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Legal Sidebar

When Is a Mandatory Minimum Sentence Not Mandatory Under the First Step Act?

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For some federal crimes, Congress establishes maximum penalties and mandatory minimum penalties that form the outer bounds of permissible federal criminal sentences. Between these statutory limits are the U.S. Sentencing Guidelines—a series of sentencing ranges based on points assigned to the offense committed and to the defendant's criminal history. Together, federal statutes and the Guidelines provide the basic structure for federal sentencing decisions.

Despite their name, mandatory minimums are not always mandatory. For instance, the First Step Act, passed by Congress in 2018, authorizes federal judges to impose a sentence below a mandatory minimum for certain drug offenses. The act provides that a defendant is eligible for this "safety valve," or relief from the mandatory minimum, depending in relevant part on the defendant's criminal history. The U.S. Courts of Appeals are divided on when defendants' criminal history renders them ineligible for safety-valve relief. In practical terms, this disagreement results in sentencing disparities across the country. Defendants in jurisdictions that interpret eligibility for safety-valve relief strictly may receive longer sentences than defendants with similar convictions and similar criminal records in jurisdictions adopting a more relaxed interpretation of the act.

Mandatory Minimum Penalties Generally

Mandatory minimum sentences require judges to impose a sentence of a term of imprisonment of at least the time specified in a statute, a requirement generally triggered by the offense of conviction and/or the defendant's recidivism. Mandatory minimums have existed throughout American history, with examples stretching as far back as at least 1790. The relationship between federal mandatory minimum sentences and judges' corresponding discretion to impose appropriate sentences in particular cases has fluctuated over time. In the modern era, the introduction of the Sentencing Guidelines in 1984 "tightly confined" judges' sentencing discretion. Congress added a host of mandatory minimum penalties shortly thereafter, including mandatory minimums for certain drug and child pornography offenses.

Proponents cite various arguments to justify mandatory minimums. According to a 1991 U.S. Sentencing Commission report, mandatory minimums ensure that a sentence reflects the seriousness of the offense, averts the prospect of lenient sentences, and promotes certainty and predictability in sentencing. Mandatory minimum sentences, the Commission observes, further several philosophical purposes of

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punishment: retribution by ensuring that defendants will receive their just deserts; deterrence by disincentivizing crime; and incapacitation by removing defendants from the community. In addition, according to the Commission, mandatory minimum sentences offer assurance to victims that the perpetrators will receive at least some known time for their crimes. The certainty and severity of mandatory minimums also can help induce cooperation and plea agreements, the Commission report added.

The Sentencing Commission and others have warned that mandatory minimums are not without costs. The Commission found that prosecutors selectively bring charges carrying mandatory minimum penalties. As a result, in the words of the Commission, mandatory minimums "transfer sentencing power from the court to the prosecution," resulting in sentencing disparities. These disparities may diminish the retributive, deterrent, incapacitative, and communicative goals of sentencing. Some in the judicial community have also expressed concern that mandatory minimums necessarily withdraw sentencing discretion from judges and frustrate their ability to impose individualized sentences. Scholars and others have pointed out that the threat of mandatory minimums may coerce defendants into pleading guilty to avoid a mandatory minimum sentence, and thus into forgoing their constitutional right to a jury trial.

The Safety Valve

Following the Sentencing Commission's 1991 report, Congress created the safety valve for certain drug offenses carrying mandatory minimum penalties after becoming concerned that the mandatory minimums could result in equally severe penalties for both more and less culpable offenders. The Commission "worked directly with Congress to enact new legislation that would address the impact of mandatory minimum penalties on low-level drug-trafficking offenders." These efforts culminated in the first safety valve, which was introduced as part of the Violent Crime Control and Law Enforcement Act of 1994. Under this statute, to be eligible for the safety valve, a federal judge could impose a sentence below a drug-related mandatory minimum if the federal defendant satisfied five criteria, including not having "more than one criminal history point, as determined under the Sentencing Guidelines." (According to the Guidelines, a defendant's criminal history is reflected in points, and the computation of these points depends on the nature and number of the prior offenses.) The Commission adopted a corresponding Sentencing Guideline provision, allowing for a two-level reduction in the Guidelines offense level based on the same 1994 criteria.

In 2011, the Commission reported to Congress that the safety valve was underinclusive. The Commission therefore urged Congress to expand the safety valve to encompass "certain non-violent [drug] offenders who receive two, or perhaps three, criminal history points under the [G]uidelines" and "low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties."

In 2018, Congress enacted the First Step Act in response to concerns about the increasing size of the federal prison population and the economic and social consequences of this growth. From 1980 to 2018, the federal inmate population increased more than 600% from approximately 25,000 to 184,000. The House Judiciary Committee took note of the "burgeoning costs" of the federal prison system, which it viewed as representing an increased burden on taxpayers and drawing funding away from public safety measures. Some supporters of the First Step Act viewed mandatory minimums as a contributing factor to the rise in the federal prison population and its associated costs.

The First Step Act addressed mandatory minimums in multiple ways. In addition to reducing the mandatory minimum penalties for certain drug-trafficking offenses, the act expanded eligibility for safety-valve relief to defendants with more significant criminal histories. Whereas federal defendants with one or zero criminal history points under the Sentencing Guidelines could receive relief under the prior law, the act made drug offenders with minor criminal records eligible for the safety valve provision. As one court framed it, "The low threshold of more than one criminal-history point resulted in many drug

offenders receiving mandatory minimum sentences in instances that some in Congress believed were unnecessary and harsh. Congress recognized the problem and sought to give district courts more flexibility."

Circuit Split on the Scope of the Amended Safety Valve

The First Step Act now permits a federal defendant convicted of certain drug offenses to receive a sentence below a mandatory minimum as long as, in relevant part:

> (1) the defendant does not have—
>
> > (A) more than four criminal history points, excluding any criminal history points resulting from a one-point offense, as determined under the Sentencing Guidelines;
> >
> > (B) a prior three-point offense; *and*
> >
> > (C) a prior two-point violent offense.

The federal appeals courts are split on when federal defendants' criminal history disqualifies them from the safety valve. Are defendants ineligible when their criminal history meets the criteria of all three subsections ((A), (B), *and* (C)), or when their criminal history satisfies only one subsection ((A), (B), *or* (C))?

The U.S. Courts of Appeals for the Ninth and Eleventh Circuits have held that only a defendant who satisfies all three criteria is ineligible for the safety valve. For example, in these circuits, judges may decide not to impose a mandatory minimum sentence on a defendant who has a prior two-point violent offense, but who does not also have more than four criminal history points and a prior three-point offense. This joint or cumulative reading of the three subsections is based on several interpretive points. Perhaps most significantly, the text of the First Step Act links the criminal history criteria with the conjunction "and." The Eleventh Circuit explained that "when 'and' is used to connect a list of requirements, the word ordinarily has a 'conjunctive' sense, meaning that all the requirements must be met." This is true, the court added, when the list follows a negative, such as "the defendant does not have." Moreover, these circuits referenced related language in the act creating a conjunctive list and the Senate's legislative drafting manual, which instructs drafters to use "and" in the conjunctive sense.

In contrast, the Fifth, Sixth, Seventh, and Eighth Circuits have held that a defendant who satisfies any one of the three subsections is disqualified from safety-valve relief. For example, under this reading, a defendant with a single prior two-point violent offense is disqualified from such relief irrespective of whether the other subsections are satisfied. The courts adopting this reading have employed several interpretive tools to arrive at this disjunctive interpretation. To begin with, according to these courts, the overall structure of the list suggests that the prefatory clause to the criteria—"does not have"—is distributive to each subsequent subsection. As the Fifth Circuit explained, "this structure, utilizing a negative preceding an em-dash followed by a conjunctive list, makes it likely that the phrase 'does not have' independently applies to each item in the list (*does not have* (A), *does not have* (B), and *does not have* (C))." In other words, as the Sixth Circuit similarly asserted, "'and' serves as a shorthand for repeating (or 'distributing') the prefatory clause before each of the subsections that follows." In addition, these circuits observed that a conjunctive reading would render the first subsection—not having more than four criminal history points—redundant because a defendant who satisfies the second and third subsections—having five combined criminal history points—would automatically have four criminal history points. These courts also declined to apply the rule of lenity—generally under which ties over ambiguous language in penal statutes are read in favor of the defendant—because the language is not sufficiently ambiguous or unclear to warrant application of this rule.

Congressional Considerations

Due to the current judicial divide over the scope of the First Step Act's safety valve, whether a defendant may receive relief from a mandatory minimum sentence under the act may depend upon the happenstance of geography: a defendant may be disqualified in one circuit when that same defendant might be eligible for relief in a different circuit. Given that sentencing disparities may appear at odds with the stated statutory policy of promoting consistency and uniformity in federal sentencing outcomes, Congress may wish to consider amending the safety valve to clarify whether the criminal history criteria are disjunctive or conjunctive.

In addition, the Sentencing Commission is exploring revisions to the Sentencing Guideline provision that is analogous to the act's safety valve: the Commission identified two options under consideration. One option would not make any change to the Guidelines and thus would permit courts to interpret the Guideline disjunctively or conjunctively. A second option would adopt the disjunctive approach. Regardless of which option the Commission approves, Congress always has the opportunity to review and revise any amendments to the Guidelines.

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