

Staff Notes

First Step Act of 2018

December 31, 2018

On December 21, 2018, President Trump signed into law the First Step Act of 2018.¹ The headings that follow are excerpted from the Act's table of contents. The unofficial staff notes, which appear below each heading, have not been reviewed by an authoritative source. These are intended merely for use by the Commission as a starting point for the further research.

With respect to Title IV ("Sentencing Reform"), each section's effective date is noted in **bold type** to facilitate easy comparison.

TITLE I—RECIDIVISM REDUCTION

Sec. 101. Risk and needs assessment system.

This section gives the U.S. Attorney General (AG) seven months to develop a risk and needs assessment system (RNAS). The RNAS will classify prisoners' risk of recidivism and misconduct, with periodic reassessment. This classification will be used for recidivism-reduction programming, housing, and prerelease/supervised release decisions. Time credits and other incentives for completing such programming are provided, although many prisoners, generally violent and deportable ones, are ineligible for incentives.

Sec. 102. Implementation of system and recommendations by Bureau of Prisons.

Upon the AG's completion of RNAS development, this section gives the Bureau of Prisons (BOP) six months to begin to implement it, with phase-in instructions.

¹ S. 756, as amended, was passed by the Senate on a vote of 87 to 12, and by the House on a vote of 358 to 36. Its text may be found at: <https://www.congress.gov/bill/115th-congress/senate-bill/756/text>

Sec. 103. GAO report.

This section requires the Government Accountability Office (GAO) to assess the implementation of the RNAS.

Sec. 104. Authorization of appropriations.

This section funds risk and needs assessments, authorizing savings from recidivism reduction to be reinvested in programming.

Sec. 105. Rule of construction.

This section prohibits placing a prisoner in prerelease custody or supervised release who is serving a state sentence, and specifies that immigration laws are not altered.

Sec. 106. Faith-based considerations.

This section prohibits discrimination against faith-based programming providers, although secular alternatives must be offered and funding may not directly support religious activities.

Sec. 107. Independent Review Committee.

This section gives the National Institute of Justice one month to select an Independent Review Committee that will assist the AG in developing the RNAS.

TITLE II—BUREAU OF PRISONS SECURE FIREARMS STORAGE

This title requires a secure storage area, or vehicle lockbox permission, for BOP employees' firearms.

TITLE III—RESTRAINTS ON PREGNANT PRISONERS PROHIBITED

This title generally prohibits the use of restraints on pregnant and postpartum prisoners, with training and reporting requirements.

TITLE IV—SENTENCING REFORM

Sec. 401. Reduce and restrict enhanced sentencing for prior drug felonies.

For second felony drug conviction, this section reduces the existing 20-year mandatory minimum to 15 years. For third felony drug conviction, this section reduces the existing life-without-release mandatory minimum to 25 years. A decay factor for prior felony drug offenses—of 15 years following release from prison—is added. Prior drug offenses no longer qualify unless the offender served a prison sentence of more than one year. Serious violent, non-drug felonies are added as qualifying priors, also with the

requirement that the prisoner had served a prison sentence of more than one year. This change applies to **sentences not yet imposed as of 12/21/18**.

Sec. 402. Broadening of existing safety valve.

The existing safety valve permits the court to impose the Sentencing Guidelines sentence in lieu of the mandatory minimum sentence applicable to drug offenses. This section expands the eligibility for the safety valve by increasing the disqualifying criminal history score. This change applies to **convictions entered on or after 12/21/18**.

Sec. 403. Clarification of section 924(c) of title 18, United States Code.

There is a 25-year mandatory minimum for twice committing a crime of violence or drug trafficking crime with a firearm. This section adds the requirement that the first conviction be final before the second offense is committed. This change applies to **sentences not yet imposed as of 12/21/18**.

Sec. 404. Application of Fair Sentencing Act.

The Fair Sentencing Act of 2010 (FSA 2010) reduced the statutory penalties for crack cocaine offenses to produce an 18-to-1 crack-to-powder drug quantity ratio (formerly 100-to-1). FSA 2010 eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased statutory fines. It also directed the U.S. Sentencing Commission (USSC) to amend the Sentencing Guidelines to account for specified aggravating and mitigating circumstances in drug trafficking offenses involving any drug type.² In 2011, the USSC decided to retroactively apply the Guidelines reductions it made in response to FSA 2010, but this did not affect the statutory changes made by FSA 2010 itself. This section permits, but does not require, the original sentencing court to give **retroactive effect** to FSA 2010 and impose a reduced sentence, on motion of either party, BOP, or the court itself.

TITLE V—SECOND CHANCE ACT OF 2007 REAUTHORIZATION

This title is the Second Chance Reauthorization Act of 2018. It authorizes grants for adult and juvenile offender state and local demonstration projects; family-based substance abuse treatment; a program to evaluate and improve educational methods at prisons, jails, and juvenile facilities; careers training demonstration; an offender reentry substance abuse and criminal justice collaboration program; and community-based mentoring and transitional service grants to nonprofit organizations. It changes federal prisoner reentry programs. It provides for auditing and evaluation of expenditures.

² The above notes were adapted from a brief description of FSA 2010 by the USSC, retrieved 12/28/18 at <https://www.uscc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010> .

TITLE VI—MISCELLANEOUS CRIMINAL JUSTICE

Sec. 601. Placement of prisoners close to families.

This section requires BOP to place prisoners as close as practicable to their homes, subject to various practical considerations.

Sec. 602. Home confinement for low-risk prisoners.

This section requires BOP to maximize durations of home confinement for prisoners with lower risks and needs.

Sec. 603. Federal prisoner reentry initiative reauthorization; modification of imposed term of imprisonment.

Among other provisions, this section expands authority to release elderly and terminally ill prisoners.

Sec. 604. Identification for returning citizens.

This section expands BOP's required assistance to released prisoners in obtaining identification documents.

Sec. 605. Expanding inmate employment through Federal Prison Industries.

This section expands the markets available to Federal Prison Industries (FPI); requires a 15 percent wage set-aside to fund inmate release expenses; and requires a GAO audit to evaluate FPI, including recidivism reduction.

Sec. 606. De-escalation training.

This section requires de-escalation training for BOP officers and employees.

Sec. 607. Evidence-Based treatment for opioid and heroin abuse.

This section requires reports from BOP and courts on availability and effectiveness of medication-assisted treatment for opioid and heroin abuse among prisoners and supervised releasees.

Sec. 608. Pilot programs.

This section requires BOP to establish pilot programs for mentorship to youthful prisoners and therapy to animals.

Sec. 609. Ensuring supervision of released sexually dangerous persons.

This section expands agents' authority to supervise releasees who had been civilly committed as sexually dangerous.

Sec. 610. Data collection.

This section requires the Bureau of Justice Statistics to collect additional prisoner statistics, including the frequency of use of solitary confinement, pregnancy outcomes and restraint use, facilities' capabilities, prisoners' treatment participation, and prisoners' family, language, alienage, education, and veteran status.

Sec. 611. Healthcare products.

This section requires free feminine hygiene products as appropriate for prisoners' needs.

Sec. 612. Adult and juvenile collaboration programs.

This section revises the funding allocation structure of grants for adult and juvenile collaboration programs.

Sec. 613. Juvenile solitary confinement.

Subject to narrow and limited exceptions, this section prohibits involuntarily placing a juvenile alone in a cell, room, or other area.

Staff Notes

Recommendations of Attorney General's Working Group on Sexual Assault

December 31, 2018

In 2018, Minnesota Attorney General Lori Swanson convened a Working Group on Sexual Assault to recommend ways in which the criminal justice system in Minnesota can improve its response to sexual assault reports by adult victim-survivors. The nine-member panel¹ released its recommendations in December 2018.

The headings that follow are excerpted from the report's table of contents. Only the headings of those sections containing recommendations are included below. Staff notes are provided only for select recommendations made to the legislature and to county attorneys. The staff notes are unofficial, and are not part of the report. For complete details, please refer to the report itself.²

RECOMMENDATIONS FOR THE MINNESOTA LEGISLATURE

Recommendation #1: The Legislature Should Require Agencies To Adopt Sexual Assault Policies and Protocols.

To provide guidance to law enforcement and accountability to police chiefs, all law enforcement agencies should be required to have in place a written policy and protocols for responding to and investigating sexual assault reports. These policies may be based on the POST Board's model policy, or other model policies, and should be evidence-based, trauma-informed, and victim-centered.

¹ The panel's membership included Inver Grove Heights Police Chief Paul Schnell, whom Governor-Elect Walz selected as his Commissioner of Corrections on December 20, 2018.

² The report is at https://www.ag.state.mn.us/Office/PressRelease/201812_SexualAssaultTaskForceReport.pdf (retrieved Dec. 31, 2018).

Recommendation #2: The Legislature Should Require the BCA To Offer Training for Local Law Enforcement Agencies in Trauma-Informed Investigations and Should Appropriate Funds to the BCA for this Purpose.

The BCA should be required and funded to facilitate training for law enforcement in investigating sexual assault cases, including trauma-informed interviewing techniques and addressing investigations where the victim-survivor is intellectually disabled. If necessary, the legislature should authorize the POST board to require sexual assault investigators to take this training.

Recommendation #3: The Legislature Should Improve the Ease of Reporting Sexual Assaults.

An agency should be required to accept reports of sexual assaults and complete a report, regardless of jurisdiction. If the agency lacks jurisdiction to investigate, it should be required to refer the matter to the agency that has such jurisdiction.

Recommendation #4: The Legislature Should Require Law Enforcement Agencies To Report Aggregate Data on Sexual Assault Reports and Responses.

All law enforcement agencies should be required to collect and annually report to the Department of Public Safety (DPS) data on sexual assault reports, case outcomes, and training. DPS would publish this data.

Recommendation #5: The Legislature Should Amend the Victim’s Rights Statute and Expand Access to Victim Advocates.

The Legislature should consider giving sexual assault victim-survivors who make police reports the legal right to access an advocate, and to have law enforcement contact an advocate at their request. This may require more qualified victim advocates, which the Legislature or another government body may need to address.

Recommendation #6: The Legislature Should Consider Granting Advocates Access to the Contact Information for Victim-Survivors Who Make Police Reports.

To enable victim advocates to explain their role and directly offer their services to victim-survivors, the Legislature should consider allowing advocates to access basic contact information for victim-survivors who make police reports.

Recommendation #7: The Legislature Should Clarify the Definition of “Physically Helpless,” for Purposes of Bringing Prosecutions When a Victim-Survivor Is Intoxicated.

The Legislature should change the law to prohibit sexual contact with a person who is awake but unable to consent due to an intoxicating substance.

Recommendation #8: The Legislature Should Reenact Authorization for Pre-Conviction DNA Collection.

To facilitate crime-solving, DNA should be collected from persons arrested for sex offenses, even before conviction. The existing statute authorizing such collection was declared unconstitutional by the Minnesota Court of Appeals in 2006, but a 2013 U.S. Supreme Court decision possibly overturned that 2006 decision. The Legislature should consider reenacting the pre-conviction DNA collection statute and funding foreseeable litigation costs that county attorneys will incur in the statute’s defense.

Recommendation #9: The Legislature Should Repeal the Voluntary Relationships Statute.

For certain criminal sexual conduct offenses—based on the complainant’s age, mental impairment, mental incapacitation, physical helplessness, or status as a recipient of special transportation services—it is a defense that the actor and the complainant were married or cohabiting.³ The Legislature should repeal this defense to sexual assault for cases based on the victim-survivor’s physical helplessness.⁴

Recommendation #10: The Legislature Should Consider Establishing a Statewide Council To Analyze Responses to Sex Crimes and Coordinate Regional Investigative Resources.

Recommendation #11: The Legislature Should Allocate Funds for Innovation Grants.

RECOMMENDATIONS FOR LAW ENFORCEMENT AGENCIES

Recommendation #1: Each Law Enforcement Agency Should Adopt a Sexual Assault Policy.

Recommendation #2: Agencies Should Provide Adequate Training to Officers Who Investigate Sexual Assaults.

³ When sexual penetration or contact would constitute criminal sexual conduct in the first- through fourth-degree because of the age of the complainant, alone or in combination with the actor’s position of authority over the complainant, Minn. Stat. § [609.349](#) prohibits prosecution if the actor and complainant are legally married, unless they are living apart and one has filed for legal separation or divorce. Likewise, when sexual penetration or contact would constitute criminal sexual conduct in the first- through fourth-degree because the complainant was mentally impaired, mentally incapacitated, or physically helpless, or because the actor was the complainant’s special transportation services provider, Minn. Stat. § [609.349](#) prohibits prosecution if the actor and complainant were, at the time of the alleged offenses, adults cohabiting in an ongoing voluntary sexual relationship, or are legally married, unless they are living apart and one has filed for legal separation or divorce.

⁴ Although the title of this recommendation suggests a recommendation to repeal the voluntary relationships statute in its entirety—which would, for example, criminalize sex between spouses if one was younger than 16 and the other was an adult—the specific language of the recommendation appears to suggest a narrower recommendation; i.e., a repeal of the statute’s applicability to cases involving physical helplessness.

Recommendation # 3: Agencies Should Receive Reports of Sexual Assaults, Regardless of Jurisdiction.

Recommendation #4: Agency Leadership Should Foster a Culture that Values Sex Crimes Assignments and Supports Sex Crimes Investigations.

Recommendation #5: Communities Can Strengthen Their Responses to Sexual Assaults by Using Multi-Disciplinary Teams.

Recommendation #6: Agencies Should Consider Improving and Building upon Their Handling of Sexual Assault Investigations by Drawing Guidance from Outside Review Organizations.

Recommendation #7: Agencies Should Not Bring Charges for Underage Consumption, or Other Minor Offenses, Against Reporters of Sexual Assault.

RECOMMENDATIONS FOR COUNTY ATTORNEYS

Recommendation #1: Prosecutors Should Expand Their Review of Law Enforcement Investigations and Involvement with Investigators.

Recommendation #2: Prosecutors Should Receive Training in Victim-Survivor Trauma and Participate in Law Enforcement Training.

Recommendation #3: Prosecutors Should Consider Prosecuting More Difficult Sexual Assault Cases Even When Evidence To Prove a Conviction Beyond a Reasonable Doubt Is Less Than Certain.

Recommendation #4: Prosecutors Should Seek Upward Departures of Sentences in Cases Involving Sexual Assaults Against People with Disabilities.

To further deter assaults against people with disabilities, prosecutors should seek enhanced sentences in these cases based on Minnesota Sentencing Guidelines aggravating factor that the victim was particularly vulnerable due to reduced mental capacity.⁵ In 2016, only three offenders in the state were sentenced for criminal sexual conduct offenses with enhanced sentences due to the victim's vulnerability, according to data from the Minnesota Sentencing Guidelines Commission.⁶

⁵ Minn. Sentencing Guidelines 2.D.b(1) lists the following aggravating factor that may be used as a reason for departure: "The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability."

⁶ Minn. Sentencing Guidelines Comm'n, *Sentencing Practices: Criminal Sexual Conduct Offenses Sentenced in 2016* at 24 (January 2018), available at http://mn.gov/msgc-stat/documents/reports/2016/2016_MSGC_Criminal_Sexual_Conduct_Report.pdf.

Recommendation #5: Prosecutors Should Consider Seeking Life Sentences in Cases Involving Especially Heinous Sexual Assaults.

To further deter extremely heinous assaults, prosecutors should consider seeking life sentences for first and second degree criminal sexual conduct where the evidence supports a finding of the requisite heinous elements.⁷

RECOMMENDATIONS FOR PEACE OFFICER STANDARDS AND TRAINING BOARD

Recommendation #1: The POST Board Should Adopt a Model Sexual Assault Investigation Policy.

Recommendation #2: The POST Board Should Require Training in Victim-Centered, Trauma-Informed Responses to Sexual Assault Reports.

⁷ Only 22 offenders have received such life sentences through 2006 to 2016. *See id.* at 13–14. Not all of these life sentences, however, were for offenders whose conduct involved a heinous element (*i.e.*, torture, great bodily harm, mutilation, inhumane conditions, weapon used, multiple victims or perpetrators, removal of victim without safe release). For a description of the various ways a sex offense can result in a life sentence, *see id.* at 46–48.