Negative: Gun Stacking Reform

By “Coach Vance” Trefethen

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Plan: FSA reforms on gun stacking charges and mandatory minimums are not retroactive, so some prisoners who might have been released sooner are overlooked. Plan will apply retroactive sentencing reduction for mandatory minimums and gun stacking charges. Each prisoner that is affected by their plan can be resentenced by the judge to the appropriate sentences under the First Step Act.

“Stacking” – is a term that refers to how a criminal is charged with multiple crimes at the time of their arrest and trial. It’s often referred to as the “924(c)” rule. A rough example: Guy with no criminal history goes into a bank, brandishes a gun, fires it into the ceiling, steals $10,000 and runs outside. Outside, someone confronts him, so he again fires it into the air, scares them off, and runs away. He never physically harms anyone. Later he gets caught. The federal prosecutor could treat what happened inside the bank and what happened outside the bank as two separate incidents and “stack” them under 924c for the purpose of charging him as a “repeat firearms offender.” He would be charged with bank robbery, plus a first offense firearm violation (firing inside the bank), plus a second offense firearm violation (firing outside the bank). Now as a “repeat firearms offender” (the second “separate” offense outside the bank), he would be sentenced much more severely than as a first time offender who fired two shots as part of his one and only first offense. He would be sentenced to a much longer prison term than if he had fired two shots inside the bank and no shots outside. FSA was supposed to reduce or correct this “stacking” disparity.  
  
Some sources say Congress did allow retroactive sentencing reductions for prisoners convicted before FSA was enacted. Others say they didn’t. The problem is an ambiguity in the law that different courts interpret differently.  
  
READ THIS VERY CAREFULLY UNTIL YOU UNDERSTAND IT:  
 A fair number of federal prisoners have already gotten retroactive sentencing relief from federal district courts in certain cases. These federal district courts (the lowest level courts in the federal system) have ruled that the wording of the FSA allows them to take into consideration the changes FSA made to “stacking” to reach back retroactively and reduce the sentences even of prisoners who were convicted before FSA was passed. So, the district court judges review them case by case, and if the prisoner is deserving, the judge reduces the sentence retroactively. Usually they cut him loose with “time served.” Or at least, they try to…  
 However, the government (Dept. of Justice) can (and sometimes, but not always does) appeal those federal district court decisions to the Circuit Court of Appeals for the region of the country where the district court is located. The DOJ prosecutors (sometimes) don’t like letting bad guys out of prison early, so sometimes they appeal it (sometimes they agree that the prisoner has served enough time and they don’t oppose his petition for relief). But when they do appeal it, DOJ argues that the wording of FSA doesn’t allow retroactive sentencing relief. What happens then? The answer is…  
 It depends. The Circuit Courts of Appeal each cover a designated region of the country and are numbered from one to eleven (plus there are two others outside the numbering system that we don’t need to worry about here). Cases that have been appealed from district courts in the 4th and 10th Circuits have been ruled by their respective Court of Appeals as affirming the retroactive sentence reduction. Cases that have been appealed from district courts to the 3rd, 6th and 7th Circuit Courts of Appeal have had the reductions rejected by the Appeals Courts. It’s a question of interpretation of a vague and difficult wording of law, and different courts reach different conclusions. What does this mean?  
 It means that a prisoner who is in a part of the country that is geographically in the states covered by the 4th or 10th Circuits will succeed if the district judge accepts it when he files for retroactive stacking sentence relief (the government will lose on appeal). And a prisoner who is located in a state covered by the 3rd, 6th or 7th Circuit could have his petition for stacking sentence relief accepted (if the district judge accepts it and the government doesn’t appeal) or rejected (if the district judge doesn’t accept it or if he does accept is and the government does appeal). And prisoners in the other Circuits, nobody knows what will happen because those Circuits’ appeals courts haven’t had a case come up yet for them to rule on. Yes, you heard that right: Federal law means different things depending on where in the country you live. This is known as a “Circuit Split.”   
 There are three ways it could be resolved. 1) The 3rd, 6th and 7th Circuit appeals courts could change their minds in future cases and start ruling in favor of the prisoners. That’s very unlikely to happen. 2) Congress could change the law and explicitly say that it should clearly be applied retroactively. This is the Affirmative’s plan. 3) One of the prisoners whose petition was denied in the 3rd, 6th or 7th Circuits appeals his case to the US Supreme Court, the Supreme Court agrees to hear it, and the Supreme Court rules in favor of the prisoner. This would force all the federal courts to follow the same rule as the 4th and 10th Circuits already have and accomplish the same thing as #2.

Negative: Gun Stacking Reform 5

BACKGROUND 5

2 Circuit Courts of Appeal allow retroactive stacking reduction based on FSA, while 3 Circuits do not 5

How the federal Circuit Courts of Appeal work 5

States covered by the 4th Circuit Court of Appeals 5

States covered by the 10th Circuit Court of Appeals 5

TOPICALITY 6

1. No substantial reform. 6

Link: FSA firearm stacking sentencing reform is already retroactive 6

“Many district courts” are already granting retroactive stacking sentence reductions 6

Violation: Doing a little more of the Status Quo isn’t substantial reform 6

Impact: No Affirmative team justifies Negative ballot 6

INHERENCY 6

1. A/T “FSA isn’t retroactive” 6

Section 403 isn’t, but Section 603 is! And 603 is being used to solve for retroactive stacking sentences 6

2. Examples of retroactive stacking sentence reductions that have already occurred thanks to FSA 7

Kepa Maumau 7

In 2019 his stacking sentence was reduced retroactively for a federal crime he committed in 2008 7

Prisoners like Maumau can file for and receive retroactive “stacking” sentence reduction 7

Derrick Rainwater 7

Derrick Rainwater got his “stacking” sentence retroactively reduced by 65% 7

3. Status Quo retroactive relief is actually BETTER than AFF Plan relief. Because it’s not “only” for stacking 8

Federal district courts can grant retroactive sentencing relief for “stacked”-sentence prisoners based on consideration of: FSA’s elimination of stacking, age of the offender, or excessively long sentence 8

HARMS / SIGNIFICANCE 8

1. Tiny number of prisoners affected 8

Maximum of 3,095 prisoners total could be affected by the AFF plan, because that’s how many, according to a source that agrees with the Affirmative position, did not get retroactive reductions under FSA 8

But wait, there’s less: 2 of the 11 Circuit Courts of Appeals have ruled that FSA stacking reform is already retroactive, 3 have ruled it isn’t, the other 6 haven’t decided 9

But wait, there’s even less: The Circuit Courts of Appeal only matter if the government appeals a federal district judge who uses FSA retroactively. Some federal prosecutors (US Attorneys) don’t appeal, some do 9

Do the math: There are 151,000 federal prisoners total 9

If all 3095 prisoners had been affected, it would be 2% of 151,283. But they’re not all affected 10

2. Not all pre-FSA “stacked” sentences were excessively long 10

[Before FSA abolished “stacking”] Supreme Court ruled a federal judge could impose as little as a 1-day “stacked” sentence if he thought a long sentence would be unjust 10

SOLVENCY 10

1. Even fewer prisoners actually benefit #1: Undeserving lose in federal district court (we hope) 10

The undeserving would (hopefully) get denied 10

Not everyone deserves FSA retroactive sentencing relief – it’s granted on a case by case basis 10

2. Even fewer prisoners actually benefit #2: They can lose on appeal 11

Federal prosecutors can appeal decisions to grant retroactive FSA stacking sentence relief and block early release 11

Impact: Infinitesimal impact to this plan 11

DISADVANTAGES 11

1. Less time = More crime 11

Shorter sentences would be bad because the “tough on crime” approach since the ‘90s has helped bring down crime rates 11

Negative: Gun Stacking Reform

BACKGROUND

2 Circuit Courts of Appeal allow retroactive stacking reduction based on FSA, while 3 Circuits do not

David A. O’Neil and 3 other attorneys 2021. (attorneys: John Gleeson, Marisa Taney and Matthew Specht. All are with Debevoise & Plimpton LLP, a law firm in Washington DC and New York) December 2021 Petition to the US Supreme Court for a writ of certiorari in the case of Thacker v. U.S. <https://www.supremecourt.gov/DocketPDF/21/21-877/204743/20211210143704408_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf> (accessed 6 March 2022)

This case squarely presents an important issue of statutory interpretation that has deeply divided the federal courts of appeals: whether a district court may consider the First Step Act’s amendment to 18 U.S.C. § 924(c), which dramatically reduced the mandatory consecutive sentences for “second or successive convictions” under that law in virtually all cases, in determining whether a sentence should be reduced under 18 U.S.C. § 3582(c)(1)(A)(i). Three courts of appeals, including the Seventh Circuit, have answered that question in the negative. These courts have held that because the amendment to Section 924(c) was not made categorically retroactive, it cannot be considered, either standing alone or in combination with other factors, in determining whether “extraordinary and compelling reasons” warrant a sentence reduction under Section 3582(c)(1)(A)(i). Two courts of appeals have reached the opposite conclusion, correctly holding that the plain language of Section 3582(c)(1)(A)(i) permits district courts to consider the First Step Act’s seismic changes to Section 924(c) when determining whether such reasons are present.

How the federal Circuit Courts of Appeal work

Official web page of the 10th Circuit Court of Appeals, last updated 11 January 2022. “General Information” <https://www.ca10.uscourts.gov/clerk/general-information#:~:text=The%20territorial%20jurisdiction%20of%20the,Wolpert>. (accessed 8 March 2022)

The federal courts of appeals are the intermediate appellate courts between the district (trial) courts and the Supreme Court of the United States. There are thirteen courts of appeals: eleven numbered circuits (First through Eleventh), the District of Columbia Circuit, and the Federal Circuit. The numbered circuits, including the Tenth Circuit, provide appellate review of all cases tried in the district courts within the geographic area of their jurisdiction; they also decide appeals brought to them by residents of the circuit from various administrative tribunals, including the Tax Court and agencies of the federal government.

States covered by the 4th Circuit Court of Appeals

Official web page of the 4th Circuit Court of Appeals, undated, accessed on 8 March 2022. “FAQs about the court” https://www.ca4.uscourts.gov/faqs/faqs-about-the-court#:~:text=The%20U.S.%20Court%20of%20Appeals,Carolina%2C%20Virginia%20and%20West%20Virginia.

The U.S. Court of Appeals for the Fourth Circuit hears appeals from the district courts in the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia.

States covered by the 10th Circuit Court of Appeals

Official web page of the 10th Circuit Court of Appeals, last updated 11 January 2022. “General Information” <https://www.ca10.uscourts.gov/clerk/general-information#:~:text=The%20territorial%20jurisdiction%20of%20the,Wolpert>. (accessed 8 March 2022)

The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho.

TOPICALITY

1. No substantial reform.

Link: FSA firearm stacking sentencing reform is already retroactive

Andrew M. Skier and Associates 2019 (Alabama law firm) 10 Jan 2019 “The “First Step Act” and the Effect on Federal Criminal Sentencing and Practice” <https://www.alabamacriminalandfamilylawyerblog.com/the-first-step-act-and-the-effect-on-federal-criminal-sentencing-and-practice/> (accessed 5 Mar 2022)

Stacking of mandatory time: “Stacking” of sentences under 18 USC 924 (possession of a firearm in connection with another felony) was commonplace under the old scheme, and people were commonly charged with more than one 924(c) count in a single indictment. The new law limits stacking to situations in which a conviction is final at the time of sentencing, so that repeated counts in an indictment can no longer result in stacking of these consecutive sentences. This provision is retroactive.

“Many district courts” are already granting retroactive stacking sentence reductions

Judge Sydney Fitzwater 2021 (federal district court, Northern District of Texas) decision of the court in the case of U.S. v. Rainwater 26 Apr 2021 <https://compassionaterelease.com/wp-content/uploads/2021/04/US_DIS_TXND_3_94cr42_MEMORANDUM_OPINION_AND_ORDER_granting_232_Motion_t.pdf> (accessed 8 Mar 2022) (brackets in original)

“A reduction in [such a] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.” United States v. Urkevich, 2019 WL 6037391, at \*4 (D. Neb. Nov. 14, 2019). Consequently, “[r]ecognizing the disparity created by the First Step Act’s alterations to § 924(c), many district courts have granted reductions to defendants with ‘stacked’ 924(c) convictions.” United States v. Curtis, 2020 WL 6484185, at \*7 (N.D. Okla. Nov. 4, 2020). These courts have determined that the First Step Act’s change to the sentencing law under § 924(c), “which would have shortened each defendants’ sentence by a full 30 years – could be considered under the ‘extraordinary and compelling’ standard.” McCoy, 981 F.3d at 279.

Violation: Doing a little more of the Status Quo isn’t substantial reform

The Negative owns the Status Quo. AFF was supposed to propose something significantly different.

Impact: No Affirmative team justifies Negative ballot

Since no one in this debate is affirming significant reform, there is effectively no Affirmative team. No matter who wins, you should write Negative on the ballot.

INHERENCY

1. A/T “FSA isn’t retroactive”

Section 403 isn’t, but Section 603 is! And 603 is being used to solve for retroactive stacking sentences

Federal Public Defender Services Office Training Division 2020 (government agency that provides free attorneys for federal criminal defendants) 16 Apr 2020 “District Courts Using First Step Act Compassionate Release To Remedy Unjust 924(c) Stacking” <https://www.fd.org/news/district-courts-using-first-step-act-compassionate-release-remedy-unjust-924c-stacking> (accessed 6 Mar 2022)

Notwithstanding the non-retroactivity of section 403,district courts are now using another provision of the First Step Act, section 603, codified at 18 U.S.C. SS 3582(c)(1)(A), to undo the harsh sentences resulting from section 924(c) stacking. Section 603 of the First Step Act amended section 3582(c)(1)(A)(i) to permit the defense to initiate a request for compassionate release based on, among other things, "extraordinary and compelling reasons." This fundamentally altered the compassionate release landscape, which had for more than three decades given BOP unreviewable discretion to file compassionate release motions on behalf of clients.

2. Examples of retroactive stacking sentence reductions that have already occurred thanks to FSA

Kepa Maumau

In 2019 his stacking sentence was reduced retroactively for a federal crime he committed in 2008

Justia US Law 2021 (legal research organization) Case Summary “United States v. Maumau, No. 20-4056 (10th Cir. 2021)” <https://law.justia.com/cases/federal/appellate-courts/ca10/20-4056/20-4056-2021-04-01.html> (accessed 5 Mar 2022)

In August 2008, 20-year-old defendant Kepa Maumau participated in armed robberies of a clothing store and two restaurants. Maumau was indicted for his role in those robberies and ultimately convicted by a jury of one count of conspiracy to commit a racketeering offense, two counts of committing violent crimes in aid of racketeering, one count of Hobbs Act robbery, and three counts of using a gun during a crime of violence. At the time of Maumau’s convictions, 18 U.S.C. 924(c) included a “stacking” provision that required a district court to impose consecutive sentences of twenty-five years’ imprisonment for second or subsequent convictions of the statute, even if those convictions occurred at the same time as a defendant’s first conviction under the statute. As a result of that “stacking” provision, Maumau was sentenced to a total term of imprisonment of 55 years. In December 2018, Congress enacted the First Step Act of 2018 (First Step Act), 132 Stat. 5194 (2018). Three provisions of the First Step Act were relevant to this appeal. In October 2019, Maumau moved to reduce his sentence, arguing that that extraordinary and compelling reasons, including the First Step Act’s elimination of section 924(c)’s stacking provision, justified a reduction. The district court granted Maumau’s motion and reduced Maumau’s sentence to time served, plus a three-year term of supervised release. The government appealed, arguing that the district court erred in granting Maumau’s motion. Finding no reversible error, the Tenth Circuit Court of Appeals affirmed the district court.

Prisoners like Maumau can file for and receive retroactive “stacking” sentence reduction

Judge Mary Briscoe 2021. (federal judge, 10th Circuit Court of Appeals) 1 Apr 2021 decision of the court in U.S. v. Maumau <https://law.justia.com/cases/federal/appellate-courts/ca10/20-4056/20-4056-2021-04-01.html> (accessed 5 Mar 2022)

In October 2019, Maumau filed a motion pursuant to § 3582(c)(1) to reduce his sentence. Maumau argued in his motion that extraordinary and compelling reasons, including the First Step Act’s elimination of § 924(c)’s stacking provision, justified a reduction. The district court granted Maumau’s motion and reduced Maumau’s sentence to time served, plus a three-year term of supervised release.

Derrick Rainwater

Derrick Rainwater got his “stacking” sentence retroactively reduced by 65%

Judge Sydney Fitzwater 2021 (federal district court, Northern District of Texas) decision of the court in the case of U.S. v. Rainwater 26 Apr 2021 <https://compassionaterelease.com/wp-content/uploads/2021/04/US_DIS_TXND_3_94cr42_MEMORANDUM_OPINION_AND_ORDER_granting_232_Motion_t.pdf> (accessed 8 Mar 2022)

Defendant Derrick Damon Rainwater (“Rainwater”)—sentenced to a total of 1,128 months in prison (later reduced to 1,117 months) for a series of armed robberies involving mandatory sentence stacking under 18 U.S.C. § 924(c)—moves under 18 U.S.C. § 3582(c)(1)(A)(i) for a sentence reduction. Having considered the parties’ submissions and heard oral argument, and for the reasons explained, the court grants the motion to the extent that it reduces Rainwater’s sentence to 397 total months’ imprisonment.

3. Status Quo retroactive relief is actually BETTER than AFF Plan relief. Because it’s not “only” for stacking

Federal district courts can grant retroactive sentencing relief for “stacked”-sentence prisoners based on consideration of: FSA’s elimination of stacking, age of the offender, or excessively long sentence

Judge Mary Briscoe 2021. (federal judge, 10th Circuit Court of Appeals) 1 Apr 2021 decision of the court in U.S. v. Maumau <https://law.justia.com/cases/federal/appellate-courts/ca10/20-4056/20-4056-2021-04-01.html> (accessed 5 Mar 2022)

The underlying premise of this argument is that the district court in the case at hand granted relief to Maumau based upon its disagreement with the length of his statutory sentence. We reject the government’s argument because its underlying premise is incorrect. Nothing in the district court’s decision indicates that the district court granted relief to Maumau based upon its general disagreement with the mandatory sentences that are required to be imposed in connection with § 924(c) convictions. Nor was the district court’s decision based solely upon its disagreement with the length of Maumau’s sentence in particular. Rather, the district court’s decision indicates that its finding of “extraordinary and compelling reasons” was based on its individualized review of all the circumstances of Maumau’s case and its conclusion “that a combination of factors” 30 warranted relief, including: “Maumau’s young age at the time of” sentencing; the “incredible” length of his stacked mandatory sentences under § 924(c); the First Step Act’s elimination of sentence-stacking under § 924(c); and the fact that Maumau, “if sentenced today, . . . would not be subject to such a long term of imprisonment.”7 Aplt. App. at 191.

HARMS / SIGNIFICANCE

1. Tiny number of prisoners affected

Maximum of 3,095 prisoners total could be affected by the AFF plan, because that’s how many, according to a source that agrees with the Affirmative position, did not get retroactive reductions under FSA

**[And in just a moment we’ll show you that even a lot of those 3000 are not affected]**

Daniel Landsman 2019 (Director of Federal Legislative Affairs for Families Against Mandatory Minimums) A Second Chance Starts With A Second Look: The Case for Reconsideration of Lengthy Prison Sentences BY DANIEL LANDSMAN https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf (accessed 7 March 2022) (brackets added) (SRCA would have been doing the Affirmative plan if Congress had passed it, so this estimate directly applies to their Plan) (Ethical disclosure: The article is undated but references material published in May 2019)

The USSC [US Sentencing Commission] estimated that more than 3,000 currently incarcerated individuals would have received an opportunity for sentencing relief had SRCA [Sentencing Reform & Corrections Act] passed. The First Step Act did not permit an opportunity for resentencing of the 3,095 individuals serving the very sentences the legislation has reformed going forward.

But wait, there’s less: 2 of the 11 Circuit Courts of Appeals have ruled that FSA stacking reform is already retroactive, 3 have ruled it isn’t, the other 6 haven’t decided

**[This means prisoners in at least 2 and possibly 8 of the regions of the country that are not under the jurisdiction of the 3rd, 6th and 7th Circuit Courts of Appeals already have the AFF plan. Subtract however many prisoners that is from the 3000 total we started with. And it’s AFF’s burden to tell us how many that is – they’re the ones who must prove their plan is a significant reform with significant impact.]**

Peter Tomasek 2021 (attorney and serves as the Legal Editor for Interrogating Justice) 8 Nov 2021 “SCOTUS PETITIONS RAISE “STACKING” ISSUES UNDER FIRST STEP ACT” <https://interrogatingjustice.org/latest-news/interrogating-justice/scotus-petitions-raise-stacking-issues-under-first-step-act/> (accessed 6 Mar 2022)

So far, the U.S. Courts of Appeals for the Third, Sixth and Seventh Circuits have held that Congress did not intend to make the changes to § 924(c) retroactive in this way. Therefore, those circuits say, considering that change when deciding whether to reduce a sentence under § 3582(c)(1)(A)(i) would be at odds with congressional intent. Conversely, the U.S. Courts of Appeals for the Fourth and Tenth Circuits have concluded that courts may consider First Step Act changes when deciding whether to grant relief under § 3582(c)(1)(A)(i). The [Watford petition](https://www.supremecourt.gov/DocketPDF/21/21-551/196086/20211012135926812_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf) and the [Jarvis petition](https://www.supremecourt.gov/DocketPDF/21/21-568/196548/20211015145000808_Jarvis%20Petition.pdf) ask the Supreme Court to agree with the Fourth and Tenth Circuits.

But wait, there’s even less: The Circuit Courts of Appeal only matter if the government appeals a federal district judge who uses FSA retroactively. Some federal prosecutors (US Attorneys) don’t appeal, some do

Eric Williamson 2021. (assistant managing editor, UVA TODAY) FALL 2021 “John Gleeson ’80 on First Step Act, Second Looks and Restoring Judicial Discretion” <https://www.law.virginia.edu/uvalawyer/article/odds-were-stacked-against-them> (accessed 7 March 2022)

And earlier this year, that thing that never happens happened again: The U.S. attorney in Puerto Rico agreed to the project’s request for the release of a client who had already spent 30 years in prison. Gleeson said the success has been gratifying, but still feels tenuous. While some prosecutors have decided not to appeal the judges’ decisions, others have.

**END QUOTE.**

Negative Analysis: In the 4th and 10th Circuit, the prisoner wins no matter what. If the district court grants retroactive relief and the government doesn’t appeal, he wins. If the government does appeal, the prisoner wins the appeal because we already know the 4th and 10th Circuits will find in favor of FSA retroactive stacking relief. In all the other Circuits, if the government doesn’t appeal, then the prisoner wins and gets retroactive relief because the case never goes to the Appeals Court for them to reject it. That’s the example above from Puerto Rico, which is in the 1st Circuit, where the DOJ simply didn’t appeal and let the prisoner have retroactive FSA stacking relief because he asked for it.

If the government does appeal, the prisoner will probably lose in the 3rd, 6th and 7th Circuits and we don’t know what will happen in the 1st, 2nd, 5th, 8th, 9th and 11th Circuits. Now the Affirmative has to tell us how many of those 3000 prisoners remain after we remove:

* All the ones in the 4th and 10th Circuit regions of the country. Because their problem is already solved.
* All the ones in the 1st, 2nd, 5th, 8th, 9th and 11th Circuits that have applied for relief, gotten appealed and had their sentence reduction upheld on appeal. Because their problem is already solved.
* All the ones throughout the country that the DOJ doesn’t appeal. Because their problem is already solved.

Do the math: There are 151,000 federal prisoners total

Dr. E. Ann Carson 2021 (PhD; statistician at the DOJ Bureau of Justice Statistics) “Federal Prisoner Statistics Collected under the First Step Act, 2021” Nov 2021 <https://bjs.ojp.gov/library/publications/federal-prisoner-statistics-collected-under-first-step-act-2021#:~:text=The%20federal%20prison%20population%20decreased,to%20151%2C283%20at%20yearend%202020>. (accessed 7 March 2022)

The federal prison population decreased 13%, from 174,391 at yearend 2019 to 151,283 at yearend 2020.

If all 3095 prisoners had been affected, it would be 2% of 151,283. But they’re not all affected

You have to subtract from the 3000 all the ones on our list above whose problems have already been solved. The total has to be less than 1%. And there’s no way a plan that affects 1% of federal prisoners is a topical significant reform, nor is it significant enough to be worth an hour and a half of our time debating it.

2. Not all pre-FSA “stacked” sentences were excessively long

[Before FSA abolished “stacking”] Supreme Court ruled a federal judge could impose as little as a 1-day “stacked” sentence if he thought a long sentence would be unjust

Brandon Sample 2017. (federal criminal defense attorney) “18 U.S.C. 924(c) Stacked Sentence Reduction Possible, Per Supreme Court” 4 Apr 2017 <https://sentencing.net/sentencing/18-usc-924-c> (accessed 8 March 2022)

Yesterday the Supreme Court in Dean v. United States held that sentencing courts are free to impose a sentence of one-day imprisonment for underlying offenses related to an 18 U.S.C. § 924(c) charge. For example, an individual charged with Hobbs Act robbery and a violation of § 924(c) can receive a sentence of one day on the Hobbs Act charge. That one day sentence would then run consecutive to the sentence on the 924 (c) charge.

SOLVENCY

1. Even fewer prisoners actually benefit #1: Undeserving lose in federal district court (we hope)

**We already reduced it to 1% of federal prisoners who could potentially benefit from the plan. Now let’s reduce that number even further to show that the plan would not actually solve for all of those 1%.**

The undeserving would (hopefully) get denied

Federal district court judges, post-plan, if they don’t already do so, for those remaining 1% could review a prisoner’s case and decide not to grant relief. That’s good because some don’t deserve it. If the undeserving don’t get denied, then it creates the Disadvantage of releasing dangerous criminals onto the street too early. If they do get denied, then that 1% number of people benefiting from the plan goes down even more.

Not everyone deserves FSA retroactive sentencing relief – it’s granted on a case by case basis

Judge Mary Briscoe 2021. (federal judge, 10th Circuit Court of Appeals) 1 Apr 2021 decision of the court in U.S. v. Maumau <https://law.justia.com/cases/federal/appellate-courts/ca10/20-4056/20-4056-2021-04-01.html> (accessed 5 Mar 2022) (accessed 6 Mar 2022)

The district court further noted that, with the First Step Act, “Congress eliminated the consecutive stacking previously required for violations of § 924(c).” Id. at 188. Ultimately, the district court concluded that “when considered together . . . Maumau’s age, the length of sentence imposed, and the fact that he would not receive the same sentence if the crime occurred today all represent[ed] extraordinary and compelling grounds to reduce his sentence.” Id. The district court acknowledged that Congress chose not to “ma[k]e its changes to § 924(c) retroactive,” but concluded this was not dispositive. Id. at 191. The district court noted: “It [wa]s not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis.”

2. Even fewer prisoners actually benefit #2: They can lose on appeal

**Even if a prisoner wins retroactive FSA stacking relief in the district court doesn’t mean he immediately gets out of jail. Federal prosecutors can appeal and argue that he doesn’t deserve it**

Federal prosecutors can appeal decisions to grant retroactive FSA stacking sentence relief and block early release

Prof. Douglas A. Berman 2019 (prof. of law, Moritz College of Law at Ohio State Univ.) “Federal judge pens extraordinary and compelling order requesting US Attorney to vacate old stacked 924(c) conviction in extraordinary and compelling case” 19 Mar 2019 https://sentencing.typepad.com/sentencing\_law\_and\_policy/2019/03/federal-judge-pens-extraordinary-and-compelling-order-requesting-us-attorney-to-vacate-stacked-924c-.html

That all said, even though I think Judge Larimer has authority to do justice for Mr. Marks without awaiting action by the local US Attorney, I still think it strategically wise to see the prosecution's involvement in his effort to do justice. With the buy-in by the local prosecutor and vacating of a one of Mr. Marks' 924(c) convictions, there would likely be no appeal and likely no impediment to a Mr. Marks getting released in short order. If Judge Larimer were to act on his own using § 3582(C)(1)(A), however, the feds could possibly appeal and seek to block any early release.

Impact: Infinitesimal impact to this plan

Start with the tiny number of total prisoners with “stacked” sentences. Subtract from that the three groups who already have access to retroactive relief in the Status Quo. Then subtract from that the two types of prisoners who could get the opportunity from the Affirmative plan but would ultimately fail to benefit (fail at the district court level or lose on appeal). What remains is… almost nothing.

DISADVANTAGES

1. Less time = More crime

Shorter sentences would be bad because the “tough on crime” approach since the ‘90s has helped bring down crime rates

Prof. BARRY LATZER 2020. (emeritus professor at John Jay College of Criminal Justice, New York) 17 Feb 2020 “Democrats Prefer ‘Reforming’ the Criminal-Justice System to Punishing Criminals” (accessed 1 July 2021) https://www.nationalreview.com/2020/02/democrats-prefer-reforming-criminal-justice-system-to-punishing-criminals/

The United States is still in a crime trough, with violent crime rates [down 51 percent since 1991](https://ucrdatatool.gov/Search/Crime/Crime.cfm). When crime is low, pressures mount to reduce especially punitive measures, such as long prison sentences or the death penalty. Meanwhile, progressives are also motivated by the belief that the criminal-justice system is biased against African Americans, as a disproportionate number of them are in prisons and jails. Though blacks are roughly 13 percent of the United States population, they are [31 percent](https://www.bjs.gov/content/pub/pdf/p17.pdf) (see table 3 of the BJS report) of state prison inmates. (No one has convincingly demonstrated that this gap is the result of anything other than [a disparity in](https://ucrdatatool.gov/Search/Crime/Crime.cfm) crime rates, so the racism allegation is unsupported.) The truth is that we are already in a period of retrenchment in criminal justice, a cutting back on arrests, prosecutions and incarceration. Imprisonment rates have fallen steadily since 2007, dropping by 15 percent. For African Americans the decline was 31 percent. The Democratic candidates for president have latched on to the cutback trend, some a lot more aggressively than others, whereas President Trump, to the extent that he takes a stance at all, has chosen a more traditional road, aiming at crime control rather than system reform. The risk in the Democrats’ leniency approach is that it may fuel another crime wave, a long-term crime boom, such as the terrible ordeal the country endured from the late 1960s to the early 1990s. The weakening of the system (fewer arrests and imprisonments, shorter sentences) was a major factor in the late 60s rise in crime. On the other hand, however, past crime booms have had multiple causes in addition to a weak criminal-justice system, such as a rise in the young male population. So far at least, these other crime correlates are not currently present.