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## **THE FIRST STEP ACT**

Presented by

**The Dayton Chapter of the Federal Bar Association, in conjunction with the  
Litigation Section of the Federal Bar Association**

University of Dayton Law School, Dayton, Ohio

Monday, May 20, 2019

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***ALL PRESENTATIONS WILL BE HELD IN ROOM 103,  
UDSL, KELLER HALL, UNLESS OTHERWISE NOTED.***

9:15 a.m. – 9:35 a.m.

### **OPENING REMARKS**

#### **VIPAL J. PATEL**

President, Dayton Chapter, Federal Bar Association  
Dayton, Ohio

#### **HON. EDMUND A. SARGUS, JR.**

Chief United States District Judge  
Southern District of Ohio  
Columbus, Ohio

9:35 – 9:50 a.m.

### **THE FIRST STEP ACT – 21 U.S.C. § 851**

#### **LAURA BYRUM**

Assistant Federal Public Defender  
Office of the Federal Public Defender  
Southern District of Ohio  
Columbus, Ohio

9:55 – 10:10 a.m.

### **THE FIRST STEP ACT – 18 U.S.C. § 924(c)**

#### **KENNETH PARKER**

Assistant United States Attorney  
Chief, Criminal Division  
United States Attorney's Office  
Southern District of Ohio  
Cincinnati, Ohio

10:15 – 10:45 a.m.

**THE FIRST STEP ACT - MOTIONS**

**KEVIN SCHAD**

Assistant Federal Public Defender  
Appellate Director  
Office of the Federal Public Defender  
Southern District of Ohio  
Cincinnati, Ohio

10:45 – 10:55 a.m.

**BREAK**

11:00 – 11:15 a.m.

**THE FIRST STEP ACT – “SAFETY VALVE”**

**TAMARA S. SACK**

CJA Panel Attorney  
Dayton, Ohio

11:20 a.m. – 12:30 p.m.

**THE FIRST STEP ACT – BUREAU OF PRISONS**

**RICK STOVER**

Associate Warden  
United States Penitentiary McCreary  
United States Bureau of Prisons  
McCreary, Kentucky

12:30 p.m. – 1:25 p.m.

**LUNCH (Provided in the Atrium)**

1:25 – 1:30 p.m.

**A QUICK WORD FROM OUR SPONSOR**

**AARON BULLOFF**

Federal Bar Association  
Litigation Section

1:30 – 2:25 p.m.

**SENTENCING COMMISSION UPDATE**

**ALAN DORHOFFER**

Deputy Director, Office of Education and Sentencing Practice  
United States Sentencing Commission  
San Francisco, California

2:30 – 3:30 p.m.

**RECIDIVISM PENALTIES UPDATE (PANEL)**

**MARY BETH YOUNG**

Assistant United States Attorney  
Chief, Appellate Division  
United States Attorney's Office  
Southern District of Ohio  
Columbus, Ohio

**GREGORY A. NAPOLITANO**

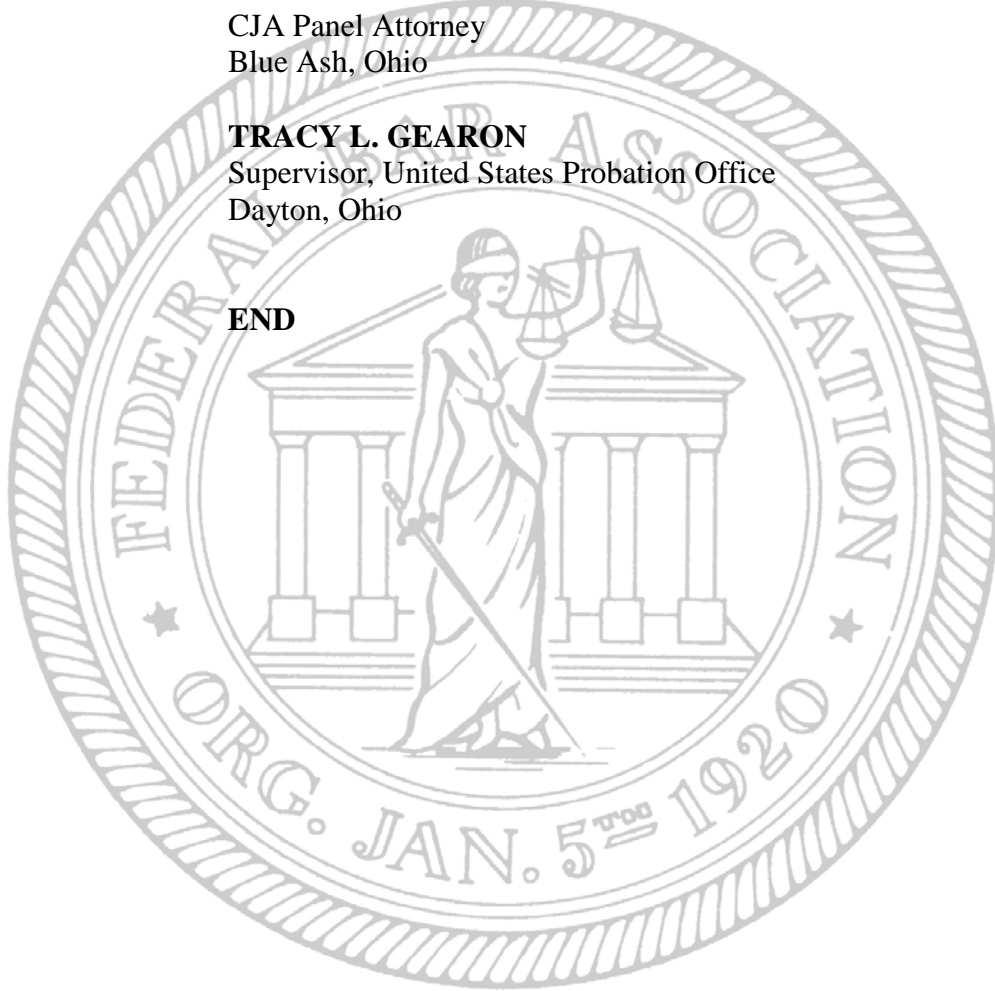
CJA Panel Attorney  
Blue Ash, Ohio

**TRACY L. GEARON**

Supervisor, United States Probation Office  
Dayton, Ohio

3:30 p.m.

**END**



THE FIRST STEP ACT  
“SAFETY VALVE”  
Interpreting and Applying the Changes

Presented by:  
Tamara S. Sack  
CJA Attorney  
Dayton, Ohio

**A. Historical reference:**

The Safety Valve came into being in 1994 under 18 U.S.C. §3553(f), after congress became concerned that imposition of mandatory minimum sentencing resulted in equally severe penalties for both the more and the less culpable offenders. (H.Rept. 103-460, at 4 (1994); *United States v Brooks*, 722 F.3d 1105, 1108 (8<sup>th</sup> Cir. 2013); *United States v. Carillo-Ayala*, 713 F. 3d 82, 88 (11 Cir. 2013).

For violations of 21 U.S.C. §§841,844,846, 960 and 963, the Safety Valve provision of 18 U.S.C.§3553 (f) directs courts to impose sentences “without regard to any statutory minimum sentence” if the five statutory conditions are met:

Provisions since the Safety Valve enactment of U.S.C.§3553(f):

1. The defendant does not have more than 1 criminal history point\*
2. The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. The offense did not result in death or serious bodily injury to any person;
4. The defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substance Act; and
5. Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the Court that the defendant has complied with this requirement.

**B. Broadening the Safety Valve under the *First Step Act*  
(signed into law December 21, 2018, P.L. 115-391)  
Title IV Sentencing Reform:**

The First Step Act broadens the existing Safety Valve at 18 U.S.C. §3553(f) as well as crimes under title 46 §§ 70503 and 70506

1. \*By now allowing a defendant to be eligible if she/he does **not** have more than **4** criminal history points, excluding any criminal history points resulting from a 1-point offense for sentences less than 60 days, including fines only, probation and deferred sentences, as determined under the sentencing guidelines;
2. The defendant does not have a prior 3-point offense, (sentences served over 1-year + 1 month); and
3. The defendant does not have a prior 2-point violent\* offense (sentences more than 60 days but less than 1-year + 1-month)

\*Violent Offense as used in the Safety Valve section of the Act is defined in 18 U.S.C. §16 See *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) holding 18 U.S.C. §16(b) as unconstitutionally vague.

Additionally, pay very close attention to the case law regarding “violent offenses” as treated in *Dimaya*, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2105) (Invalidating a portion of the ACCA as void); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (applying *Johnson* retroactively); *Beckles v. United States*, 137 S.Ct. 886, 892 (2017) (holding sentencing guidelines immune from vagueness challenges because they are advisory).

**C. New Safety Valve, as amended by Section 402:**

“Old” Safety Valve at 18 U.S.C. §3553(f) Still applies at 2, 3, 4, and 5; however, 5 has some qualifying language.

1. Criminal History: defendant “does not have
  - (A) more than 4 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 guidelines.”

2. Violence: the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.
3. Death or Serious Bodily Injury: the offense did no result in death or serious bodily injury to any person.
4. Role: the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. §848; and
5. Proffer: not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that that the defendant has complied with this requirement.

***New addition to the Proffer Requirement: "Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."***

#### **D. Important Application of the "New" Safety Valve to use:**

The Safety Valve provision of the U.S.S.G. Manual at §5C1.2 is different from the statutory provision of 18 U.S.C. §3553(f)

You should use both:

1. The changes made by the First Step Act or statutory and did not make changes to the *Guidelines Manual*.
2. The Court will have to apply the new 'First Step' Safety Valve Criteria set forth at Title IV to determine if the defendant qualifies for relief pursuant to 18 U.S.C. §3553(f).
3. U.S.S.G. §2D1.1(b)(18) states: "If the defendant meets the criteria set-forth in subdivisions (1)-(5) of subsection (a) of §5C1,2, **decrease by 2 levels.**"
4. U.S.S.G. §5C1.2 has not been amended to reflect the 'NEW' Safety Valve criteria of the First Step Act.

5. The Court may reduce the guideline range by 2 levels, or, in the alternative, the Court may reduce by 2 levels as a **variance**, under 18 U.S.C. §3553(a).
6. Applicability: The amendments made by Section 402 (b) of the First Step Act “shall apply only to a conviction entered on or after the date of enactment” December 21, 2018.  
DOJ position: “applies to defendants who were found guilty pre-act, but against whom judgment was or will be entered after December 21, 2018.”

**E. Examples *taken from the* :United States Sentencing Commission ESP Insider Express February 2019 Publication at Website and separate hand-out at this CLE:**

1. If a defendant has a prior conviction for a “violent” offense is she excluded from relief of a mandatory minimum sentence?

It will depend on the Sentence the defendant received for the violent offense. If the defendant received 5 years of probation, resulting in 1 criminal history point, and this is the defendant’s only prior conviction, the defendant **is** Safety Valve eligible under the First Step Act.

2. If a defendant has four 1-point convictions and two 2-point convictions for possession of cocaine, for a total of 8 criminal history points. Is this defendant safety valve eligible?

Yes. He has no more than 4 criminal history points excluding the 1-point convictions, no prior 3-point offenses, and no prior 2-point violent offenses. But see the criteria for the 2-level deduction at §2D1.1(b)(18), which only allows for the reduction where the defendant has no more than 1 criminal history point.

3. If a defendant is charged with Possession with Intent to Distribute Cocaine and he is a Career Offender under §4B1.1 because he has a prior for sale of a controlled substance and another prior for distribution of crack, where he received 3 years probation on the first prior and 30 days imprisonment on the second prior, for a total of 2 criminal history points; however, he is a Career Offender with a criminal history category VI, is he eligible for relief under 18 U.S.C. §3553(f)?

Yes. Although the defendant is a Career Offender, his prior record does not disqualify him from eligibility under the revised *statutory* safety valve.

4. If the defendant is charged with Possession with Intent to Distribute Methamphetamine, and he is a Career Offender under §4B1.1, due to a prior for aggravated assault and a prior for distribution of methamphetamine and he received

2 years of probation for the first prior and 6 months imprisonment on the second, for a total of 3 criminal history points, but he is a Career Offender with a Criminal History Category VI, is he eligible for relief under 18 U.S.C. §3553(f)?

Yes. Although the defendant is a Career Offender, his prior record does not disqualify him from being eligible for relief under the revised *statutory* safety valve.

5. If a defendant has a total of 6 criminal history points, and he has two prior 2-point convictions for non-violent offenses, and he received two criminal history points for “status” under §4A1.1(d) for being under a criminal justice sentence for one of the prior 2-point convictions, is he eligible for relief under 18 U.S.C. §3553(f)?

No. He has more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, and is therefore not eligible for the *statutory* safety valve.

6. If a defendant has four 1-point convictions and two 2-point convictions, for a total of 8 criminal history points, and the defendant received 2 criminal history points for “status” under §4A1.1(d), for being under a criminal justice sentence on one of the 1-point prior convictions, is he eligible for relief under 18 U.S.C. §3553 (f)?

Yes. The newly amended statute requires that the defendant have no more than four criminal history points excluding any criminal history points resulting from a 1-point offense as determined under the sentencing guidelines. Because the 2 Points for “status” resulted from one of the defendant’s 1-point convictions, it is excluded from the calculation of whether the defendant has more than 4 criminal history points as described in §3553(f)(1)(A). The defendant would qualify for *statutory* relief.





**FSA**

**First Step Act**

404b Motions

Kevin Schad, Assistant  
Federal Public Defender



## Where We Started

Fair Sentencing Act (8.3.10)

- Changed statutory ranges for crack cocaine offenses
- 10 to life – 280 grams or more (was 50 grams)
- 5-40 years – 28 grams or more (was 5 grams)
- 0-20 years – anything else

**THE PROBLEM?** *Dorsey v. United States* 567 U.S. 260 (2012)

## The Fix – First Step Act of 2018

### SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) Definition of Covered Offense—In this section, the term “covered offense” means a violation of a Federal criminal statute, **the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010** (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) Defendants Previously Sentenced.—A court that imposed a sentence for a covered offense may, **on motion of the defendant**, the Director of the Bureau of Prisons, the attorney for the Government, or the court, **impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed**.

(c) Limitations—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

## Who can benefit from this?

- Anyone sentenced prior to August 3, 2010 whose indictment read “5 grams or more” or “50 grams or more”
- Includes those who were sentenced as career offenders
- Includes those who received 21 USC §851 enhancements



## What Kind of Motion to File?

It is a  
“First Step Act Motion”

Pursuant to Section 404(b)  
of the First Step Act

It is NOT:

- A 28 U.S.C. § 2255 petition
- An 18 U.S.C. § 3582 petition

# Some Examples of How this Works

## Defendant Justice

- Sentenced in 2007. Indictment was “5 grams or more” of crack cocaine, plus a 18 USC § 924c count. Statutory range 5 -40 years. Guidelines range was 168-210 months. (plus 60 months consecutive for the gun). Sentenced to 228 months total.
  - NOW – statutory range drops to **0-20 years**. Guidelines drops to **100-125 months**.
  - NOTE – consecutive sentence on 924C count stays the same, BUT can argue *Deal v. United States*

## Defendant Patel

- Sentenced in 2005 . Indictment was for “50 or more grams” of crack cocaine - 10 years to life
  - Original sentencing figures – **10 to life**, Guidelines **168-210** Court gives sentence of 168
  - In 2015, defendant files a 3582 motion – gets sentence reduced to 120 months; however, Guidelines have dropped to 108-135. Stuck at mandatory minimum.
  - NOW – statutory range drops to **5-40 years**. Court can now consider sentence down to 5 years.



# Some Examples of How this Works

## Defendant Byrum

- Sentenced in 2005. Indictment was for “50 grams or more” of crack cocaine. 21 USC § 851 enhancement range 20 years to life. Guidelines range was 168-210 (BOL 32 (90 grams of crack) plus 2 for gun). BUT statutory minimum 240, sentenced to 240.
  - NOW – statutory range drops to **10 – life**. Guidelines range drops to **92-115**. Still stuck at new mandatory minimum of 120; however, immediate release eligible.
  - Never got benefit of 3582 because of mandatory minimum

## Defendant Schad


- Sentenced in 1992. Indictment was for “5 or more grams” of crack cocaine (case involved 32 grams) PLUS 21 U.S.C. § 851 enhancement for prior conviction – so 10 years to life – AND career offender
  - Original sentencing figures – **10 to life**, BOL 34 (assuming reduction for acceptance) Guidelines **262-327** Court gives sentence of 300
  - NOW – statutory range drops to **0-30 years** PLUS Guidelines range drops to 31 (career offender minus acceptance) – new range is **188-235**
  - Keep in mind this defendant never got benefit of prior 3582 reductions because of career offender

## Considerations when putting together your motion

- Emphasize drug amount (if low)
- Take a look at their programming in the BOP – *Pepper v. United States*
- Consult with the prosecutors to see if they will agree
- Ask for a hearing/ de novo sentencing
- Consider supervised release clients







Reminder – it is in the discretion of the  
Court

“Nothing in this section shall be construed to require a  
court to reduce any sentence pursuant to this section”

## Final Warning

- No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.



**FSA**

**Thank You.**

- 👤 Kevin Schad
- 📞 513.929.4834
- ✉️ [Kevin\\_schad@fd.org](mailto:Kevin_schad@fd.org)
- 🌐 [www.fd.org](http://www.fd.org)

The background is a solid blue gradient. In the four corners, there are white, stylized circuit board traces with circular nodes at various points, extending towards the center.

# THE FIRST STEP ACT “SAFETY VALVE” INTERPRETING AND APPLYING THE CHANGES

PRESENTED BY:  
TAMARA S. SACK  
CJA ATTORNEY  
DAYTON, OHIO



## A. HISTORICAL REFERENCE:

The Safety Valve came into being in 1994 under 18 U.S.C. §3553(f), after congress became concerned that imposition of mandatory minimum sentencing resulted in equally severe penalties for both the more and the less culpable offenders. (H.Rept. 103-460, at 4 (1994); *United States v Brooks*, 722 F.3d 1105, 1108 (8<sup>th</sup> Cir. 2013); *United States v. Carillo-Ayala*, 713 F. 3d 82, 88 (11 Cir. 2013).

For violations of 21 U.S.C. §§841,844,846, 960 and 963, the Safety Valve provision of 18 U.S.C.§3553 (f) directs courts to impose sentences “without regard to any statutory minimum sentence” if the five statutory conditions are met:

# PROVISIONS SINCE THE SAFETY VALVE ENACTMENT OF U.S.C. §3553(F):

1. The defendant does not have more than 1 criminal history point\*
2. The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. The offense did not result in death or serious bodily injury to any person;
4. The defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substance Act; and
5. Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the Court that the defendant has complied with this requirement.



## **B. BROADENING THE SAFETY VALVE UNDER THE *FIRST STEP ACT (SIGNED INTO LAW DECEMBER 21, 2018, P.L. 115-391) TITLE IV SENTENCING REFORM***

The First Step Act broadens the existing Safety Valve at 18 U.S.C. §3553(f) as well as crimes under title 46 §§ 70503 and 70506

1. \*By now allowing a defendant to be eligible if she/he does **not** have more than **4** criminal history points, excluding any criminal history points resulting from a 1-point offense for sentences less than 60 days, including fines only, probation and deferred sentences, as determined under the sentencing guidelines;
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\* Violent Offense as used in the Safety Valve section of the Act is defined in 18 U.S.C. §16 *See Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) holding 18 U.S.C. §16(b) as unconstitutionally vague.

Additionally, pay very close attention to the case law regarding “violent offenses” as treated in *Dimaya*, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2105) (Invalidating a portion of the ACCA as void); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (applying *Johnson* retroactively); *Beckles v. United States*, 137 S.Ct. 886, 892 (2017) (holding sentencing guidelines immune from vagueness challenges because they are advisory).



## **C. NEW SAFETY VALVE, AS AMENDED BY SECTION 402**

“Old” Safety Valve at 18 U.S.C. §3553(f) Still applies at 2, 3, 4, and 5; however, 5 has some qualifying language.

1. Criminal History: defendant “does not have

- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
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2. Violence: the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.
3. Death or Serious Bodily Injury: the offense did not result in death or serious bodily injury to any person.
4. Role: the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. §848; and
5. Proffer: not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

**New addition to the Proffer Requirement: *“Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”***



## D. IMPORTANT APPLICATION OF THE “NEW” SAFETY VALVE TO USE:

The Safety Valve provision of the U.S.S.G. Manual at §5C1.2 is different from the statutory provision of 18 U.S.C. §3553(f)

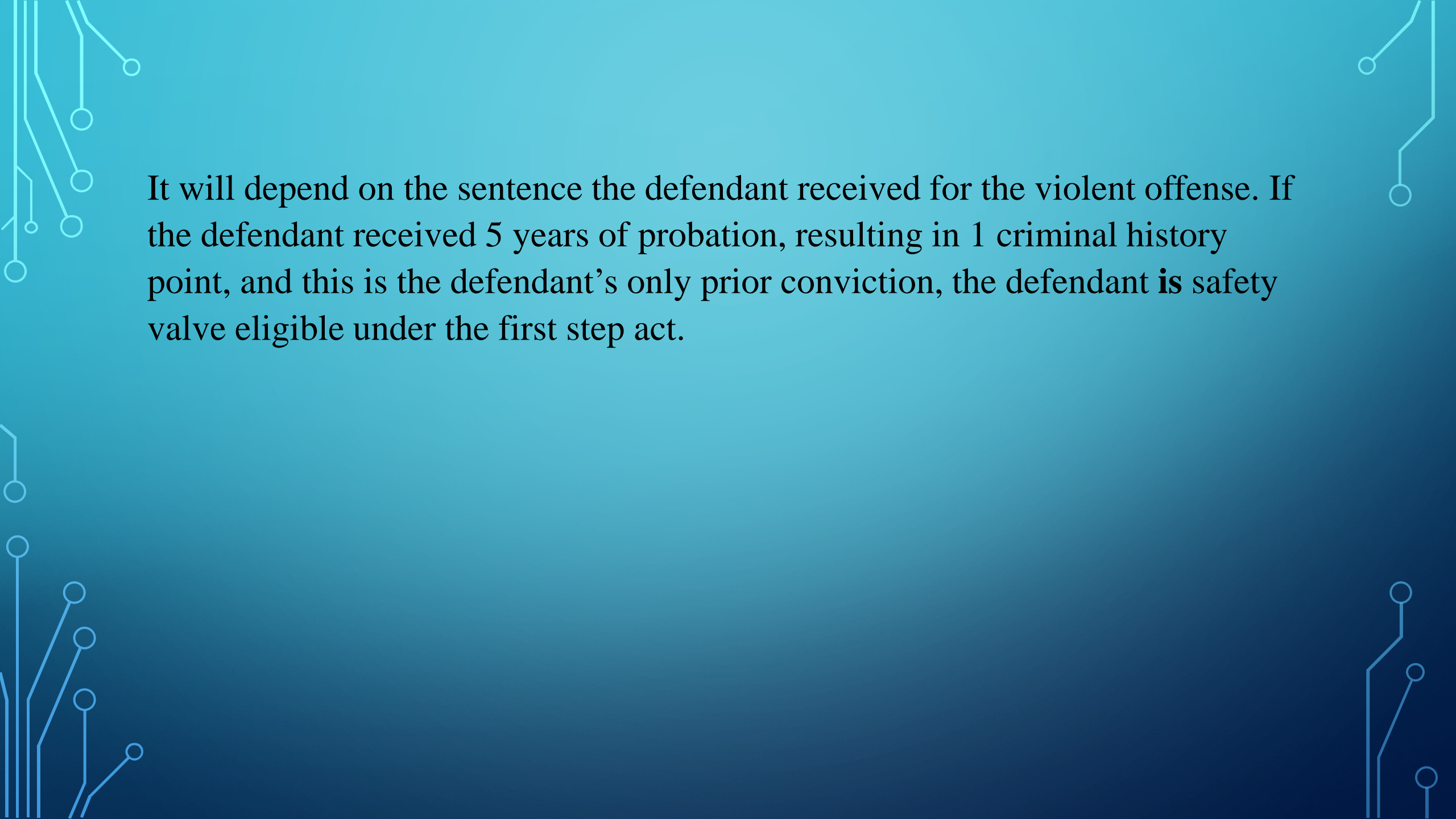
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2. The Court will have to apply the new ‘First Step’ Safety Valve Criteria set forth at Title IV to determine if the defendant qualifies for relief pursuant to 18 U.S.C. §3553(f).
3. U.S.S.G. §2D1.1(b)(18) states: “If the defendant meets the criteria set-forth in subdivisions (1)-(5) of subsection (a) of §5C1,2, **decrease by 2 levels.**”
4. U.S.S.G. §5C1.2 has not been amended to reflect the ‘NEW’ Safety Valve criteria of the First Step Act.
5. The Court should reduce the guideline range by 2 levels, or, in the alternative, the Court can reduce by 2 levels as a **variance**, under 18 U.S.C. §3553(a).
6. Applicability: The amendments made by Section 402 (b) of the First Step Act “shall apply only to a conviction entered on or after the date of enactment” December 21, 2018.

DOJ position: “applies to defendants who were found guilty pre-act, but against whom judgment was or will be entered after December 21, 2018.”

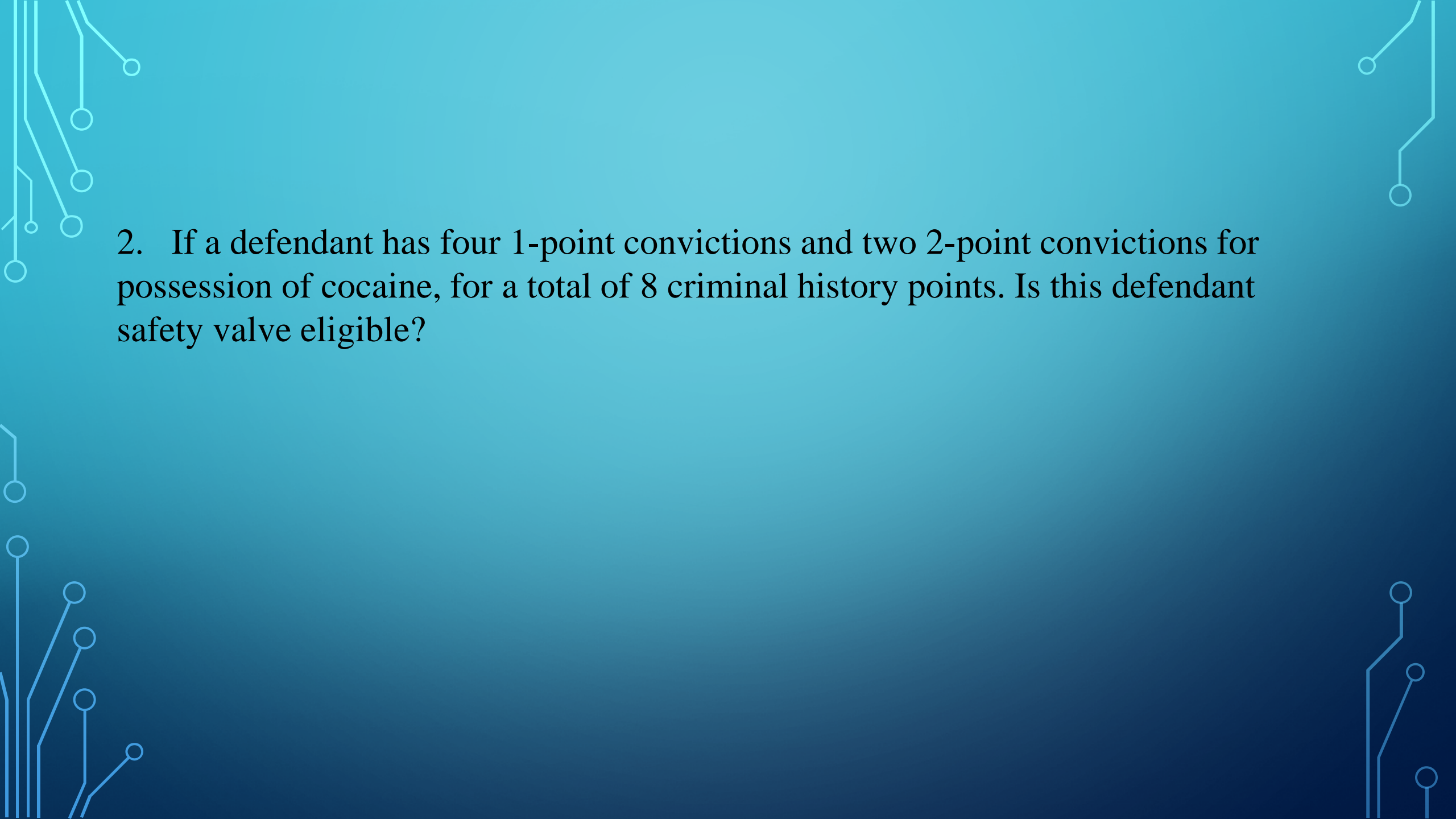
## **E. EXAMPLES**

1. If a defendant has a prior conviction for a “violent” offense is she excluded from relief of a mandatory minimum sentence?

The image features a dark blue gradient background with white, stylized circuit board traces in the corners. These traces consist of straight lines and small circles, resembling electronic components or data paths. The traces are located in the top-left, top-right, bottom-left, and bottom-right corners, framing the central text.

It will depend on the sentence the defendant received for the violent offense. If the defendant received 5 years of probation, resulting in 1 criminal history point, and this is the defendant's only prior conviction, the defendant **is** safety valve eligible under the first step act.



The background is a solid blue gradient. In the four corners, there are decorative white line-art elements resembling circuit traces or neural network connections, with small circles at the end of the lines.

2. If a defendant has four 1-point convictions and two 2-point convictions for possession of cocaine, for a total of 8 criminal history points. Is this defendant safety valve eligible?

Yes. He has no more than 4 criminal history points excluding the 1-point convictions, no prior 3-point offenses, and no prior 2-point violent offenses. But see the criteria for the 2-level deduction at §2D1.1(b)(18), which only allows for the reduction where the defendant has no more than 1 criminal history point.

3. If a defendant is charged with Possession with Intent to Distribute Cocaine and he is a Career Offender under §4B1.1 because he has a prior for sale of a controlled substance and another prior for distribution of crack, where he received 3 years of probation on the first prior and 30 days imprisonment on the second prior, for a total of 2 criminal history points; however, he is a Career Offender with a criminal history category VI, is he eligible for relief under 18 U.S.C. §3553(f)?



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Yes. Although the defendant is a Career Offender, his prior record does not disqualify him from eligibility under the revised *statutory* safety valve.

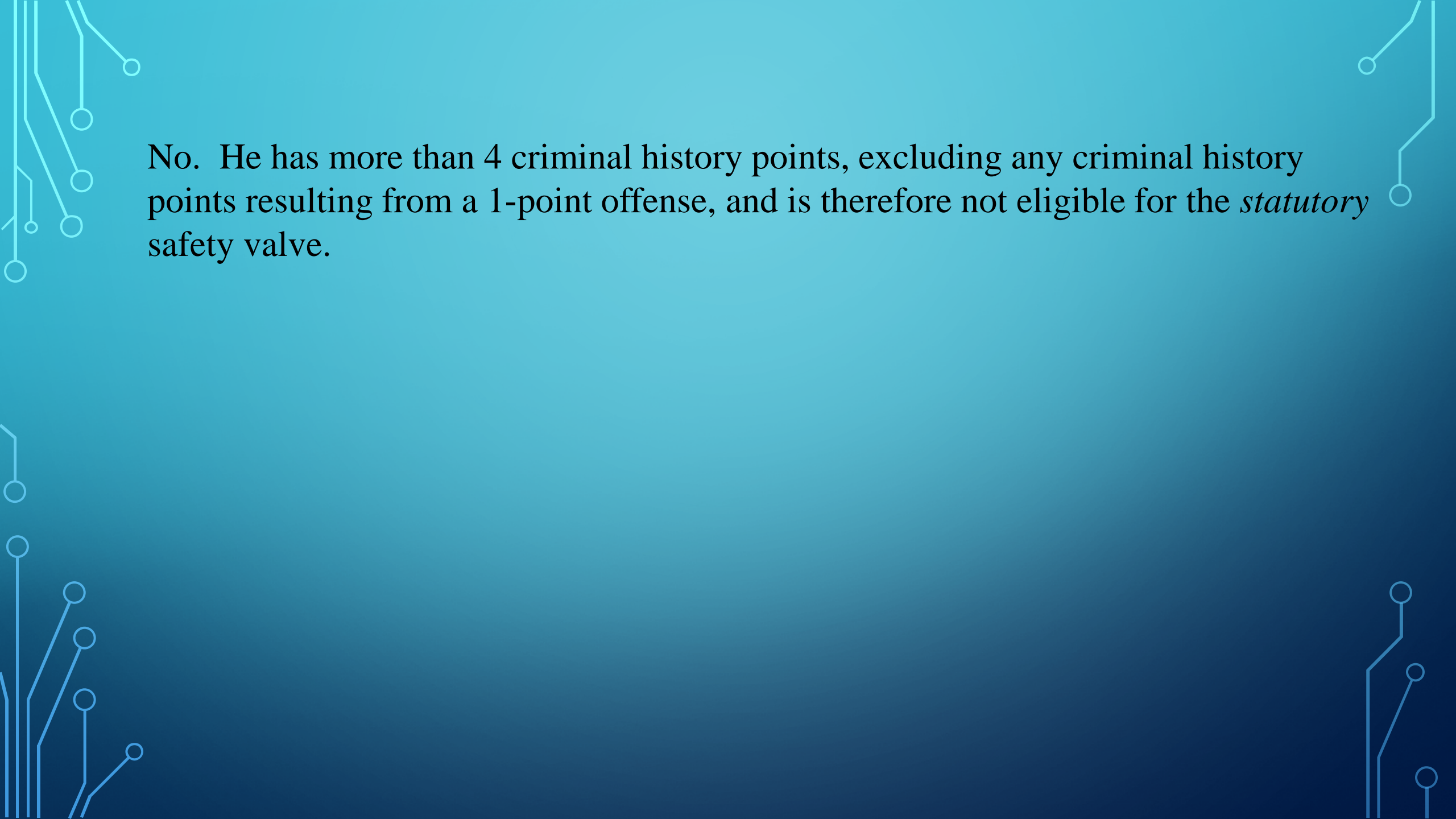
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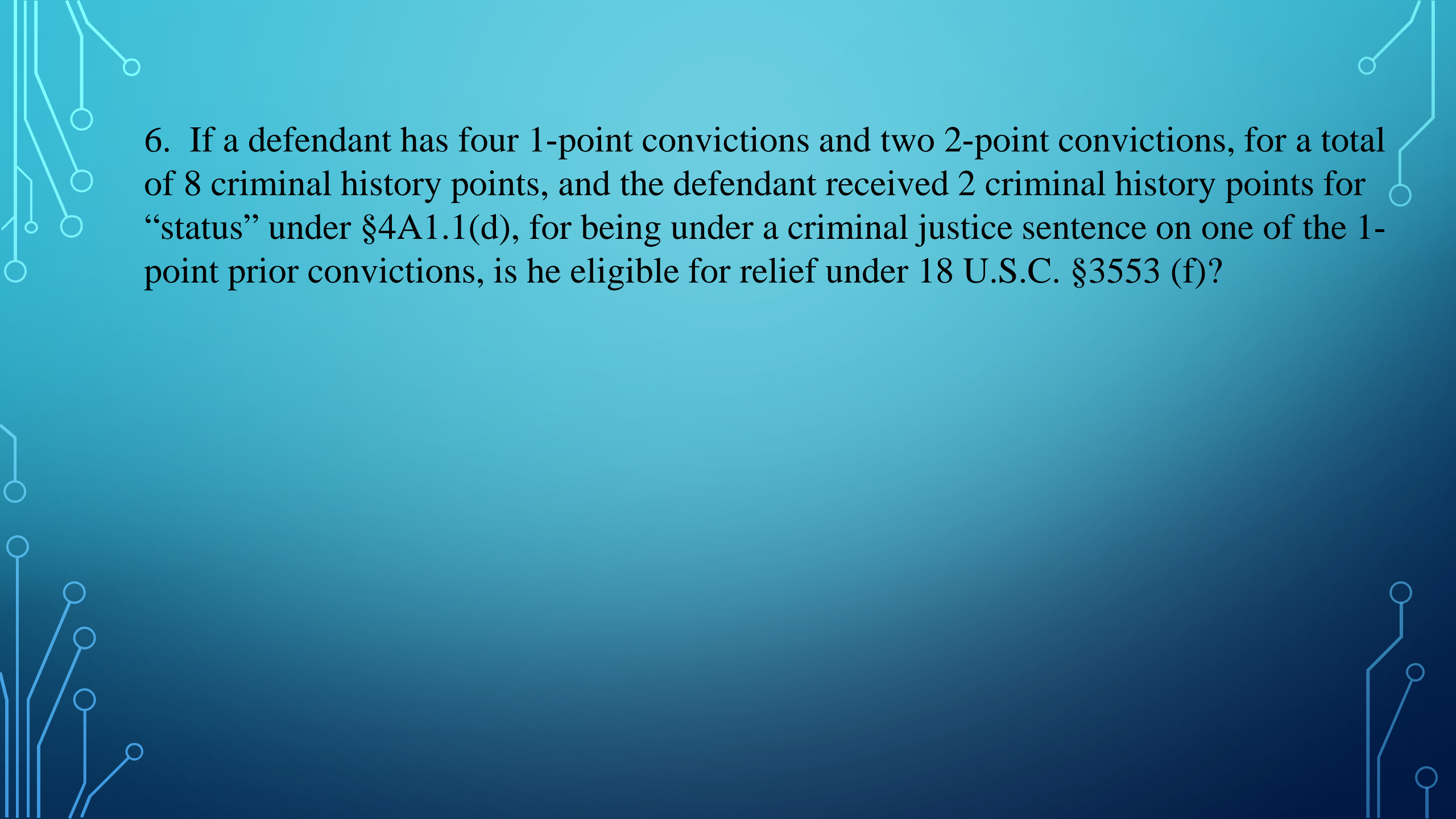
Yes. Although the defendant is a Career Offender, his prior record does not disqualify him from being eligible for relief under the revised *statutory* safety valve.



5. If a defendant has a total of 6 criminal history points, and he has two prior 2-point convictions for non-violent offenses, and he received two criminal history points for “status” under §4A1.1(d) for being under a criminal justice sentence for one of the prior 2-point convictions, is he eligible for relief under 18 U.S.C. §3553(f)?

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No. He has more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, and is therefore not eligible for the *statutory* safety valve.



6. If a defendant has four 1-point convictions and two 2-point convictions, for a total of 8 criminal history points, and the defendant received 2 criminal history points for “status” under §4A1.1(d), for being under a criminal justice sentence on one of the 1-point prior convictions, is he eligible for relief under 18 U.S.C. §3553 (f)?



Yes. The newly amended statute requires that the defendant have no more than four criminal history points excluding any criminal history points resulting from a 1-point offense as determined under the sentencing guidelines. Because the 2 Points for “status” resulted from one of the defendant’s 1-point convictions, it is excluded from the calculation of whether the defendant has more than 4 criminal history points as described in §3553(f)(1)(A). The defendant would qualify for *statutory* relief.

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# Thank You!

Tamara S. Sack  
Attorney at law  
CJA-Dayton, Ohio  
Tsacklaw@gmail.com





FSA

# First Step Act: Title IV (Sentencing Reform)

Section 401: §851 Enhancements

Laura Byrum

Assistant Federal Public Defender

## Changes to Drug Mandatory Minimum Penalties

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.

# § 851 Before and After the First Step Act

| 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 Mandatory Minimum | 20-year Mandatory Minimum (after one prior conviction for a felony drug offense)<br><br>Life (after two or more prior convictions for a felony drug offense) | 15-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)<br><br>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 Mandatory 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 Mandatory 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 Mandatory 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.

# Changes to Predicate Offenses Triggering Enhancements

**THEN:** “felony drug offense” (including simple possession)

**NOW:** “serious drug felony” (must have a distribution-related element)

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**THEN:** crimes of violence did not trigger an enhanced penalty

**NOW:** a “serious violent felony” will trigger the enhanced penalty

## WATCH OUT FOR EX POST FACTO ISSUES

The First Step 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 December 21, 2018.

Defendants with drug-related priors will in all likelihood benefit from the change in law. **BUT**, under old law, violent felonies did not trigger an enhancement. Argue that your client’s current federal sentence cannot be enhanced by a “serious violent felony” if his current offense was committed prior to December 21, 2018.

# “SERIOUS DRUG FELONY” (21 U.S.C. § 802)

- an offense described 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

**Note: sentence served is not the same as the Guidelines’ definition of “sentence imposed”**



# 18 U.S.C. § 924(e)(2)(A)

- 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 the maximum term of imprisonment is ten years or more.

\*But maybe not conspiracy or attempt... *See United States v. Havis*, No. 17-5772 (6th Cir. 2019) (pending *en banc* review)



# “SERIOUS VIOLENT FELONY”

## 21 U.S.C. § 802

- an offense described in 18 U.S.C. § 3559(c)(2); or
- any offense that would be a felony violation of section 18 U.S.C § 113 (various forms of assault), if the offense were committed in the special maritime and territorial jurisdiction of the United States; and
- for which the offender **served a term of imprisonment of more than 12 months**

**Note: sentence served is not the same as the Guidelines’ definition of “sentence imposed”**



# 18 U.S.C. § 3559(c)(2)(F)

The term "serious violent felony" means—

- (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in 18 USC § 1111); manslaughter other than involuntary manslaughter (as described in 18 USC § 1112); assault with intent to commit murder (18 USC § 113(a)); assault with intent to commit rape\*; aggravated sexual abuse and sexual abuse (as described in 18 USC §§ 2241 and 2242); abusive sexual contact (as described in 18 USC § 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in 49 USC § 46502); robbery (as described in 18 USC § 2111, 2113, or 2118); carjacking (as described in 18 USC § 2119); extortion\*; arson\*; firearms use\*; firearms possession (as described in 18 USC § 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
- (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more 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*<sup>†</sup>;

\* These offenses are defined in 18 U.S.C. § 3559(c)(2)(A)-(E).

† The italicized language is nearly identical to language that was struck down in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).



## Tips for Determining Applicability of Enhancements

- Use the “categorical approach.”
- Always obtain the indictment, plea-related documents, and judgment from prior conviction.
- Look to the version of statute in place at the time of the prior conviction.
- Drug priors can no longer be possession-only offenses (not even aggravated possession).
- Pay close attention to statutory maximum penalty for prior offenses (in Ohio, F2 through F5 offenses are not punishable by 10 years or more).
- For enumerated “serious violent felonies” or offenses that would constitute violations of 18 U.S.C. § 113, look to how the offenses are defined under Federal law, not the “generic contemporary definition.”



# Useful Links

- [Text of the First Step Act](#)
- [U.S. Sentencing Commission, ESP Insider Express \(Special Edition: The First Step Act of 2018\)](#)
- [U.S. Sentencing Commission, Primer, Categorical Approach \(July 2017\)](#)
- [Defender Services Office, Training Division: Sentencing Resources](#)
- [U.S. Sentencing Commission, The Categorical Approach: A Step by Step Analysis](#)





FSA

## Thank You.



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