## MACARTHUR SAFETY AND JUSTICE CHALLENGE

Grant awarded 10.2018

### SJC GRANT

#### SJC Team

- ➤ Tom McCaffrey Criminal Court Administrator
- ➤ Angharad Stock Court Administration
- ► Erin Dalton DHS
- ➤ Molly Morrill DHS
- ➤ Janice Dean Pretrial
- Frank Scherer Probation
- ► Becky Spangler DA
- ► Matt Dugan PD
- ➤ Sanjeev Baidyaroy Court Data Analyst

## PUBLIC DEFENDERS AT INITIAL APPEARANCE

John Munoz, Esq.
Arraignment Manager
Office of the Public Defender

## PRELIMINARY ARRAIGNMENT LOCATIONS AND TIMES

Total Preliminary Arraignments at PMC		
(April 1, 2017 – March 31, 2018)	Preliminary Arraignments	% of Total
Total Possible	4,991	23%
PD Represented Prel Arraignments	3,203	15%
Prel Arraignments that qualified but no		
PD	1 <b>,7</b> 88	8%
Other Arraignments	1 <i>7</i> ,015	<b>77</b> %
Evening (4:30 pm -12am PMC)	2,593	12%
Late night (12 am — 8:30am PMC)	4,314	20%
Weekend (PMC)	4,935	22%
Workday (Outlying MDJs)	5,173	23%
Grand Total	22,006	100%

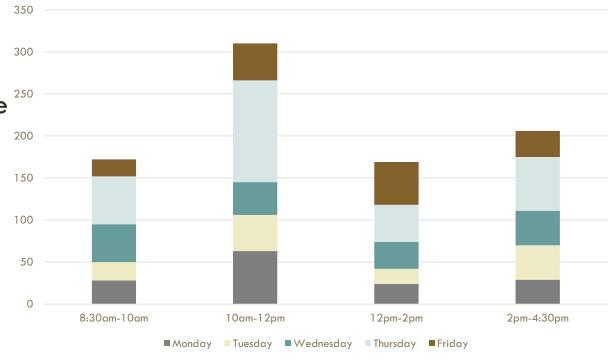
# PROPOSAL 1: COVERING ALL QUALIFYING ARRAIGNMENTS (POTENTIAL FOR ADDITIONAL 7%)

**Opportunity:** The process is already established so there is no additional staff.

Challenge: Arraignments occur throughout the day, so a PD would have to be available from 8:30 to 4:30 to cover all. A schedule would have to be established for coverage if people are absent during their 'shift'.

Thirty-six percent (310) of the preliminary hearings without PDs occurred between 10am and noon. Almost half of these occurred on Thursdays.

Preliminary Arraignments at PMC with no PD representation, by Day and Time (4/1/17-9/30/17)



# PROPOSAL 2: OUTLYING MDJS DURING WORKDAY (POTENTIAL FOR ADDITIONAL 26%)

**Opportunity:** Because these occur during normal business hours, the Office of the Public Defender can cover these hearings with no additional staff. In addition, all MDJ offices have video conferencing equipment that could be utilized.

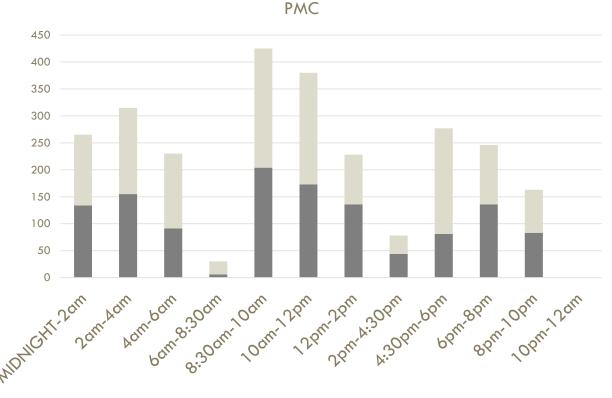
**Challenge:** Pretrial services would require additional staff to assess the additional people.

Most of the PA at the outlying MDJs occur in the morning (8:30-12). 1,989 (17% of all PA) occur during this time. The addition 1,000 occurred in the afternoon.

Outlying MDJs	Number	Number with Assessments at bail decision	% of possible PA with assessments	
Morning	1,989	142	7%	
Afternoon	1,000	131	13%	

## PROPOSAL 3: WEEKEND PMC (POTENTIAL FOR ADDITIONAL 23%) Assessment's Conducted over the Weekend (April-Sept. 2017) at

- 42 percent of weekend PMC arraignments occurred during traditional business hours
- Pretrial currently conducts assessments on all people so would not require additional staff
- The PD would require staff to cover this.



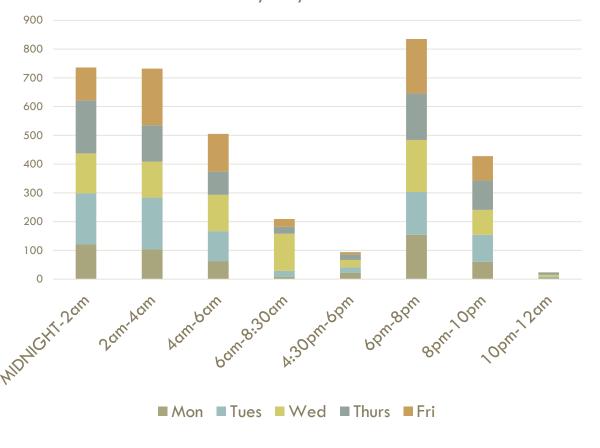
Weekends	Saturday	% of All	Sunday	% of All	Total	% of All
Mornings (8:30-						
12pm)	428	4%	377	3%	805	7%
Afternoons (12-4:30)	126	1%	180	2%	306	3%
4:30pm-midnight	386	3%	300	3%	686	6%
Midnight to 8:30 am	454	4%	386	3%	810	7%

## PROPOSAL 4: EVENING AND LATE NIGHT PMC (POTENTIAL FOR ADDITIONAL 29%)

■ This proposal could potentially make a large impact since from 12:00am to 8:30am money bail is used 64% of the time, compared to 8:30am to 11:00pm money is used 34% of the time.

Time	Mon	Tues	Wed	Thurs	Fri
MIDNIGHT-2am	121	178	138	185	114
2am-4am	103	181	125	126	197
4am-6am	63	104	126	81	131
6am-8:30am	8	21	129	24	27
4:30pm-6pm	22	20	25	19	8
6pm-8pm	154	149	181	162	189
8pm-10pm	60	94	87	102	85
10pm-12am	6	3	6	8	1
Grand Total	537	750	817	707	752





## OUTCOMES

#### SUMMARY STATISTICS

- This analysis examines all cases with representation by the Office of the Public Defender from April 1, March 31, 2018.
  - It includes all preliminary arraignments that occurred during this period at PMC during normal business hours (8:30-4:30)
- •14 percent of all preliminary arraignments during this period had representation from a public defender and also had a pretrial assessment
  - On average, 14 cases were represented per day

## Total Preliminary Arraignments (April 2017-March 31, 2018)

	Hearings	% of Total
Total Possible (Arraignments at PMC during business hours)	4,991	23%
Preliminary Arraignments w/PD representation	3,203	15%
Preliminary Arraignments that qualified but no PD	1 <i>,</i> 788	8%
Other Arraignments	17,015	77%
Evening (4:30-midnight) (PMC)	2,593	12%
Late night (midnight-8:30am) (PMC)	4,314	20%
Weekend (Saturday/Sunday) (PMC)	4,935	22%
Workday (Outlying MDJs)	5,173	23%
Total	22,006	100%

#### ANALYSIS

- Compared all preliminary arraignments with representation (N=3,203) to those that occurred in the prior 1 year to the start of the project (4/1/2016-3/31/2017) (N=5,241)
  - Includes all preliminary arraignments that occurred at PMC M-F from 8:30-4:30

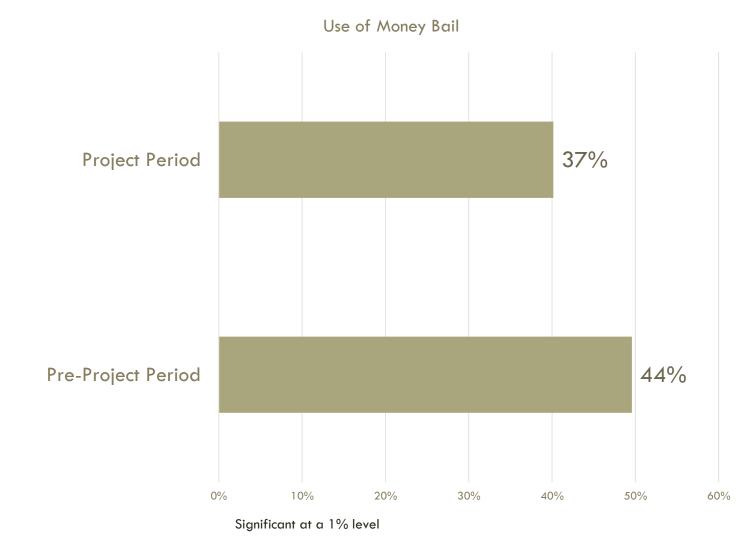
#### **Examined:**

- The use of money bail
- Concurrence rates with Pretrial Services' recommendations
- Jail bookings at the time of arraignment
- Continuances at preliminary hearing
- Outcome of preliminary hearing

### THE USE OF MONEY BAIL

There was a 17% decrease in the use of money bail during the project period.

44 percent (2,318) of all preliminary arraignments in the comparison group had a money bail compared to 37 percent (1,175) of represented cases. This is a statistically significant difference (at a 1% level).

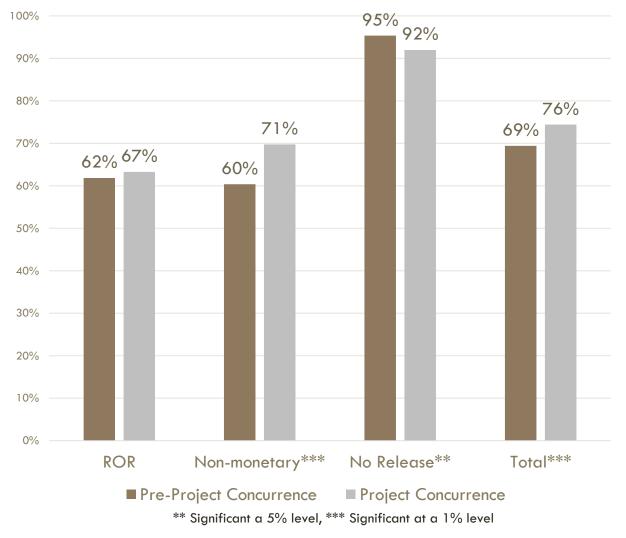


## CONCURRENCE RATES WITH PRETRIAL RECOMMENDATIONS

There was a 10% increase in overall concurrence rates (from 69 percent to 74 percent). This resulted from a:

- 8 percent increase in concurrence with ROR
- 18 percent increase in concurrence with nonmonetary release
- 3 percent decrease in concurrence with no release\*

\*Note: Concurrence with no release is if the judge orders a money bail

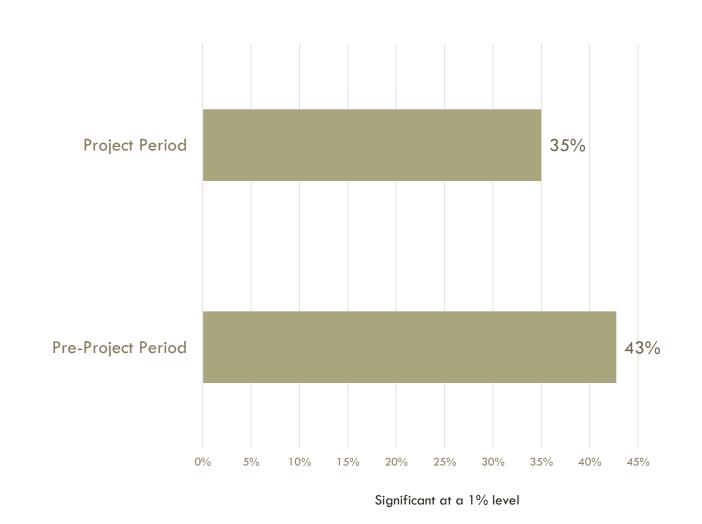


#### JAIL BOOKINGS AT TIME OF ARRAIGNMENT

There was a 18% decrease in jail bookings at the time of arraignment.

43 percent (826) of people were booked at the time of arraignment in the comparison compared to 35 percent (565) of people who were represented. This is a statistically significant difference (at a 1% level).

This translates into 125 fewer people booked, saving an estimated 2,216 jail bed days (based on an average 17 days booking). This saves the county an estimated \$172,862.

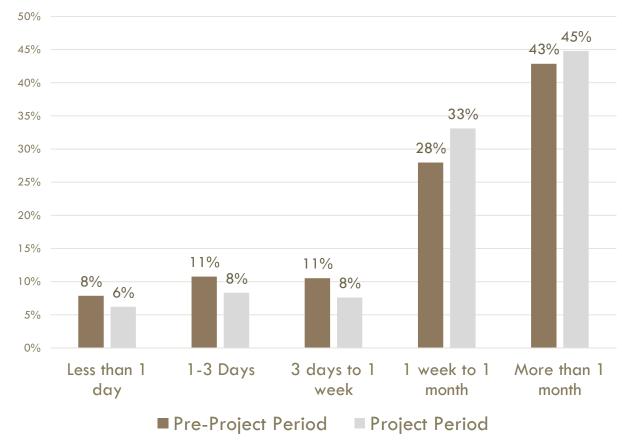


#### JAIL DAYS USED — LENGTH OF STAY

There was a 24 percent decrease in the percent of people booked at preliminary arraignment who were there for a week or less. This is a statistically significant difference (at a 1% level).

- 21 percent fewer people were booked for less than 1 day
- 23 percent fewer people were booked for 1-3 days
- 28 percent fewer people were booked 3 days to 1 week





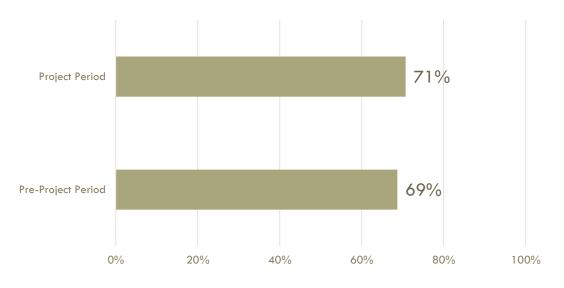
#### CONTINUANCES

There is no significant change in the number of preliminary hearing continuances or the average number of scheduled preliminary hearings.

There was a 25% reduction in the time between preliminary arraignment and preliminary hearing.

- This is significant at a 1% level.

#### Percentage of Cases with Preliminary Hearing Continuance



		Average of Time from Preliminary Arraignment to Actual Preliminary Hearing***
Pre-Project Period	2.58	60.68
Project Period	2.44	50.04

### PRELIMINARY HEARING OUTCOMES

There is no significant change in preliminary hearing and lower court outcomes.

	Cases held for court	Cases with reduced charges (held for court)	Percentage Change in Number of Charges Filed vs. Held
Pre-Project Period	50%	21%	-10%
Project Period	51%	22%	-12%

### MOVING FORWARD



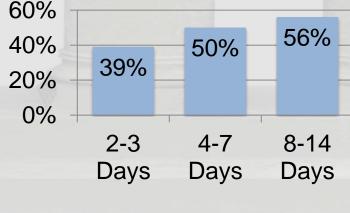
**Bail Reform in Practice in Allegheny County** 



- The use of money bail disproportionately impacts low income communities
- Due to disparities in the pretrial process, African American and Latino populations are more impacted by the use of money bail
- The use of money bail is arbitrary and not guided by the use of risk assessments or national standards.
- An inability to pay the money bail may coerce people to plead guilty so that they can get out of jail sooner despite being innocent.



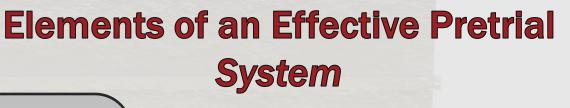








\*Lowenkamp, C.T., VanNostrand, M., & Holsinger, A. (2013). The Hidden Costs of Pretrial Detention. Laura and John Arnold Foundation. New York City NY.





Release options following or in lieu of arrest



Experienced prosecutors screen criminal cases before first appearance



Defense counsel active at first appearance





Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute



Legal framework that includes: presumption of least restrictive nonfinancial release; restrictions or prohibition against the use of secured financial conditions of release; and preventive detention for a limited and clearly defined type of defendant



Collaborative group of stakeholders that employs legal and evidence-based decision-making to ensure a high functioning system Elements of an Effective Pretrial

System



Pretrial release and detention decisions based on risk and designed to maximize release, court appearance, and public safety



Dedicated pretrial services agency

Release Options Following or in Lieu of Arrest

The legal principle of release on the least restrictive conditions starts with the initial contact with law enforcement. High functioning jurisdictions use citation releases or summonses by law enforcement in lieu of custodial arrests for non-violent offenses when the individual's identity is confirmed and no reasonable cause exists to suggest the individual may be a risk to the community or miss the ensuing court date.

**Experienced Prosecutors Screen Criminal Cases Before First Appearance** 

Trained and experienced prosecutors screen arrest filings before initial appearance to determine the most appropriate charge or action. Early screening helps:

 Reduce needless pretrial detention based on bail decisions made using arrest charges;

 Aid prosecution in determining the most appropriate recommendations for pretrial release or detention;

Dispose of weaker cases sooner and target resources to higher level cases; and

 Identify defendants eligible for diversion and other alternatives to adjudication.

Screening outcomes range from dismissing or reducing charges, offering defendants referrals to diversion or problem-solving courts or preparing the best bail recommendations at the initial court appearance.

Defense Council Active at First Appearance

Defense counsel engaged before initial appearance and prepared to represent the defendant regarding pretrial release/detention.

 The U.S. Supreme Court ruled in Rothgery v Gillespie County, 554 U.S. 191 (2008) that the initial bail hearing is a critical stage in the criminal case because liberty is at stake. Therefore, this decision point requires legal representation.

 The American Bar Association's "Ten Principles of a Public Defense Delivery System" recommend that clients are screened for eligibility and defense counsel assigned as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

### **Legal Framework**

1. A presumption of nonfinancial release on the least restrictive conditions necessary to ensure future court appearance and public safety.

2. Prohibition or restrictions on the use of secured financial

conditions.

3. Provisions for detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety. Detention without bail must include robust due process protections for detention-eligible defendants and those detained.

All three of these components are interrelated and must exist within a legal framework to achieve maximized rates of release, appearance, and public safety.

**Risk-Based Pretrial Decisions** 

Goal: To Maximize Court Appearance, Maximize Public Safety, and Maximize Release rates. All other essential elements flow from this defining principle.

Appearance: "Bail set at a figure higher than an amount reasonably calculated to [ensure court appearance] is 'excessive' under the Eighth Amendment." Stack v. Boyle 342 U.S. 1 (1951).

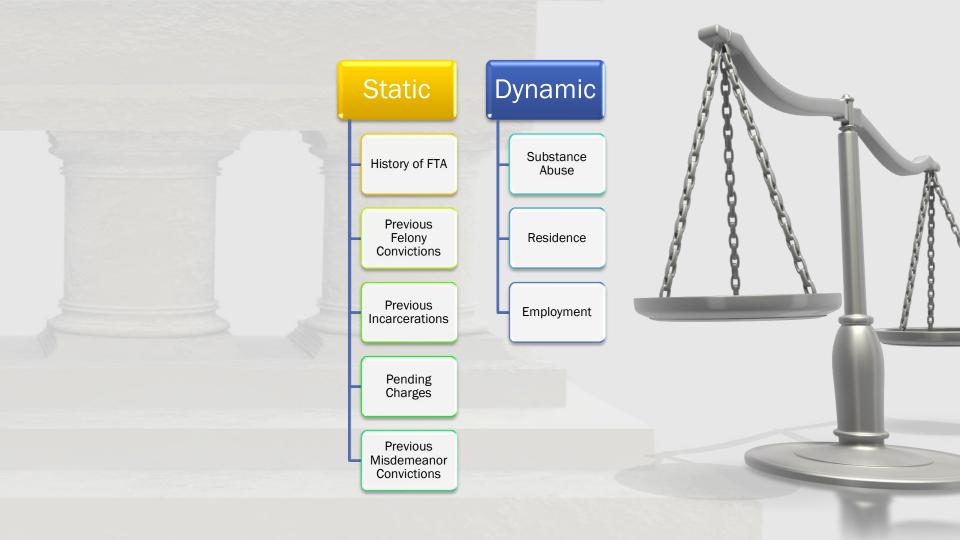
Safety: Detention may be authorized when defendants are found "after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987).

Release: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Salerno.



Effective pretrial systems and agencies use validated assessment criteria to gauge a defendant's likelihood of FTA and re-arrest. The assessment is empirical and preferably based on local research to ensure that its factors are proven as the most predictive of pretrial failure.

Separate instruments may be used to predict the likelihood of new violent offenses, domestic violence charges, substance use disorders and mental health needs.



### Decision Making Matrix - Allegheny County

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	ROR	ROR	ROR	Report by Phone	Report in person	No release
FTA 2	ROR	ROR	ROR	Report by Phone	Report in person	No release
FTA 3	ROR	ROR	Report by Phone	Report in person	Report in person	No release
FTA 4	Report by Phone	Report by Phone	Report in person	Report in person	Report in person	No release
FTA 5	Report by Phone	Report by Phone	Report in person	Report in person	Report in person	No release
FTA 6	Report by Phone	Report by Phone	Report in person	Report in person	Report in person	No release

**Research On Pretrial Release Conditions** 

#### Court Notification (Appearance):

✓ Solid evidence-based practice. Should be used as a uniform intervention. Could be the baseline for low/moderate level supervision.

#### Drug testing (Appearance, Public Safety):

✓ Results are mixed, dated. Drug use often is a behavior, not a risk factor. Used when specific drug has a link to pretrial failure. Should not be a blanket condition. Don't drug test alone if there is greater treatment need. Keeping up with drug use trends is a must.

## **Research on Pretrial Release Conditions**

#### Electronic Surveillance (Safety):

✓ No evidence of risk reduction, though can encourage release of higher-level defendants. Electronic Surveillance is not a true condition, but a method to monitor stay away from areas and curfew conditions. Not very useful with stay away from victim conditions.



#### **Non-Financial Conditions**

Level of Supervision/Monitoring

High Electronic Monitoring

Stay away order

Curfew

Drug testing

Travel restrictions

Prescribed contact/supervision

Court reminder

Release or ROR or Unsecured





Allegheny County Reporting Frequency (phone-in and in-person)

Every 2 weeks

Monthly

Court dates only

Everyone gets a court reminder

#### New Criminal Activity (NCA)

Requiring a defendant to report in excess of four times has no significant effect on new criminal activity

Most defendants will be re-arrested within 60 days from their initial bond being set and release from custody

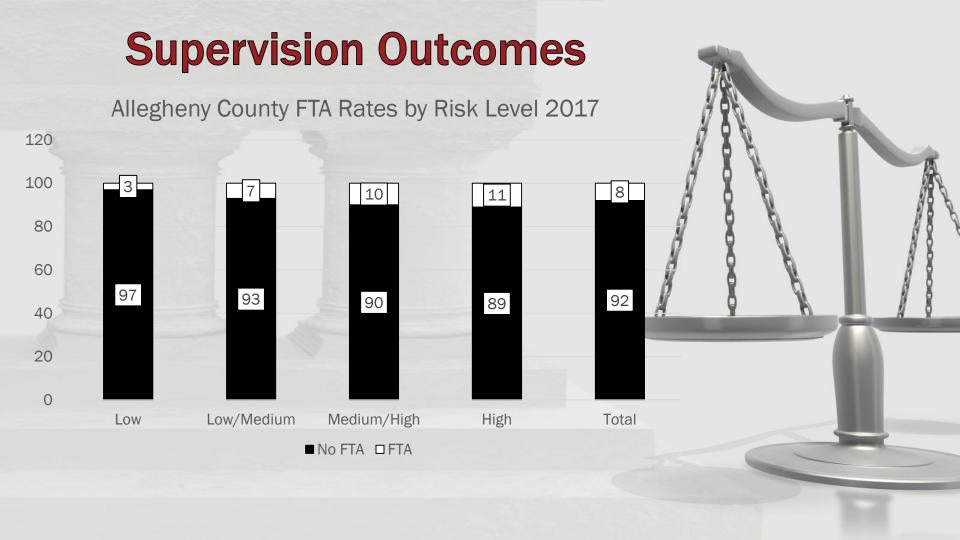
After 60 days on pretrial supervision, new criminal activity is dramatically reduced

#### Failure to Appear (FTA)

A defendant required to report in excess of 3 times will appear at 77% of all scheduled court appearances while a person who reports in excess of 10 will appear at 83% of all scheduled court appearances.

6% difference

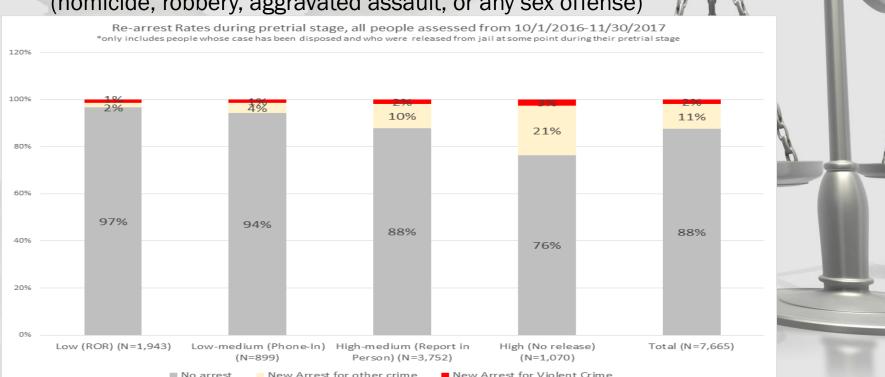






### **New Violent Criminal Activity**

Across all risk levels 2% of all defendants released at the pretrial stage were arrested for a new violent offense in 2017. (homicide, robbery, aggravated assault, or any sex offense)





Janice Radovick-Dean Allegheny County Pre-Trial Services





# SCHOOL TO PRISON PIPELINE

Lisa A. Mantella, Esq. Counsel, Leech Tishman

#### FROM SCHOOL HOUSE TO JAILHOUSE

- The School-to-Prison Pipeline refers to the use of school policies and practices that make the criminalization and incarceration of children and youth more likely and the attainment of a high-quality education less likely.
  - Largely blamed on the "zero tolerance policies" of the 90's and 2000's that mandated harsh punishments for school infractions.
  - It has a disproportionate effect on minority students.

#### FROM SCHOOL HOUSE TO JAILHOUSE

- Direct Impact students are put in contact with the juvenile justice system for disciplinary violations in school.
- Indirect Impact use of suspensions and expulsions that limit quality of education and promote academic failure. These students are more likely to become involved in the criminal justice system.

## WHAT DOES IT LOOK LIKE IN ALLEGHENY COUNTY?

- Allegheny County Juvenile Probation publishes a report annually.
  - 2018 report not yet available
  - Does not report specifically on arrests made while in school
  - Overall, the number of petitions filed decreased from 2016 to 2017
    - Arrests for possession of a weapon on school property increased 14%
    - Arrests for aggravated assault of a teacher increased by 19%
    - These offenses must be reported to law enforcement.

#### **SCHOOL-BASED PROBATION**

School-Based Probation Unit: This Unit includes 30 probation officers in 5 supervisory units. With probation officers in 13 city schools, 18 school districts and 1 charter school, the Allegheny County Juvenile Probation's School-Based Probation program is the largest in the Commonwealth and believed to be the largest in the nation.

School-based probation officers are fully engaged in the school environment, participating in a host of school related activities, including serving as coaches, club sponsors, D.A.R.E. instructors, and Student Assistance Program members. School-based probation officers also process new intake allegations for offenses occurring on school grounds as well as arrests made in the community if the youth attends a school-based probation school. When community protection is not compromised, juveniles are diverted from formal processing.

#### SCHOOL-JUSTICE PARTNERSHIP

Allegheny County assembled a cross-systems, cross-discipline team to implement a School-Justice Partnership (SJP) in Allegheny County. Under the leadership of Judge Dwayne Woodruff, Allegheny County attended Georgetown University's Center for Juvenile Justice Reform's 2016 School-Justice Partnerships Certificate Program. The team developed an SJP initiative with the core principles of prearrest diversion and behavioral health support.

The SJP team received a technical assistance grant in 2017 to work with the National Council of Juvenile and Family Court Judges and National Center for Juvenile Justice to support its goal to partner with a local school district. In addition, the grant funded attendance at the School Justice Partnership Institute in California in May 2017 and supported a site visit to a fully implemented SJP program in Philadelphia in June 2017. The team continues to collaborate with system partners from education, law enforcement, and behavioral health as it nears the completion of its first Memorandum of Understanding between a school district and law enforcement. The initial school district partnership involves Woodland Hills School District, but the team recently met with Pittsburgh Public School District officials to explore a similar partnership.

### **ACT 44**

- In the wake of the February 14, 2018 shooting at Marjory Stoneman Douglas High School, Gov. Wolf signed Act 44.
- Among other provisions, it:
  - Mandates the appointment of School Safety and Security Coordinators.
    - Responsible for school police, SRO and security guards
    - Responsible for policies, procedures, trainings,
    - Coordinates with law enforcement and first responders
  - Creates the School Safety and Security Committee within the PA Commission on Crime and Delinquency
  - Establishes standards for school police, school resource officers and school security guards
  - Appropriated funds for school districts to implement these provisions.

### **SCHOOL POLICE**

- Defined in Education Code
- School Police Officer 24 P.S. §§ 13-1301-C, 1302-C, 1306-C
  - an employee of the school
  - Undergo firearm training through MPOETC or is former PSP
  - Duty to "enforce good order in school buildings...."
  - Has authority to issue summary citations and detain students until arrival of local law enforcement
- School Resource Officer 24 P.S. §§ 13-1301-C, 13-1313-C
  - Employed by local police department with a duty station located in a school entity
  - Stationing within school is established by agreement between PD and School District
  - Duties include education of students in crime prevention, conflict resolution, develop community justice initiatives, etc.
- Security Guard 24 P.S. §§ 13-1301-C, 13-1314-C
  - Employed by school or 3<sup>rd</sup> party assigned to a school for safety and security and not engaged in programs with students.

## SCHOOL POLICE IN ALLEGHENY COUNTY

- Some schools have had school police departments before Act 44
  - Ex. City of Pittsburgh, Gateway
- Since Act 44
  - Plum borough created in district police department – July, 2018
  - July, 2018 West Mifflin School Board votes to create school police department
  - August, 2018 Upper St. Clair schools have school police
  - October, 2018 Fox Chapel hired 3 School Police officers.
- Most of the officers are armed.



Aug, 2018 - Bethel Park School Police expanded police department to 4 full time police officers and one SRO.



North Hill SD approved resolution May 2018

#### SCHOOL RESOURCE OFFICERS

- Mt. Lebanon utilizes a SRO
- Woodland Hills still utilizes a SRO
- April, 2018 NA hired 2 full time SRO's through McCandless PD
- Deer Lakes uses part time West Deer officers paid by the school. Not trained as SRO.

#### **FUTURE OF REFORM**

- Unintended consequences of the influx of police in our schools is not yet measured.
- Most of the provisions are located in the School Code, but it is incumbent that criminal attorneys are aware of the changes.
- Not all bad....
  - Allegheny County Juvenile Court more progressive than others in PA.
  - Potential for positive role models in the school
  - SRO duties include interaction with students and program development

Call to criminal law practitioners – engage your local school board.

### **SUMMARY AND QUESTIONS**

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# PENNSYLVANIA INVESTIGATING GRAND JURY REFORM

LISA A. MANTELLA COUNSEL, LEECH TISHMAN

"Recent high profile trials have focused attention on investigating grand juries and the important role they play in the justice system"

> - Chief Justice Thomas G. Saylor

CASES OF PUBLIC INTEREST

**NEWS RELEASES** 

MEDIA RESOURCES

RESEARCH & STAT

> Neur & Statistics

#### News

PA Supreme Court forms task force to review operations of investigating grand juries and recommend updates



#### NEWS ARTICLE

July 20, 2017

The Pennsylvania Supreme Court has formed a task force to perform a comprehensive review of investigating grand juries.

"Recent high profile trials have focused attention on investigating grand juries and

the important role they play in the justice system," said Chief Justice of Pennsylvania Thomas G. Saylor. "It is good policy to periodically evaluate operations and make updates and improvements where warranted. As a comprehensive review of Pennsylvania's investigating grand juries has not taken place in recent memory, the Supreme Court has formed this task force to prepare a public report detailing current operations of grand juries and advancing proposals for possible improvement."

An investigating grand jury is a group of citizens, usually numbering 23, which investigates



#### THE TASK FORCE

- Local members
  - J. Anthony Mariani, Chair
  - Thomas J. Farrell
  - Prof. Wesley Oliver
- Matters to be assessed:
  - Scope and nature of Grand Jury secrecy
  - Role of the supervising judge and the Commonwealth's attorney
  - Training for supervising judges
  - gag orders
  - swearing attorneys to secrecy

# SINCE THE FORMATION OF THE TASK FORCE

In Re: Fortieth Statewide Investigating Grand Jury

### SCOPE AND NATURE OF GRAND JURY SECRECY

- Protected as secret:
  - "Matters occurring before the grand jury," 42 Pa.C.S.A. §4549(b)
  - "Any information pertaining to the grand jury," Pa.R.Crim.P. 231(C)
- In Re: Fortieth Statewide Investigating Grand Jury, 191 A.3d 750 (Pa 2018)
  - "matters occurring before the grand jury" is "plainly broader than a witness's disclosure of his or her own testimony.... Such matters .... includ[e] comments by a supervising judge of the attorney for the Commonwealth made before the grand jury and evidence which may be proffered or discussed during a witness's testimony."
  - "General Assembly has not provided a definition of the phrase "matters occurring before the grand jury. ... [T]he term should be understood to reach beyond only what actually transpires in a grand jury courtroom."

#### **SWEARING ATTORNEYS TO SECRECY**

- In Re: Fortieth Statewide Investigating Grand Jury, 191 A.3d 750 (Pa 2018)
  - Dioceses subject to grand jury subpoena moved to strike the non-disclosure provisions, which effectively served as a secrecy oath, from the entry-of-appearance form for dioceses' counsel.
  - Court acknowledged in a footnote that the issue "bears hallmarks of a moot controversy" but determined that the issue of was of "sufficient public importance to justify its timely, final resolution."
  - The court thereafter "exercise[d] [its] supervisory authority" in amending the language of OAG's entry of appearance form used as a secrecy oath.
  - The amended language thereafter allowed an attorney to disclose the content of a witness- client's GJ testimony under the same circumstances in which the witness-client may do so where the attorney has the witness-client's express permission.

#### WHAT WE MAY SEE IN A REPORT OF THE AD HOC COMMITTEE

- Justice Baer and Justice Donohue both supported the use of the ad hoc committee to modify the non disclosure (secrecy oath) form.
- Additional powers/ duties of the supervising judge
  - "... we believe and we have learned that the courts should assume a stronger role in supervising the grand jury process..." 191 A.3d 750 (Aug. 21, 2018)
- Clarity regarding the use and purpose of reports in matters of "public interest" 42 Pa.C.S.A. § 4542
  - "...courts draw a sharp distinction between grand jury reports that speak generally to public affairs and those that impugn named persons." 191 A.3d 560 (July 27, 2018)
- Additional rights afforded to individuals subject to criticism in a report.
  - "...individuals enjoy the fundamental right to the protection of their reputations. That right cannot be impaired by government actors ... absent the affordance of due process..." 191 A.3d 560 (July 27, 2018)

#### STATUTE VS. RULES

- "We begin our analysis by observing that the investigating grand jury process is solely a creature of statute ... and, as such, the General Assembly has specified in detail therein a grand jury's duties and the procedures to be utilized in carrying out its designated tasks."
- "[O]ur Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself..."

In re Fortieth Statewide Investigating Grand Jury, 197 A.3d 712, 721 (Pa. 2018)

### **SUMMARY AND QUESTIONS**

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## PENNSYLVANIA POST-CONVICTION FALL 2018 AMENDMENTS

## Fall 2018 Statutory Amendments

- Both the Post Conviction Relief Act (PCRA) 42 Pa. C.S. § 9541 et seq. and Post Conviction DNA Testing statute 42 Pa. C.S. § 9543.1. were amended in the fall of 2018.
- These are the first changes to the statutory text in over ten years.

# Changes to the Post-Conviction DNA Testing Statute

#### MAIN CHANGES:

- People who pleaded guilty are now able to apply to get DNA testing 42 Pa. C.S. § 9543.1(a)(5).
- People who have completed their sentences will now be able to apply to get DNA testing. 42 Pa. C.S. § 9543.1(a)(1).
- Confessions do not serve as a bar to DNA testing. 42 Pa. C.S. § 9543.1(a)(5).
- DNA testing will be allowed with newer technology. 42 Pa. C.S. § 9543.1(a)(2).
- Any eligible profiles will be automatically uploaded to CODIS. 42 Pa. C.S. § 9543.1(f)(4) (emphasis added).

## **Guilty Pleas**

- Traditionally, Pennsylvania case law has prohibited people who pleaded guilty from asking a court for DNA testing.
- The statute now expressly provides that "[n]otwithstanding any other provision of law, a plea of guilty to a crime of violence, as defined in section 9714(g) (relating to sentences for second and subsequent offenses) . . . shall not prohibit the applicant from asserting actual innocence under subsection (c)(2) or the court from making a determination and ordering DNA testing under subsection (d)(2)." 42 Pa. C.S. § 9543.1(a)(5).

### Guilty Pleas Cont...

#### ■ NOTE:

- The statute further provides that applicants must explain how, after a review of the record of his/her guilty plea, "there is a reasonable **probability**, that testing would produce exculpatory evidence that would establish the applicant's actual innocence of the offense for which the applicant was convicted." 42 Pa. C.S. § 9543.1(a)(6) (emphasis added).
- This is in contrast to the standard applied to applicants who did not plead guilty; in that situation, the applicant must show that there is a "reasonable possibility" that the testing would produce exculpatory results that would establish the applicant's actual innocence of the crime for which he/she was convicted. Id. (emphasis added).

## No Longer Under State Supervision

- Under the prior version of the statute, a person had to have been incarcerated or on parole to be eligible for post-conviction DNA testing.
- The statute provides that anyone that has been convicted of a criminal offense in the Commonwealth may apply for testing. 42 Pa. C.S. § 9543.1(a)(1).

#### ■ NOTE:

- As with applicants who pleaded guilty, those who have completed their sentences must establish that there is a "reasonable probability" that DNA testing would produce exculpatory evidence that would establish their actual innocence. 42 Pa. C.S. § 9543.1(a)(6).

## Confessions No Longer a Bar to Testing

- The original version of the statute was silent as to the effect that a confession would have on an individual's ability to seek post-conviction DNA testing.
- Pennsylvania courts interpreted the statute to bar testing for someone who had confessed. See Commonwealth v. Young, 873 A.2d 720, 727 (Pa. Super. 2005)
- The Pennsylvania Supreme Court disagreed, ruling that confessions, even if found voluntary, did not bar post-conviction DNA testing. *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011)
  - ("We now hold that a confession, in and of itself, is not a per se bar under Section 9543.1(c)(3) to a convicted individual establishing a prima facie case that DNA testing would establish actual innocence of the crime for which he or she was convicted, even if the voluntariness has been fully and finally litigated.").
- This holding has now been incorporated into the statutory text:
  - "[A] confession given by the applicant concerning the offense for which the applicant was convicted, shall not prohibit the applicant from asserting actual innocence under subsection (c)(2) or the court from making a determination and ordering DNA testing under subsection (d)(2)." 42 Pa. C.S. § 9543.1(a)(5).

### Testing, Using New Technology, is Allowed-Even If Testing Has Been Conducted In The Past

- The statute now provides that testing may be granted where "the evidence was subject to [DNA] testing, but newer technology could provide substantially more accurate and substantially probative results. . . . " 42 Pa. C.S. § 9543.1(a)(2).
- This change aligns Pennsylvania with 41 other sister states who have identical or very similar provisions.

# Eligible Profiles Shall Be Uploaded to CODIS

- Previously silent on CODIS uploads, the statute now mandates that, "[i]f testing complies with Federal Bureau of Investigation requirements and the data meets NDIS criteria, profiles obtained from the testing be searched or uploaded to CODIS." 42 Pa. C.S. § 9543.1(f)(4) (emphasis added).
- The Statute also includes provisions that take into account that testing may be done by private laboratories that cannot themselves upload profiles to CODIS stating: "[w]hen testing is conducted by a private laboratory, a court may order a public laboratory with access to CODIS to take the necessary measures to ensure the DNA profile obtained from probative biological material from crime scene evidence can be uploaded to CODIS by the public laboratory." 42 Pa. C.S. § 9543.1(f)(5).

# Changes to the Post-Conviction Relief Act

#### MAIN CHANGES:

- The timeline for filing a successive PCRA petition has been extended from 60 days to one year. 42 Pa. C.S. § 9545(b)(1).
- The Statute now requires that all Petitions requesting an evidentiary hearing included witness certifications signed by the witness him or herself. 42 Pa. C.S. § 9545(d)(1)(i)

### 60 Day Timeline Extended to One Year

- The PCRA now provides that "[a]ny petition . . ., including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. . . ." 42 Pa. C.S. § 9545(b)(1).
- Only Exceptions:
  - Petitioner's failure to raise a claim previously was the result of governmental interference; or
  - "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;"
  - or "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa. C.S. § 9545(b)(1).
- Previously, a petitioner invoking one of these exceptions had 60 days from the discovery of the information giving rise to the claim to file a PCRA petition based on it.
- That time period has now been extended to one year: "Any petition invoking an exception provided in subparagraph (1) shall be filed within one year of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2).

## Petitions Requesting an Evidentiary Hearing and Witness Certifications

- Previously, petitioners requesting an evidentiary hearing were required to include with their petitions a signed certification as to each intended witness's testimony and as to each witness's contact information.
  - A certification from an attorney sufficed to meet this requirement.
- Now, petitioners must include certifications signed by the witnesses themselves.
- Cannot obtain a witness's signature: Petitioner can support the petition with a certification signed by the petitioner or by counsel that includes the substance of the witness's expected testimony and the witness's contact information, along with relevant documents. The petitioner can also provide the contact information directly to the Commonwealth. 42 Pa. C.S. § 9545(d)(1)(i)
  - This certification must also include an explanation of the basis of the petitioner's information about the witness and efforts made to obtain the witness's signature..." 42 Pa. C.S. § 9545(d)(1)(ii).
- Failure to substantially comply with these requirements regarding certifications "shall render the proposed witness's testimony inadmissible." 42 Pa. C.S. § 9545(d)(1)(iii).

## Some Recent Changes in Federal Court

- Second Chance Act—year enacted, goal
- Fair Sentencing Act—year enacted, goal
- First Step Act—year enacted, goal
- Obama Commutations—effort of legal community to process as many as possible prior to leaving office

## Second Chance Act



### Second Chance Act

In fiscal year 2010, \$144 million were appropriated for prisoner reentry programs, including reentry initiatives in the Federal Bureau of Prisons and Second Chance grant programs:

Reentry demonstration projects under Sec. 101

Mentoring grants to nonprofit organizations under Sec. 211 [32] 16

Reentry Courts under Sec. 111

Family-based, substance abuse treatment under Sec. 113

Grants to evaluate and improve education in prisons, jails, and juvenile facilities under Sec. 114

Technology career training demonstration grants under Sec. 115

Reentry Substance Abuse and criminal justice collaboration under Sec. 201

Reentry research under Sec. 245

## Fair Sentencing Act of 2010

#### The FSA implemented long-held Commission findings and recommendations on federal cocaine policy.

In 1995, 1997, 2002, and 2007, the Commission submitted **four separate reports** to Congress regarding cocaine sentencing, based on legislative history, scientific and medical literature, extensive analysis of the Commission's own data, public comment, and expert testimony.

In its reports, the Commission made four core findings regarding crack cocaine penalties as they existed before the Fair Sentencing Act:

- they overstated the relative harmfulness of crack cocaine compared to powder cocaine;
- they swept too broadly and applied most often to lower level offenders;
- they overstated the seriousness of most crack cocaine offenses and failed to provide adequate proportionality; and
- their severity mostly impacted minorities.

As a result of these findings, the Commission recommended that Congress reduce crack cocaine penalties so that the crack-to-powder drug quantity ratio was no more than 20-to-1, and that Congress repeal the mandatory minimum penalty for simple possession of crack cocaine.

# The FSA reduced the disparity between powder cocaine and crack cocaine sentences. Average Sentence for Powder & Crack Cocaine Trafficking 124 months 96 months 79 months \*\*\* Powder Cocaine months FY 2005 FY 2009 FY 2013

## Fair Sentencing Act of 2010

#### FEDERAL CASELOAD

Crack cocaine was the most commonlysentenced drug in nearly 40% of all federal judicial districts in 2010; in 2014, it was the most commonly-sentenced drug in less than 10% of all federal districts.

Fiscal Year 2010



Fiscal Year 2014



#### COOPERATION

The willingness of crack offenders to cooperate, as measured by the rate of below-range sentences for substantial assistance, appears unaffected by reductions in crack cocaine penalties during this time period.

Rates of Substantial Assistance Provided to Government (USSG §5K1.1)



#### After the FSA, many fewer crack cocaine offenders were sentenced in the federal system.



Beginning just prior to the FSA and accelerating after it, there has been a steep reduction in the number of crack cocaine offenders sentenced in the federal system. Between 2010—the last year before the FSA took effect—and 2014, the number of crack cocaine offenders sentenced in the federal system decreased by half.

#### The FSA will reduce the federal prison population.

The Commission identified two impacts of the FSA on the federal prison population that it can estimate. The first is the impact that the guideline reductions the Commission made in response to the FSA will have going forward:

- 5,984 drug trafficking offenders would have had a higher sentence under the pre-FSA statutory and guideline scheme.
- These offenders received an average sentence of 71 months.
- Had the FSA not passed, their average sentence would have been 106 months.
- Based on this difference, the Commission estimates that the FSA will result in a savings of 15,320 bed-years to the Bureau of Prisons.

The second is the impact of the Commission's decision to retroactively apply the guideline reductions it made in response to the FSA:

- As of December 2014, 6,880 crack cocaine offenders had received reduced sentences
- The Commission estimates that these reductions will result in a savings of 14,333 bed-years to the Bureau of Prisons.

In total, the prospective and retrospective changes made in response to the FSA resulted in an approximate savings of 29,653 bed-years to the Bureau of Prisons.



reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);



broadens the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties (Section 402);



reduces the severity of the "stacking" of multiple § 924(c) offenses (Section 403); and



applies retroactively the Fair Sentencing Act of 2010 which reduced mandatory minimum penalties for crack cocaine offenses (Section 404).

First Step Act Provisions				
Title I	Recidivism Reduction			
Title II	Lieutenant Osvaldo Albarati Correctional Officer Self-Protection			
	Act of 2018			
Title III	Restraints on Pregnant Prisoners Prohibited			
Title IV	Sentencing Reform			
Title V	Second Chance Act of 2007 Reauthorized			
Title VI	Miscellaneous (includes recidivism reduction, reentry programming,			
	prison conditions, treatment for opioid and heroin abuse, and more)			

#### Changes to Drug Mandatory Minimum Penalties Section 401

#### **DRUG OFFENSES**

The First Step Act made changes to both the length of certain mandatory minimum penalties and the types of prior offenses that can trigger enhanced penalties.

Statutory Provision	Statutory Penalty	Enhanced Penalty BEFORE First Step Act	Enhanced Penalty AFTER First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year Manda- tory Minimum	20-year Mandatory Minimum (after one prior conviction for a felony drug offense)	15-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)
		Life (after two or more prior convictions for a felony drug offense)	25-year Mandatory Minimum (after two or more prior convictions for a serious drug felony or serious violent felony)
21 U.S.C. § 841(b)(1)(B)	5-year Manda- tory Minimum	10-year Mandatory Minimum (after one prior conviction for a felony drug offense)	10-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)
21 U.S.C. § 960(b)(1)	10-year Manda- tory Minimum	20-year Mandatory Minimum (after one prior conviction for a felony drug offense)	15-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)
21 U.S.C. § 960(b)(2)	5-year Manda- tory Minimum	10-year Mandatory Minimum (after one prior conviction for a felony drug offense)	10-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)

Note that §§841(b)(1)(C) and (D) were NOT amended.

#### "Serious Drug Felony" (&)



#### "Serious Violent Felony"

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

An offense for which the defendant served a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) or 18 U.S.C. § 113 (assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States. Section 3559(c)(2)(F) defines "serious violent felony" as enumerated offenses such as murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses, among others, or as any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense" and is punishable by a maximum term of imprisonment of ten years or more.

Effective date of these changes: The Act provides that these changes shall apply to any offense that was committed before the date of enactment of the Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

## Safety Valve

#### NOTE

The new statutory safety valve provision applies to crimes under Title 46 (Maritime Offenses).

#### **Old Limitation**

 The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History category);

Note that this limitation still exists in §5C1.2.

#### **New Limitation**

- (1) The defendant does not have:
  - (A) more than four 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;

Definition of Violent Offense: As used in this section, the term "violent offense" means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

Effective date of these changes: The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

**Example:** Contemplates five-year mandatory minimum terms for using, carrying, or possessing a firearm in furtherance of a crime of violence or drug trafficking offense. Higher mandatory minimums apply depending on other factors such as whether the firearm was brandished (seven years) and whether the firearm was a machine gun (30 years) among others.

924(c) Counts of Conviction in the Same Indictment	BEFORE the First Step Act	AFTER the First Step Act
1 Count	Mandatory minimum of 5 years	Mandatory minimum of 5 years
2 Counts	Mandatory minimum of 5 + 25 = 30 years	Mandatory minimum of 5 + 5 = 10 years
3 Counts	Mandatory minimum of 5 + 25 + 25 = 55 years	Mandatory minimum of 5 + 5 + 5 = 15 years

Effective date of these changes: The Act provides that the amendments to section 924(c) 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 [December 21, 2018].

Any defendant sentenced before the effective date of the Fair Sentencing Act (August 3, 2010) who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act. Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties. Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. The First Step Act authorizes the defendant, the Director of the Bureau of Prisons, the attorney for the government, or the court to make the motion.

BEFORE	The Fair Sentencing Act	AFTER
5 g 50 g	21 U.S.C. § 841 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g
5 g 50 g	21 U.S.C. § 960 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g