

FIRST STEP ACT PANEL TRAINING (April 2020)

I. Success stories:

A. Released prisoners

1. Emerson Davis – March 6, 2019. Nine counts of money laundering and one count of conspiring to distribute 50 grams or more of crack. Held responsible for at least 8.4 kilograms of crack. Sentenced on August 8, 1996, to life on the crack offense and concurrent 240-month sentences on the money laundering. Sentence reduced to time served.
2. Davis had a whole group of conspirators who were sentenced to life in 1996: Patricia Clarke, Patrick Howell, Egnatius Johnson, Norris Mothersill. All have had their sentences reduced to time served.
3. Robert Clark: Sentenced in 1995 for 15 kilograms of crack. Sentence reduced to time served.
4. Nathaniel James: sentenced in 1991 to life for somewhere between 5 and 15 kilograms. Sentence reduced to time served.
5. His codefendant, James Denson was sentenced to 660 months. Sentence reduced to time served.
6. Eric Parker: sentenced to life in 1992 to life for somewhere between 1.5 and 5 kilograms of crack. Sentence reduced to time served.
7. Calvin White: sentenced to 2006 to 262 months as a career offender. Sentence reduced to time served.
8. Vernon Faulk: Sentenced in 2008 to 235 months. Sentence reduced to 160 months or time served, whichever was greater. (released last November)
9. Steffany Frazier. Sentenced in 1995 to life for a case involving substantially more than 1.5 kilograms. Sentence reduced to time served.
10. Jonathan Jones: Sentenced in 2008 to life. 94 grams. Sentence reduced to 168 months. (Released in November)
11. Anthony Oliver: Sentenced to life in 2009. 58 grams. Sentence reduced to time served.
12. Stanton Robinson: Sentenced in 1990 to life. 100 kilograms. Sentence reduced to 440 months (scheduled to be released this October)

13. Anthony Swatzie: Sentenced in 2000 to life. 136 grams.
Resentenced to 262 months or time served, whichever was greater.
(Was released last May)
14. Craig Fleming. Sentenced to life in 1996. 25 kilograms. Reduced to time served.

II. The statute

A. Summary

1. Changes Rules for § 841 enhancement
 - a. “Serious Drug Felony” rather than “felony drug offense” - Served a term of more than 12 months. Excludes possession. Release within 15 years of new offense.
 - b. Added “serious violent felony” – served a term of more than 12 months. No time limit.
2. Changes mandatory minimum for § 841(b)(1)(A) – 25 and 15 years.
3. Changes “stacking” rules for § 924(c) offenses.
4. Provides for additional good time credit (47 to 54 days)
5. Provides for earned good time credit
6. Retroactively applies the Fair Sentencing Act of 2010
7. Expands Compassionate Release
8. Loosened rules on safety valve eligibility

III. § 404(a): “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

A. Fair Sentencing Act: Aug 3, 2010

IV. Who is eligible?

- A. *United States v. Blocker*, 378 F.Supp.3d 1125, 1129 (N.D. Fla. 2019). “Indictment controls theory” or “offense-controls theory.”
- B. *United States v. Jackson*, 945 F.3d 315 (5th Cir. 2019); *United States v. McDonald*, 944 F.3d 769 (8th Cir. 2019); *United States v. Beamus*, 943 F.3d 789 (6th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175 (4th Cir. 2019).
- C. *United States v. Aflfonso Allen*, No. 19-10758 (11th Cir). Argument set for April 21.
- D. *United States v. Davis*, No. 4:92cr4013-WS, 2019 WL 7498753, *4 (N.D. Fla. March 3, 2019); *United States v. Lavar Hills*, No. 5:04cr23-MCR (N.D. Fla.) ECF No. 365 at 8; *United States v. Lavell Gardner*, No. 3:09cr85-LAC, (N.D. Fla.) ECF No. 72 at 4

- E. Argument: *United States v. Frank Sharpe*, No. 4:98cr45-RH (N.D. Fla.).
- V. Other eligibility questions
 - A. Relevant conduct: *United States v. Vernon Faulk*, No. 4:08cr26-RH (N.D. Fla.)
 - B. Five Kilograms of Powder: *United States v. Gravatt*, 2020 WL 1327200 (4th Cir. March 23, 2020)
 - C. Sentencing Package: *United States v. Hill*, No. 96-00399, 2020 WL 891009 (D. Md. Feb. 24, 2020); *United States v. Jones*, No. 3:99-cr-264-5, 2019 WL 6907304 (D. Conn. Dec. 19, 2019).
 - D. 21 U.S.C. § 841(b)(1)(C): *United States v. Smith*, 2020 WL 1698797 (1st Cir. April 8, 2020).
- VI. And if Eligible?
 - A. § 404(b): “A court that imposed a sentence for a covered offense may, on motion of the defendant, Director of the Bureau of Prisons, the attorney for the Government, or the court, impose sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time of the covered offense was committed.”
 - B. *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019)
 - 1. Only changes are those brought about by the Fair Sentencing Act, i.e. the old guidelines still apply.
 - a. If that’s so, Court may be able to apply guideline amendments: *United States v. Lavar Hills*, No. 5:04cr23-MCR, (N.D. Fla.) ECF No. 365 at 12.
 - 2. There are, however, decisions holding that current versions of the Guidelines apply.
 - 3. Maybe, though, it doesn’t make any difference. *See United States v. Eric Balcolm*, No. 4:02cr52-RH (N.D. Fla.) ECF No. 169 at 5-6; *United States v. Jackson*, 945 F.3d 315, 322 n. 7 (5th Cir. 2019) (“We do not hold [in *Hegwood*] that the court *cannot* consider post-sentencing conduct – only that it isn’t required to.”)
 - C. Obstacles?
 - 1. Completed drug sentence: Sentences are aggregated – *United States v. Nance*, No. 8:08cr449, 2019 WL 2436210 (D. Neb. June 10, 2019)
 - 2. Bad conduct: *Nance* (“The Court shares the Government’s concern for the danger Nance may pose to public safety. Yet the Court is also mindful of the congressional intent

underlying the Fair Sentencing Act and Section 404 of the First Step Act.”

3. Substantial Assistance: *United States v. Head*, 178 F.3d 1205 (11th Cir. 1999)
4. Already received benefit of Guideline Amendments
5. Sentenced under career offender provision or a guideline other than 2D1.1: *United States v. Gangsta Gospidon*, No. 4:06cr21-RH (N.D. Fla) (“most defendants who are career offenders under the Guidelines manual receive – and should receive – below-guideline sentences”); *Lavell Gardner* No. 3:09cr85-LAC (N.D. Fla.).

VII. Compassionate Release § 603

A. Success stories:

1. V.M: Sentenced in 2009 to 20 years (15 under ACCA and 5 more due to 924(c). Case also included 12 grams of crack and 65 grams of powder cocaine. End stage renal disease (on dialysis for 12 years) and already had one leg amputated. Odds of surviving more than 18 months in his favor. 46 years old. Warden had decided he was ineligible. In February, Judge Hinkle reduced the sentence to time served.
2. V.S: Sentenced in 2010 to life for conspiring to distribute crack cocaine (720 grams), money laundering, and possession of a firearm by a convicted felon. Stage IV colon cancer. Maybe 18 months to live. This past September, Judge Hinkle reduced the sentence to time served.
3. A.W.: Sentenced in 2005 to life for armed bank robbery, possession of a firearm by a convicted felon, and for brandishing a firearm in furtherance of a crime of violence. Congestive heart failure and recently had a defibrillator implanted, end stage renal failure. 79 years old. Citing at some length the risks posed by the pandemic, earlier this month Judge Rodgers reduced the sentence to time served.
4. B.W.: Sentenced in 1995 to, with clemency, what turned out to be 30 years for conspiring to distribute some 4 kilograms of crack. 72 years old. Diabetes, high blood pressure, and chronically high cholesterol. In October, Judge Vinson reduced the sentence to time served.

B. The statute: Section 18 U.S.C. § 3582(c)(1)(A)

1. Prior to the First Step Act, only the Director of the Bureau of Prisons could file a request for compassionate release.

2. Now, a prisoner may file a motion if, after filing a request with the prison warden, he has waited 30 days and not received a decision or if he has exhausted all of his administrative rights to appeal a denial.
 - a. Some authority supports a waiver of the exhaustion requirement. *United States v. McCarthy*, No. 3:17cr230, 2020 WL 1698732 (D. Conn. 2020).
 3. Grounds.
 - b. “extraordinary and compelling reasons” and the defendant is not a danger to others.
 - c. Defendant is at least 70 years old, has served at least 30 years in prison, and the Director of the Bureau of Prisons has determined the defendant is not a danger to others
- C. The Guideline: USSG § 1B1.13 (Commentary)
1. Defines “extraordinary or compelling reasons.”
 - a. Defendant is suffering from a terminal illness.
 - b. Defendant is suffering from a serious physical or medical condition, a serious functional or cognitive impairment, or experiencing deteriorating physical or mental health because of the aging process that substantially diminishes the ability of the defendant to provide self-care within the prison and from which he is not expected to recover.
 - c. The defendant is at least 65 years old, is experiencing a serious deterioration in physical or mental health because of the aging process and has served at least 10 years or 75 percent of his term of imprisonment, whichever is less.
 - d. The death or incapacitation of the caregiver of the defendant’s minor child
 - e. The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver of the spouse or registered partner.
 2. Commentary created before the First Step Act, and some have argued it is inapplicable. *United States v. Cantu*, No. 1:05cr458, 2019 WL 2498923 (S.D. Tex. June 17, 2019).