RESOLVED, That the American Bar Association urges the federal government to immediately implement the First Step Act of 2018 by providing all necessary funding for its full implementation;

FURTHER RESOLVED, the federal government should engage the National Institute of Justice to choose a nonpartisan, nonprofit organization, with expertise in risk and needs assessment, to host an Independent Review Committee to develop a risk-and-needs-assessment system necessary to implement the “earned time credits” provided for in the Act, so that certain federal prisoners can earn good-time credits by completing rehabilitative programming and engaging in productive activities that can be applied to pre-release custody or supervised release;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to apply retroactively all of the sentencing amelioration provisions of the Act;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to make effective immediately the increase in “good time credits” for federal prisoners from 47 days credit per year to 54 days per year; and

FURTHER RESOLVED, That the American Bar Association urges that, until legislation is adopted to make all of the sentencing amelioration provisions of the Act retroactive, the President and the Department of Justice should immediately implement a systemic program to consider commutation of the sentences of federal prisoners whose sentences would be lower if all of the ameliorative sentencing provisions of the Act were retroactive.
Imprisonment is both a societal and economic failure. It’s expensive. And the numbers are staggering. State correctional costs have quadrupled over the past two decades and now top $50 billion a year. That’s 1 in every 15 general fund dollars. Despite the expensive price tag, the public gets little for its investment. Imprisonment does nothing to assist an individual to reintegrate into society as a productive citizen, it prevents economic mobility for entire communities, and it simply does not prevent recidivism. Re-arrest rates for released prisoners in the United States is over 50 percent. Knowing that persons who are sentenced will ultimately be released should focus society on the need to prepare these persons to return to communities as functioning persons. Accordingly, criminal justice stakeholders are dispensing with the idea that we can discard people who have committed crimes and punish them forever for their worst mistakes, even after they have served their punishments in prison. If we truly want to better assure that a person will not reoffend, it is necessary to invest elsewhere: in education, rehabilitation, and providing socio-economic support through job skills training.

Ameliorative sentencing provisions

The First Step Act takes preliminary action to reintegrate persons who have completed their sentences. The Act does so through rehabilitation programs and motivating participation in these programs through the potential of earning substantial good time credits. Persons who participate in these programs can earn ten days good time credit for every thirty days that they participate in the programs. These persons are also spurred to qualify as lower risk under risk-and-needs assessments so they can use those credits for early release.

The Act also takes steps to ease federal mandatory minimum sentences. It expands the “safety valve” judges can use to sentence below mandatory minimums for drug offenses. It restricts the current practice of stacking gun charges against drug offenders that added potentially decades to prison sentences. The combination of these changes will lead to shorter prison sentences in the future and should apply to those who have been sentenced for the same offenses. The Act substantially eases reentry by providing that persons, once released, receive their birth certificates and photo identifications.

The Act increases general “good time credits” as well. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this general earned cap to 54 days per year, after the creation and application of certain risk assessment tools. Due to a legislation drafting error, this change is delayed for the formation and application of risk assessment tools that are relevant to the programmatic good time credits; additional ten days credit for thirty days of program participation.

In addition, the Act retroactively applies the 2010 Fair Sentencing Act, which decreased the disparity in sentences for crack and powder cocaine offenses from a one-hundred to

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1 The First Step Act is available at: https://www.congress.gov/bill/115th-congress/senate-bill/756/text
2 Extended punishments after release include collateral consequences.
one weight ratio to an eighteen to one weight ratio and eliminated the five-year minimum mandatory sentence. The prior draconian and disparate crack sentences were enacted after tragic cases of crack related deaths.

In all, the purpose of the Act is to apply sensible sentences both for those who are sentenced for crimes going forward and for those who have been sentenced for the same crimes before the Act.

The Numbers

As of July 19, 2018, the United States had the highest prisoner rate in the world with 655 prisoners for every 100,000 people. Although the United States accounts for only 5% of the world’s population, it imprisons about 25% of the total persons incarcerated. As of 2014, the United States was also the world leader in an imprisoned population by incarcerating roughly 2.2 million prisoners. Within the federal system, the majority of U.S. prisoners were black or African-American. Of these African-American inmates, about 500,000 were men and only 26,000 were women. Within the state system, 237,000 prisoners were sentenced for drug related offenses, which account for about 17.4% of all the state prisoners in the United States. Sentences relating to murder account for roughly 12.2% of those in the state system and robbery sentences accounted for about 13.6%. However, of federal inmates, about 50% are serving sentences for drug-related offenses. The state statistics are particularly relevant because of the trickle-down effect of changes in federal sentencing and imprisonment policies. The First Step Act is expected to have an indirect impact on states’ sentencing, imprisonment and reentry policies.

Overview of Major provisions of the First Step Act

The Act applies to sentencing and imprisonment of persons in the federal system, and primarily makes changes to drug offense sentencing. It also includes violent offenses in sentencing enhancements for repeat offenders. Further, it makes more good conduct time available for those federal inmates who participate in certain programs while in custody.

The Act also prohibits the use of restraints on most pregnant and postpartum-recovering women. It expands compassionate release by allowing prisoners who are terminally ill or elderly to move for their release after exhausting administrative remedies.

The Act expressly makes the reforms enacted by the Fair Sentencing Act of 2010 retroactive, which reduce the disparity between crack and powder-cocaine sentences.

The delay in implementation

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3 Gramlich, John, America’s incarceration rate is at a two-decade low (Pew Research Center, 2018), available at http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/

4 Data obtained through https://www.prisonpolicy.org/global/appendix_2018.html, including the Bureau of Justice Statistics
The First Step Act was enacted by Congress on December 21, 2018, with the purpose of reducing mass incarceration in the federal system and increasing successful reentry of those who have completed their federal sentences. It applies to persons who have not been sentenced before enactment. However, it does not appear to apply retroactively, with the exception of the direct retroactive application of the Fair Sentencing Act of 2010, which targeted crack/cocaine disparity. In addition, the Act reduces some federal sentences for repeated drug offenses and adds violent offenses to those for which repeat offenders’ sentences are increased. For those persons who have not yet been sentenced, these decreased penalties and the requirement for a serious drug felony predicate conviction apply immediately. The Act also requires hearings to determine whether a person’s prior final convictions qualify the individual for an enhanced sentence under 21 U.S.C. §851 in which the Government bears the burden of proof beyond a reasonable doubt.

The Act also uses vocational and rehabilitative programs and risk assessment devises, once imprisonment begins, to determine which inmates will qualify for earlier release or earlier post confinement reintegration. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this earned cap to 54 days per year. But this correction will not be realized until the assessment devices are in place and functioning, and the Department of Justice and Bureau of Prisons have not begun to put the necessary assessment tools in place. Once they do, implementation of the Act will also qualify some persons for up to 10 days good conduct credit for every 30 days of participation in programs. Those whose offenses or risk assessments do not qualify them for this good conduct time, can earn more telephone or visitation time or higher limits on commissary purchases by participating in programs.

The Act also takes steps to ease federal mandatory minimum sentences. It expands the “safety valve” judges can use to sentence below mandatory minimums for drug offenses. It restricts the current practice of stacking gun charges against drug offenders to add potentially decades to prison sentences. The combination of these changes will lead to shorter prison sentences in the future.

The Importance of the Act and its Retroactive Application

Research has shown that education and training reduce recidivism. For this reason, the Act allows inmates “earned time credits” who participate in vocational and rehabilitative programs. These credits allow persons to be released early to halfway houses or to home confinement. This practice will not only decrease the incarcerated population, but the

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5 Twenty-year mandatory minimum for one prior drug conviction under 21 U.S.C. §851 was decreased to fifteen years and now requires the prior conviction to be a serious drug offense or serious violent felony as defined in the Act. Reduces the life sentence required for those with two prior drug convictions to twenty-five years and requires the prior convictions to be serious drug offenses or serious violent felonies as defined in the Act. Serious drug felony is described in 18 U.S.C. §924(e)(2) as a federal offense or state offense that has a maximum sentence of ten years or more and for which the person served more than twelve months in prison within fifteen years of the current offense.
education programs will decrease recidivism and, as a result, reduce crime and mass incarceration.

The Act is designed to help almost everyone in the federal criminal justice system. However, not everyone will see immediate benefits. Some benefits will manifest over time. For offenders with a high-risk level, the good behavior and good time training credits they earn cannot be utilized until their risk levels are reevaluated to being within acceptable limits. Offenders who have been convicted of high-level offenses or who are undocumented immigrants will not be able to earn credits. The Act will motivate incarcerated persons, regardless of their eligibility for early release, to improve their risk assessments by providing increased privileges in exchange for participation in reentry programs. Those who qualify will be motivated to improve their risk assessments to achieve early release. But since very few provisions of the Act will apply until it is implemented, we will not see the benefits of the programs come to fruition. Further, many recidivism-prevention tools and measures intended to decrease mass incarceration are not clearly retroactive in the Act.

Implementation of the Act is Critical

Within 180 days of enactment, the Attorney General was slated to develop and release a risk and needs assessment system after consultation with the Independent Review Committee created by the Act. The needs assessment system will (i) determine the recidivism risk of each prisoner upon intake as low, medium, or high; (ii) determine the risk of violent or serious misconduct of each prisoner; (iii) determine the type and amount of recidivism reduction programming for each prisoner and assign them to it; (iv) reassess the recidivism risk of each prisoner periodically based on dynamic factors; (v) reassign prisoners to appropriate recidivism reduction programs or productive activities based on the revised determination; 6 (vi) determine when to provide incentives and rewards; and (vii) determine when a prisoner is ready to transfer into prerelease custody or supervised release. 7

The risk assessment system will be implemented another 180 days after the Attorney General completes and releases the risk and needs assessment system. The Bureau of Prisons has a two-year period to provide programs for eligible and interested prisoners and to develop and validate the risk and needs assessment tool to be used in reassessments. It will give priority for programs for prisoners with earlier release dates. It has the authority to expand programming. In addition, the Attorney General will create policies to partner with faith-based, art, community-based organizations, higher education institutions or private entities on a paid or volunteer basis. These partnerships will also be

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6 Inmates at each risk level must have a meaningful opportunity to reduce their prison time. Specific criminogenic needs of each inmate must be addressed. All inmates must be able to successfully participate in the programs.

used to provide vocational training, to employ prisoners, or assist prisoners in prerelease custody or supervised release to find jobs. The Bureau of Prisons director is required to provide all prisoners with an opportunity to participate in the programs. The director will give priority to medium and high-risk prisoners for recidivism reduction programs and priority access to productive activities for medium and low risk prisoners.\(^8\)

The Attorney General is required to submit a report to Congress upon successfully implementing the Act and must provide data such as recidivism rates, types of programs and activities, details on each prisoner in a program, fiscal savings, and recommendations for how to reinvest savings into other federal, state, and local law enforcement activities and evidence-based recidivism reduction programs in the Bureau of Prisons.\(^9\) Substantial funding is appropriated to implement the Act.

In order to advance these effective measures to decrease mass incarceration and recidivism, all reforms made in the First Step Act should be made retroactive by Congress. The President should also use his powers to commute the sentences of currently incarcerated persons to decrease\(^{10}\) them to what they would have been had the First Step Act reforms been available when they were sentenced.

Respectively submitted,

Drew Findling
President
National Association of Criminal Defense Lawyers
August 2019

\(^8\) Id.
\(^9\) Id.
\(^{10}\) A retroactive increase in sentence violates the *ex post facto* clause. Article 1, Section 9, Clause 3, United States Constitution.
GENERAL INFORMATION FORM

Submitting Entity: National Association of Criminal Defense Lawyers

Submitted By: Cynthia Orr, House of Delegates representative

1. **Summary of Resolution(s).** The resolution urges Congress to make the ameliorative provisions of the First Step Act retroactive and urges the President and Attorney General to take action to implement the provisions of the Act. It also urges the President to implement a systemic program to consider commutation of the sentences of federal prisoners whose sentences would be lower if all of the ameliorative sentencing provisions of the Act were retroactive.

2. **Approval by Submitting Entity.** The NACDL approved the resolution at its Midwinter meeting in Phoenix, Arizona in February 2019.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** No other resolution will be affected by this resolution.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

6. **Status of Legislation.** (If applicable) The First Step Act was passed by Congress on December 21, 2018.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The NACDL and ABA should urge Congress to clarify or enact legislation as appropriate to assure that the ameliorative sentencing provisions of the Act are all retroactive. These organizations should also urge the President of the United States to utilize his commutation power to effectively make the ameliorative sentencing provisions of the Act retroactive.

8. **Cost to the Association.** (Both direct and indirect costs)

9. **Disclosure of Interest.** (If applicable)
10. **Referrals.** Concurrent with the filing of this resolution and Report with the House of Delegates, the National Association of Criminal Defense Lawyers is sending the resolution and report to the following entities and/or interested groups:

Criminal Justice Section  
Section of Civil Rights and Social Justice

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Cynthia Orr  
House of Delegates Representative  
For the National Association of Criminal Defense Lawyers  
310 S. St. Mary’s Street, 29th Floor Tower Life Building  
San Antonio, Texas  
T: (2210)865-4222  
Email: Whitecollarlaw@gmail.com

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Cynthia Orr  
House of Delegates Representative  
For the National Association of Criminal Defense Lawyers  
310 S. St. Mary’s Street, 29th Floor Tower Life Building  
San Antonio, Texas  
T: (2210)865-4222  
Email: Whitecollarlaw@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution The resolution urges Congress to make the ameliorative provisions of the First Step Act retroactive and urges the President and Attorney General to take action to implement the provisions of the Act. It also urges the President to take action through his power to commute federal sentences to reduce them to what they would be if the ameliorative sentencing provisions of the Act were retroactive.

2. Summary of the Issue that the Resolution Addresses It assures that the correction of harsh federal prison sentences corrected by the Act are corrected for all eligible federal inmates regarding whom it is unclear whether the Act currently applies. The Act is unclear about retroactive application of its provisions or does not apply for the retroactive application of provisions.

3. Please Explain How the Proposed Policy Position Will Address the Issue The proposed policy would seek to make the ameliorative sentencing provisions in the Act retroactive.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. There have been no minority views expressed within or outside the ABA.