Impact of the Sentencing Reform and Corrections Act of 2015 (S. 2123)

Note: The following is a revision of a memo prepared for the Federal Public and Community Defenders Legislative Committee, as part of their analysis of pending legislation. It attempts to estimate the likely effects of the bill passed out of the Senate Judicial Committee, which was paralleled in many respects by the House bill. Any opinions expressed are my own.

The Sentencing Commission has not made public datasets with all the information needed to estimate precisely how many defendants will be affected by the proposed legislation. In an October 19 Statement, Commission Chair Saris estimated the impact of selected sections of the proposed bill using the Commission’s prison impact model. I incorporate these estimates below, along with my own best efforts using monitoring datasets from FYs 1992 through 2014.

Section 101: 21 U.S.C. §§ 841/851, Enhancements for Prior Offenses

The proposed Senate bill both limits and expands applicability of these enhancements, and makes reductions retroactive. Enhancements are expanded to include, at the discretion of prosecutors, “serious violent felonies” for which defendants served more than twelve months. The Commission did not estimate the impact of this expansion, and there is no basis in public data to determine how many defendants have such offenses, or how often prosecutors are likely to invoke them. The Commission estimated that, taken as a whole, the limitations in Section 101 would reduce sentences for 84 defendants a year by about 22.5 percent (54 months). They found 2,265 offenders currently incarcerated who could similarly benefit (Saris Statement, p. 8).

Reduction in twenty-year sentences. The proposed bill reduces twenty-year minimums resulting from one prior drug offense to fifteen years. I estimated the number of offenders who might benefit by selecting cases (i) with twenty-year drug mandatory minimums, (ii) who actually sentenced to at least twenty years, (iii) who had a base offense level under 2D1.1 less than 43 (to exclude cases where death or serious bodily injury resulted). Since 1993, 4,242 offenders met these criteria, but some sentenced in the earliest years may no longer be incarcerated. Of these offenders, 59 percent are African American, 20 percent are white, 20 percent are Hispanic, 1 percent are “other.”

Section 102: Expansion of the Existing Safety Valve

This section broadens the safety valve to include defendants with up to 4 criminal history points, provided the priors do not include any 3-point offenses, or 2-point drug or violent offenses. All these limitations could be waived, however, if the court finds that they overstate the seriousness of the defendant’s criminal record. This change is not retroactive, so I used FY 2014 data to estimate how many defendants are likely to benefit going forward.

I estimated effects only of waiver of the statutory minimum, not potential reductions of two offense levels under the guidelines’ safety valve, which can apply to some defendants not subject to statutory minimums. In the past, the Commission has amended the guideline safety valve to track the statutory criteria. Interestingly, Commissioner Saris’s Statement (p. 5) found that 3,314 offenders would...
benefit each year from this expansion, with average sentence reductions of 20 percent (11 months). Commission staff confirmed by email that this assumes the guideline safety valve will be amended to track the statutory change.

Focusing only on the statutory waiver, I found just 2,418 offenders in FY 2014 who could possibly benefit, and not all of these would receive a judicial waiver or be sentenced below the current guideline or statutory minimum. My rationale was as follows:

Of the 11,596 defendants with a drug mandatory minimum, 3,591 (31%) benefitted from the current statutory safety valve, 3,924 (24%) benefitted from a substantial assistance departure, and 1,188 benefitted from both. This left 5,221 (45%) without current relief from the mandatory minimum. Of these, 2,564 had 2, 3, or 4 criminal history points. Several of these were sentenced primarily under guidelines other than for drugs, indicating the presence of other charges that may prevent them from benefitting from the safety valve. Of the 1,168 sentenced under the drug guidelines, 494 appear to be disqualified by other criteria (use of weapon, threats of violence, leadership role). A handful qualified for career offender status. This left 1,525, half of whom would be disqualified by the prohibition on 3-point priors, leaving about 761. Nearly half of these had 2-point priors, which for another half could also be disqualifying. This left about 380 defendants who could benefit from the expansion to 4 points, without relying on judicial waiver of the criminal history exclusions. About 55 percent of these defendants are currently sentenced at the statutory minimum, so they are very likely to benefit from a waiver of the statutory minimum. For the remaining 45 percent, any benefit will depend on judges’ willingness to sentence below the guideline range for reasons other than substantial assistance. Over half of these are currently sentenced within or above the guideline minimum, suggesting they would not benefit from lowering a statutory minimum that is already below their guideline minimum.

This means the number of defendants who would actually receive lower sentences, without relying on judicial waiver of the criminal history criteria or amendment of the guideline safety valve, could be closer to 500 defendants per year. It is impossible to precisely estimate how often judges would seek waiver of the criminal history criteria. About 1,144 offenders who otherwise qualify for the safety valve are currently sentenced at the mandatory minimum, either because it trumped the guideline range or judges departed downward to the statutory minimum. These can be considered likely to benefit from the expansion.

Together, these considerations suggest that at least 500 and up to 1,144 defendants would benefit each year from the safety valve expansion without the Commission amending the guideline safety valve. As noted above, the Commission estimated that 3,314 offenders would benefit each year from a combination of statutory changes and guideline amendment.

Nearly 40 percent of these defendants are currently subject to a minimum of ten or more years, with most of the remainder subject to five years. The proposed expansion does not appear to have a dramatically disproportionate benefit for any racial or ethnic group. Hispanics are somewhat more likely to have drug mandatory minimums (compared to their portion of all defendants with a conviction under 21 U.S.C. § 841), and they are similarly slightly more likely to benefit from the expanded safety valve.

Section 103: New Reduction of Some Ten-Year Drug Minimums to Five Years
The proposed bill would allow judges to sentence certain defendants with ten-year drug mandatory minimums “as if” the statutory minimums were five years. There is no limitation on the number of criminal history points, but there can be no prior conviction for “serious” drug or violent felonies. The best estimate I can find for the effect of this limitation is the 10 percent of defendants with prior serious drug offenses, from Section 101 above. In addition to other requirements of the current safety valve, the defendant must also have not exercised “substantial authority” or been an importer, manufacturer, or wholesaler. The Commission’s 2011 Mandatory Minimum Report found that 21 percent of drug offenders were wholesalers, 11 percent were high-level dealers or importers, 4 percent were growers or manufacturers. In combination with the 10 percent estimate, it seems reasonable to assume that about half would be excluded by these combined criteria. This change would not be retroactive.

In FY 2014, 5,723 defendants had ten-year drug mandatory minimums and were sentenced primarily under a drug guideline. Of these, 2,048 did not benefit from the current safety valve or a substantial assistance motion. All but 1,113 of these would be eliminated by use of violence, possession of a weapon, aggravating role, or death or serious bodily injury. If half of these are eliminated by the other restrictions, about 556 defendants per year would benefit from being sentenced “as if” their minimums were five years. The racial breakdown of the 1,113 is: 22 percent white, 27 percent African American, and 49 percent Hispanic. The Commission estimated that this provision would benefit 550 offenders, with an average sentence reduction of 19.3 percent or twenty-one months.

Presumably, the offense levels in the Drug Quantity Table for these offenders would continue to reflect the ten-year drug amounts, so any impact would result from sentencing below the guideline range. It is hard to predict how the Commission or judges would respond to this change.

Section 104: Revisions to 18 U.S.C. § 924(c)
This section would reduce the recidivist enhancement for subsequent conviction under § 924(c) from twenty-five to fifteen years. It would also make the enhancement applicable only to prior convictions that were final at the time of sentencing. Reports from the field suggest that the vast majority of prior convictions currently used to
enhance sentences are not final. This change would be retroactive.

The section also expands the types of priors that may be predicates for the enhancement to include convictions under “[s]tate law for a crime of violence that contains as an element . . . carrying, brandishing, or use of a firearm.” Moreover, the enhancement will apply whenever the court finds that a defendant has prior predicate convictions. Unlike current “stacked” § 924(c) enhancements for prior drug offenses under §§ 841 and 851, there is no need for a conviction or a government motion. It would appear that this expansion could increase the number of priors that will invoke the enhancement more than the restriction to final 924(c)s will reduce it. The Commission did not attempt to estimate the effect of this expansion, and I am unable to do so.

I searched for defendants sentenced since 1992 with § 924(c) enhancements of lengths consistent with multiple convictions (e.g., 360, 384, 420 months, etc.) Of these defendants, 58 percent are African American, 23 percent are white, and 15 percent are Hispanic. In 2014, I found 170 defendants with such enhancements. Commissioner Saris’s Statement estimated that about 62 offenders a year would benefit from the proposed legislation, with average reductions of 30.4 percent (229 months), from an average of 753 months to 524 months. (Note that the average reduced sentence still exceeds the life expectancy of federal prisoners.) It is not clear to me why the Commission’s estimate of annual beneficiaries is much lower than the 170 defendants I found in 2014, but about 40 percent of these defendants already received reductions for substantial assistance. The Commission also estimated that about 2,500 currently incarcerated offenders could receive retroactive reductions.

Section 105: Amendment to ACCA
This section reduces the minimum enhancement for armed career criminals from fifteen to ten years. This change would be retroactive. The Commission estimated that about 227 offenders a year would benefit from this change, with an average reduction of 21.6 percent (40 months) to 145 months. In addition, 2,317 offenders currently in prison could receive a reduction of 19 percent (35 months) to 148 months. Considerably more defendants received the ACCA enhancement between 1992 and 2014, but I assume that many of these fail to benefit from the statutory change due to other factors included in the Commission’s prison impact model. For example, 48 of the 567 offenders receiving ACCA increases in 2014 also qualified for career offender status. Defendants who qualify for ACCA status are 61 percent African American, 31 percent white, and 6.3 percent Hispanic.

Section 106: Retroactivity of the FSA
The Commission used their “resentencing model,” which recalcures sentences under amended guidelines and statutes, taking into account sentence enhancements and other factors, to estimate the impact of making the Fair Sentencing Act retroactive. They determined that 5,826 currently incarcerated offenders could receive a sentence reduction of approximately 20 percent.

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