Act (12 U.S.C. 1715w); or

"(II) diagnosed with a terminal illness.".

(b) INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE.—Section 3582 of title 18, United States Code, is amended—

<< 18 USCA § 3582 >>

(1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier,";

<< 18 USCA § 3582 >>

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting after subsection (c) the following:

<< 18 USCA § 3582 >>

"(d) NOTIFICATION REQUIREMENTS.—

"(1) TERMINAL ILLNESS DEFINED.—In this subsection, the term 'terminal illness' means a disease or condition with an end-of-life trajectory.

"(2) NOTIFICATION.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements—

"(A) in the case of a defendant diagnosed with a terminal illness—

"(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

"(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

"(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

"(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

"(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

"(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

***5240**

"(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

"(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

"(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

"(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

"(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

"(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

"(3) ANNUAL REPORT.—Not later than 1 year after the date of enactment of this subsection, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

"(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

"(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

"(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(G) for each request, the time elapsed between the date the request was received by the warden and the ***5241** final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

"(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

"(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.".

SEC. 604. IDENTIFICATION FOR RETURNING CITIZENS.

(a) IDENTIFICATION AND RELEASE ASSISTANCE FOR FEDERAL PRISONERS.—Section 231(b) of the Second Chance Act of 2007 (34 U.S.C. 60541(b)) is amended—

(1) in paragraph (1)—

<< 34 USCA § 60541 >>

(A) by striking "(including" and inserting "prior to release from a term of imprisonment in a Federal prison or if the individual was not sentenced to a term of imprisonment in a Federal prison, prior to release from a sentence to a term in community confinement, including"; and

<< 34 USCA § 60541 >>

(B) by striking "or birth certificate) prior to release" and inserting "and a birth certificate"; and

(2) by adding at the end the following:

<< 34 USCA § 60541 >>

"(4) DEFINITION.—In this subsection, the term 'community confinement' means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility.".

(b) DUTIES OF THE BUREAU OF PRISONS.—Section 4042(a) of title 18, United States Code, is amended—

<< 18 USCA § 4042 >>

(1) by redesignating paragraphs (D) and (E) as paragraphs (6) and (7), respectively;

(2) in paragraph (6) (as so redesignated)—

(A) in clause (i)—

<< 18 USCA § 4042 >>

(i) by striking "Social Security Cards,"; and

<< 18 USCA § 4042 >>

(ii) by striking "and" at the end;

<< 18 USCA § 4042 >>

(B) by redesignating clause (ii) as clause (iii);

(C) by inserting after clause (i) the following:

<< 18 USCA § 4042 >>

"(ii) obtain identification, including a social security card, driver's license or other official photo identification, and a birth certificate; and";

***5242**

<< 18 USCA § 4042 >>

(D) in clause (iii) (as so redesignated), by inserting after "prior to release" the following: "from a sentence to a term of imprisonment in a Federal prison or if the individual was not sentenced to a term of imprisonment in a Federal prison, prior to release from a sentence to a term of community confinement"; and

<< 18 USCA § 4042 >>

(E) by redesignating clauses (i), (ii), and (iii) (as so amended) as subparagraphs (A), (B), and (C), respectively, and adjusting the margins accordingly; and

<< 18 USCA § 4042 >>

(3) in paragraph (7) (as so redesignated), by redesignating clauses (i) through (vii) as subparagraphs (A) through (G), respectively, and adjusting the margins accordingly.

SEC. 605. EXPANDING INMATE EMPLOYMENT THROUGH FEDERAL PRISON INDUSTRIES.

(a) NEW MARKET AUTHORIZATIONS.—Chapter 307 of title 18, United States Code, is amended by inserting after section 4129 the following:

<< 18 USCA § 4130 >>

§ 4130. Additional markets

"(a) IN GENERAL.—Except as provided in subsection (b), notwithstanding any other provision of law, Federal Prison Industries may sell products to—

"(1) public entities for use in penal or correctional institutions;

"(2) public entities for use in disaster relief or emergency response;

"(3) the government of the District of Columbia; and

"(4) any organization described in subsection (c)(3), (c)(4), or (d) of section 501 of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of such Code.

"(b) OFFICE FURNITURE.—Federal Prison Industries may not sell office furniture to the organizations described in subsection (a)(4).

"(c) DEFINITIONS.—In this section:

"(1) The term 'office furniture' means any product or service offering intended to meet the furnishing needs of the workplace, including office, healthcare, educational, and hospitality environments.

"(2) The term 'public entity' means a State, a subdivision of a State, an Indian tribe, and an agency or governmental corporation or business of any of the foregoing.

"(3) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands.".

<< 18 USCA T. 18 pt. III ch. 307 prec. § 4121 >>

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 307 of title 18, United States Code, is amended by inserting after the item relating to section 4129 the following:

“4130. Additional markets.”.

<< 18 USCA § 4126 >>

(c) DEFERRED COMPENSATION.—Section 4126(c)(4) of title 18, United States Code, is amended by inserting after “operations,” the following: “not less than 15 percent of such compensation for any inmate shall be reserved in the fund or a separate account ***5243** and made available to assist the inmate with costs associated with release from prison,”.

(d) GAO REPORT.—Beginning not later than 90 days after the date of enactment of this Act, the Comptroller General of the United States shall conduct an audit of Federal Prison Industries that includes the following:

(1) An evaluation of Federal Prison Industries's effectiveness in reducing recidivism compared to other rehabilitative programs in the prison system.

(2) An evaluation of the scope and size of the additional markets made available to Federal Prison Industries under this section and the total market value that would be opened up to Federal Prison Industries for competition with private sector providers of products and services.

(3) An evaluation of whether the following factors create an unfair competitive environment between Federal Prison Industries and private sector providers of products and services which would be exacerbated by further expansion:

(A) Federal Prison Industries's status as a mandatory source of supply for Federal agencies and the requirement that the buying agency must obtain a waiver in order to make a competitive purchase from the private sector if the item to be acquired is listed on the schedule of products and services published by Federal Prison Industries.

(B) Federal Prison Industries's ability to determine that the price to be paid by Federal Agencies is fair and reasonable, rather than such a determination being made by the buying agency.

(C) An examination of the extent to which Federal Prison Industries is bound by the requirements of the generally applicable Federal Acquisition Regulation pertaining to the conformity of the delivered product with the specified design and performance specifications and adherence to the delivery schedule required by the Federal agency, based on the transactions being categorized as interagency transfers.

(D) An examination of the extent to which Federal Prison Industries avoids transactions that are little more than pass through transactions where the work provided by inmates does not create meaningful value or meaningful work opportunities for inmates.

(E) The extent to which Federal Prison Industries must comply with the same worker protection, workplace safety and similar regulations applicable to, and enforceable against, Federal contractors.

(F) The wages Federal Prison Industries pays to inmates, taking into account inmate productivity and other factors such as security concerns associated with having a facility in a prison.

(G) The effect of any additional cost advantages Federal Prison Industries has over private sector providers of goods and services, including—

(i) the costs absorbed by the Bureau of Prisons such as inmate medical care and infrastructure expenses including real estate and utilities; and

***5244**

(ii) its exemption from Federal and State income taxes and property taxes.

(4) An evaluation of the extent to which the customers of Federal Prison Industries are satisfied with quality, price, and timely delivery of the products and services provided it provides, including summaries of other independent assessments such as reports of agency inspectors general, if applicable.

<< 18 USCA § 4042 NOTE >>

SEC. 606. DE-ESCALATION TRAINING.

Beginning not later than 1 year after the date of enactment of this Act, the Director of the Bureau of Prisons shall incorporate into training programs provided to officers and employees of the Bureau of Prisons (including officers and employees of an organization with which the Bureau of Prisons has a contract to provide services relating to imprisonment) specialized and comprehensive training in procedures to—

(1) de-escalate encounters between a law enforcement officer or an officer or employee of the Bureau of Prisons, and a civilian or a prisoner (as such term is defined in section 3635 of title 18, United States Code, as added by section 101(a) of this Act); and

(2) identify and appropriately respond to incidents that involve the unique needs of individuals who have a mental illness or cognitive deficit.

<< 18 USCA § 3621 NOTE >>

SEC. 607. EVIDENCE-BASED TREATMENT FOR OPIOID AND HEROIN ABUSE.

(a) REPORT ON EVIDENCE-BASED TREATMENT FOR OPIOID AND HEROIN ABUSE.—Not later than 90 days after the date of enactment of this Act, the Director of the Bureau of Prisons shall submit to the Committees on the Judiciary and the Committees on Appropriations of the Senate and of the House of Representatives a report assessing the availability of and the capacity of the Bureau of Prisons to treat heroin and opioid abuse through evidence-based programs, including medication-assisted treatment where appropriate. In preparing the report, the Director shall consider medication-assisted treatment as a strategy to assist in treatment where appropriate and not as a replacement for holistic and other drug-free approaches. The report shall include a description of plans to expand access to evidence-based treatment for heroin and opioid abuse for prisoners, including access to medication-assisted treatment in appropriate cases. Following submission, the Director shall take steps to implement these plans.

(b) REPORT ON THE AVAILABILITY OF MEDICATION-ASSISTED TREATMENT FOR OPIOID AND HEROIN ABUSE, AND IMPLEMENTATION THEREOF.—Not later than 120 days after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit to the Committees on the Judiciary and the Committees on Appropriations of the Senate and of the House of Representatives a report assessing the availability of and capacity for the provision of medication-assisted treatment for opioid and heroin abuse by treatment service providers serving prisoners who are serving a term of supervised release, and including a description of plans to expand access to medication-assisted treatment for heroin and opioid abuse whenever appropriate among prisoners under supervised release. Following submission, the Director will take steps to implement these plans.

***5245**

<< 18 USCA § 4042 NOTE >>

SEC. 608. PILOT PROGRAMS.

(a) IN GENERAL.—The Bureau of Prisons shall establish each of the following pilot programs for 5 years, in at least 20 facilities:

(1) MENTORSHIP FOR YOUTH.—A program to pair youth with volunteers from faith-based or community organizations, which may include formerly incarcerated offenders, that have relevant experience or expertise in mentoring, and a willingness to serve as a mentor in such a capacity.

(2) SERVICE TO ABANDONED, RESCUED, OR OTHERWISE VULNERABLE ANIMALS.—A program to equip prisoners with the skills to provide training and therapy to animals seized by Federal law enforcement under asset forfeiture authority and to organizations that provide shelter and similar services to abandoned, rescued, or otherwise vulnerable animals.

(b) REPORTING REQUIREMENT.—Not later than 1 year after the conclusion of the pilot programs, the Attorney General shall report to Congress on the results of the pilot programs under this section. Such report shall include cost savings, numbers of participants, and information about recidivism rates among participants.

(c) DEFINITION.—In this title, the term “youth” means a prisoner (as such term is defined in section 3635 of title 18, United States Code, as added by section 101(a) of this Act) who was 21 years of age or younger at the time of the commission or alleged commission of the criminal offense for which the individual is being prosecuted or serving a term of imprisonment, as the case may be.

SEC. 609. ENSURING SUPERVISION OF RELEASED SEXUALLY DANGEROUS PERSONS.

<< 18 USCA § 3603 >>

(a) PROBATION OFFICERS.—Section 3603 of title 18, United States Code, is amended in paragraph (8)(A) by striking "or 4246" and inserting ", 4246, or 4248".

<< 18 USCA § 3154 >>

(b) PRETRIAL SERVICES OFFICERS.—Section 3154 of title 18, United States Code, is amended in paragraph (12)(A) by striking "or 4246" and inserting ", 4246, or 4248".

<< 34 USCA § 10132 NOTE >>

SEC. 610. DATA COLLECTION.

(a) NATIONAL PRISONER STATISTICS PROGRAM.—Beginning not later than 1 year after the date of enactment of this Act, and annually thereafter, pursuant to the authority under section 302 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3732), the Director of the Bureau of Justice Statistics, with information that shall be provided by the Director of the Bureau of Prisons, shall include in the National Prisoner Statistics Program the following:

(1) The number of prisoners (as such term is defined in section 3635 of title 18, United States Code, as added by section 101(a) of this Act) who are veterans of the Armed Forces of the United States.

(2) The number of prisoners who have been placed in solitary confinement at any time during the previous year.

(3) The number of female prisoners known by the Bureau of Prisons to be pregnant, as well as the outcomes of such pregnancies, including information on pregnancies that result in live birth, stillbirth, miscarriage, abortion, ectopic pregnancy, maternal death, neonatal death, and preterm birth.

***5246**

(4) The number of prisoners who volunteered to participate in a substance abuse treatment program, and the number of prisoners who have participated in such a program.

(5) The number of prisoners provided medication-assisted treatment with medication approved by the Food and Drug Administration while in custody in order to treat substance use disorder.

(6) The number of prisoners who were receiving medication-assisted treatment with medication approved by the Food and Drug Administration prior to the commencement of their term of imprisonment.

(7) The number of prisoners who are the parent or guardian of a minor child.

(8) The number of prisoners who are single, married, or otherwise in a committed relationship.

(9) The number of prisoners who have not achieved a GED, high school diploma, or equivalent prior to entering prison.

(10) The number of prisoners who, during the previous year, received their GED or other equivalent certificate while incarcerated.

(11) The numbers of prisoners for whom English is a second language.

(12) The number of incidents, during the previous year, in which restraints were used on a female prisoner during pregnancy, labor, or postpartum recovery, as well as information relating to the type of restraints used, and the circumstances under which each incident occurred.

(13) The vacancy rate for medical and healthcare staff positions, and average length of such a vacancy.

(14) The number of facilities that operated, at any time during the previous year, without at least 1 clinical nurse, certified paramedic, or licensed physician on site.

(15) The number of facilities that during the previous year were accredited by the American Correctional Association.

(16) The number and type of recidivism reduction partnerships described in section 3621(h)(5) of title 18, United States Code, as added by section 102(a) of this Act, entered into by each facility.

(17) The number of facilities with remote learning capabilities.

(18) The number of facilities that offer prisoners video conferencing.

(19) Any changes in costs related to legal phone calls and visits following implementation of section 3632(d)(1) of title 18, United States Code, as added by section 101(a) of this Act.

(20) The number of aliens in prison during the previous year.

(21) For each Bureau of Prisons facility, the total number of violations that resulted in reductions in rewards, incentives, or time credits, the number of such violations for each category of violation, and the demographic breakdown of the prisoners who have received such reductions.

(22) The number of assaults on Bureau of Prisons staff by prisoners and the number of criminal prosecutions of prisoners for assaulting Bureau of Prisons staff.

***5247**

(23) The capacity of each recidivism reduction program and productive activity to accommodate eligible inmates at each Bureau of Prisons facility.

(24) The number of volunteers who were certified to volunteer in a Bureau of Prisons facility, broken down by level (level I and level II), and by each Bureau of Prisons facility.

(25) The number of prisoners enrolled in recidivism reduction programs and productive activities at each Bureau of Prisons facility, broken down by risk level and by program, and the number of those enrolled prisoners who successfully completed each program.

(26) The breakdown of prisoners classified at each risk level by demographic characteristics, including age, sex, race, and the length of the sentence imposed.

(b) REPORT TO JUDICIARY COMMITTEES.—Beginning not later than 1 year after the date of enactment of this Act, and annually thereafter for a period of 7 years, the Director of the Bureau of Justice Statistics shall submit a report containing the information described in paragraphs (1) through (26) of subsection (a) to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

<< 18 USCA § 4042 NOTE >>

SEC. 611. HEALTHCARE PRODUCTS.

(a) AVAILABILITY.—The Director of the Bureau of Prisons shall make the healthcare products described in subsection (c) available to prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner.

(b) QUALITY PRODUCTS.—The Director shall ensure that the healthcare products provided under this section conform with applicable industry standards.

(c) PRODUCTS.—The healthcare products described in this subsection are tampons and sanitary napkins.

SEC. 612. ADULT AND JUVENILE COLLABORATION PROGRAMS.

Section 2991 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10651) is amended—

(1) in subsection (b)(4)—

<< 34 USCA § 10651 >>

(A) by striking subparagraph (D); and

<< 34 USCA § 10651 >>

(B) by redesignating subparagraph (E) as subparagraph (D);

<< 34 USCA § 10651 >>

(2) in subsection (e), by striking "may use up to 3 percent" and inserting "shall use not less than 6 percent"; and

(3) by amending subsection (g) to read as follows:

<< 34 USCA § 10651 >>

"(g) COLLABORATION SET-ASIDE.—The Attorney General shall use not less than 8 percent of funds appropriated to provide technical assistance to State and local governments receiving grants under this part to foster collaboration between such governments in furtherance of the purposes set forth in section 3 of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004 (34 U.S.C. 10651 note).".

SEC. 613. JUVENILE SOLITARY CONFINEMENT.

(a) IN GENERAL.—Chapter 403 of title 18, United States Code, is amended by adding at the end the following:

<< 18 USCA § 5043 >>

§ 5043. Juvenile solitary confinement

"(a) DEFINITIONS.—In this section—

"(1) the term 'covered juvenile' means—

***5248**

"(A) a juvenile who—

"(i) is being proceeded against under this chapter for an alleged act of juvenile delinquency; or

"(ii) has been adjudicated delinquent under this chapter; or

"(B) a juvenile who is being proceeded against as an adult in a district court of the United States for an alleged criminal offense;

"(2) the term 'juvenile facility' means any facility where covered juveniles are—

"(A) committed pursuant to an adjudication of delinquency under this chapter; or

"(B) detained prior to disposition or conviction; and

"(3) the term 'room confinement' means the involuntary placement of a covered juvenile alone in a cell, room, or other area for any reason.

"(b) PROHIBITION ON ROOM CONFINEMENT IN JUVENILE FACILITIES.—

"(1) IN GENERAL.—The use of room confinement at a juvenile facility for discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile's behavior that poses a serious and immediate risk of physical harm to any individual, including the covered juvenile, is prohibited.

"(2) JUVENILES POSING RISK OF HARM.—

"(A) REQUIREMENT TO USE LEAST RESTRICTIVE TECHNIQUES.—

"(i) IN GENERAL.—Before a staff member of a juvenile facility places a covered juvenile in room confinement, the staff member shall attempt to use less restrictive techniques, including—

"(I) talking with the covered juvenile in an attempt to de-escalate the situation; and

"(II) permitting a qualified mental health professional to talk to the covered juvenile.

"(ii) EXPLANATION.—If, after attempting to use less restrictive techniques as required under clause (i), a staff member of a juvenile facility decides to place a covered juvenile in room confinement, the staff member shall first—

"(I) explain to the covered juvenile the reasons for the room confinement; and

"(II) inform the covered juvenile that release from room confinement will occur—

"(aa) immediately when the covered juvenile regains self-control, as described in subparagraph (B)(i); or

"(bb) not later than after the expiration of the time period described in subclause (I) or (II) of subparagraph (B)(ii), as applicable.

"(B) MAXIMUM PERIOD OF CONFINEMENT.—If a covered juvenile is placed in room confinement because the covered juvenile poses a serious and immediate risk of physical harm to himself or herself, or to others, the covered juvenile shall be released—

"(i) immediately when the covered juvenile has sufficiently gained control so as to no longer engage ***5249** in behavior that threatens serious and immediate risk of physical harm to himself or herself, or to others; or

"(ii) if a covered juvenile does not sufficiently gain control as described in clause (i), not later than—

"(I) 3 hours after being placed in room confinement, in the case of a covered juvenile who poses a serious and immediate risk of physical harm to others; or

"(II) 30 minutes after being placed in room confinement, in the case of a covered juvenile who poses a serious and immediate risk of physical harm only to himself or herself.

"(C) RISK OF HARM AFTER MAXIMUM PERIOD OF CONFINEMENT.—If, after the applicable maximum period of confinement under subclause (I) or (II) of subparagraph (B)(ii) has expired, a covered juvenile continues to pose a serious and immediate risk of physical harm described in that subclause—

"(i) the covered juvenile shall be transferred to another juvenile facility or internal location where services can be provided to the covered juvenile without relying on room confinement; or

"(ii) if a qualified mental health professional believes the level of crisis service needed is not currently available, a staff member of the juvenile facility shall initiate a referral to a location that can meet the needs of the covered juvenile.

"(D) SPIRIT AND PURPOSE.—The use of consecutive periods of room confinement to evade the spirit and purpose of this subsection shall be prohibited.".

<< 18 USCA T. 18 pt. IV ch. 403 prec. § 5031 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 403 of title 18, United States Code, is amended by adding at the end the following:

"5043. Juvenile solitary confinement.".

Approved December 21, 2018.
LEGISLATIVE HISTORY—S. 756:

SENATE REPORTS: No. 115–135 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD:

Vol. 163 (2017): Aug. 3, considered and passed Senate.

Vol. 164 (2018): July 25, considered and passed House, amended.

Dec. 13, 17, 18, Senate considered and concurred in House amendment with an amendment.

Dec. 20, House concurred in Senate amendment.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2018):

Dec. 21, Presidential remarks and statement.