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Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions

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SUMMARY

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Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions

Federal law requires a sentencing judge to impose a minimum sentence of imprisonment following conviction for any of a number of federal offenses. Congress has created three exceptions. Two are available in any case where the prosecutor asserts that the defendant has provided substantial assistance in the criminal investigation or prosecution of another. The other, commonly referred to as the safety valve, is available, without the government's approval, for a handful of the more commonly prosecuted drug trafficking and unlawful possession offenses that carry minimum sentences.

Qualification for the substantial assistance exceptions is ordinarily only possible upon the motion of the government. In rare cases, the court may compel the government to file such a motion when the defendant can establish that the refusal to do so was based on constitutionally invalid considerations, or was in derogation of a plea bargain obligation or was the product of bad faith.

Qualification for the safety valve exception requires a defendant to satisfy five criteria. His past criminal record must be minimal; he must not have been a leader, organizer, or supervisor in the commission of the offense; he must not have used violence in the commission of the offense, and the offense must not have resulted in serious injury; and prior to sentencing, he must tell the government all that he knows of the offense and any related misconduct.

In response to a congressional request, the U.S. Sentencing Commission recommended expansion of the safety valve. The First Step Act, P.L. 115-391, broadened the safety valve for the benefit of (1) defendants with slightly more serious criminal records and (2) defendants convicted under the Maritime Drug Enforcement Act.

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Introduction

Federal law houses hundreds of offenses punishable by a mandatory minimum term of imprisonment.[1] Although only a handful of these mandatory minimum offenses are prosecuted with any regularity, drug trafficking offenses accounted for over two-thirds of the total.[2] Congress has created three procedures that make punishment for these offenses a little less mandatory. One, the so-called safety valve (18 U.S.C. § 3553(f)), permits a sentencing court to disregard a statutory minimum sentence for the benefit of a low-level, nonviolent, cooperative defendant with a minimal prior criminal record, convicted under several mandatory minimum controlled substance offenses. The other two, 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure,[3] afford a sentencing court comparable latitude but only on the motion of the prosecutor, based on the defendant's substantial assistance to the government, and without regard to the offense charged.

In October 2009, Congress instructed the U.S. Sentencing Commission to prepare a report on the mandatory minimum sentencing provisions under federal law.[4] In early 2010, the commission conducted a survey of federal district court judges regarding their views on mandatory minimum sentencing. A majority of those responding endorsed amendments to the safety valve and substantial assistance exceptions.[5] The commission also held a public hearing at which several witnesses urged adjustments in the safety valve and substantial assistance provisions.[6] The commission subsequently recommended that Congress consider expanding the safety valve to cover other offenses and to reach offenders with a slightly more extensive prior criminal record.[7]

The First Step Act authorized safety-valve relief for convictions under the Maritime Drug Enforcement Act and for defendants with slightly more extensive prior criminal records.[8]

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[1] See generally U.S. Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011); U.S. Sentencing Commission, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (July 2017); CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, by Charles Doyle; Nathan Greenblatt, How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences, 36 AM. J. CRIM. L. 1, 27-28 (2008) ("[P]rosecutors have power to offer plea deals, reduce charges, limit introduction of evidence, and decide whether to appeal judges' trial management decisions and other orders. Each of these powers gives prosecutors the opportunity to allow a defendant to avoid a mandatory minimum sentence.").

[2] U.S. Sentencing Commission, *Quick Facts: Mandatory Minimum Penalties* (May 2018) ("Drug trafficking offenses accounted for … 67.8% of the offenses carrying a mandatory minimum penalty …"); *see also* U.S. Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System* (Oct. 2017).

[3] Most of the Federal Rules of Criminal Procedure are the work of delegated legislative authority rather than direct congressional action. 28 U.S.C. §§ 2071-2074. Congress, however, inserted the substantial assistance feature into Rule 35 in the 1984 Sentencing Reform Act and made it applicable to mandatory minimums in the 1986 Anti-Drug Abuse Act. P.L. 98-473, § 215(b), 98 Stat. 2015 (1984) and P.L. 99-570, § 1009, 100 Stat. 3207-8 (1986), respectively.

[4] Section 4713 of the National Defense Authorization Act for Fiscal Year 2010, found in the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, P.L. 111-84, 123 Stat. 2843 (2009).

[5] U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010: Question 2. Safety Valve* (June 2010) (*Survey*), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

[6] U.S. Sentencing Commission, *Public Hearing Agenda Thursday, May 28, 2010* (*Hearing*), http://www.ussc.gov/AGENDA/20100527/Agenda.htm.

[7] United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 355-56 (2011).

[8] P.L. 115-391, § 402, 132 Stat. 5221 (2018).

Safety Valve

Background

Low-level drug offenders can escape some of the otherwise applicable mandatory minimum sentences if they qualify for the safety valve.[9] Congress created the safety valve after it became concerned that the mandatory minimum sentencing provisions could have resulted in equally severe penalties for both the more and the less culpable offenders.[10] It is available to qualified offenders convicted of violations of the drug trafficking, simple possession, attempt, or conspiracy provisions of the Controlled Substances or Controlled Substances Import and Export acts.[11]

It is not available to avoid the mandatory minimum sentences that attend some of the other controlled substance offenses, even those closely related to the covered offenses. For instance, not covered are convictions under the statute that proscribes drug trafficking near schools, playgrounds, or public housing facilities and that sets the penalties for violation at twice those set for simple drug trafficking.[12] In addition, until the First Step Act, safety valve relief was not available to those convicted under the Maritime Drug Law Enforcement Act (MDLEA), even though the MDLEA proscribes conduct closely related to the smuggling and trafficking activities outlawed in the Controlled Substances Import and Export Act.[13]

The prosecution need not prove that a defendant is ineligible for safety valve relief. The Supreme Court did hold in *Alleyne v. United States* "that any fact that increases the mandatory minimum is an 'element' [of the offense] that must be submitted to the jury" and proved beyond a reasonable doubt.[14] Subsequent lower appellate courts, however, have held that *Alleyne* does not require a jury verdict or application of the reasonable doubt standard.[15] Thus, for the convictions to which the safety valve applies, the defendant must convince the sentencing court by a preponderance of the evidence that he satisfies each of the safety valve's five requirements.[16] He may not have a

[9] 18 U.S.C. § 3553(f).

[10] H.R. Rep. No. 103-460, at 4 (1994); United States v. Hargrove, 911 F.3d 1306, 1326 (10th Cir. 2019); United States v. Brooks, 722 F.3d 1105, 1108 (8th Cir. 2013); United States v. Carillo-Ayala, 713 F.3d 82, 88 (11th Cir. 2013).

[11] 18 U.S.C. § 3553(f) ("Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing....").

[12] 21 U.S.C. § 860. United States v. Anchundia-Espionza, 897 F.3d 629, 633-34 (5th Cir. 2018); United States v. Bui, 795 F.3d 363, 367 (3d Cir. 2015); United States v. Koons, 300 F.3d 985, 994 (8th Cir. 2002). One Sentencing Commission witness indicated that "in districts where substantial portions of towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. §860 for the purpose of preventing safety valve relief for offenders who would otherwise qualify," *Hearings, Statement of Michael Nachmanoff, Federal Public Defender for E.D. Va.* at 31.

[13] United States v. Gamboa-Cardenas, 508 F.3d 491, 496-503 (9th Cir. 2007); *but see* United States v. Mosquera-Murrillo, 902 F.3d 285. 295-96 (D.C. Cir. 2018) (suggesting the coverage of MDLEA may have been an open question prior to the First Step Act). The First Step Act, P.L, 115-391, eliminated any doubt when it placed MDLEA under the safety-valve umbrella, 18 U.S.C. § 3553(f).

[14] Alleyne v. United States, 570 U.S. 99, 103 (2013).

[15] United States v. Leanos, 827 F.3d 1167, 1169-70 (8th Cir. 2016); *see also* United States v. King, 773 F.3d 48, 55 (5th Cir. 2014); United States v. Lizarraga-Carrizales, 757 F.3d 995, 997-99 (9th Cir. 2012) (citing United States v. Harakaly, 734 F.3d 88, 97-8 (1st Cir. 2013)).

[16] *Hargrove*, 911 F.3d at 1326-27; United States v. Bolton, 858 F.3d 905, 913 (4th Cir. 2017); United States v.

disqualifying criminal history point total.[17] He may not have used violence or a dangerous weapon in connection with the offense.[18] He may not have been an organizer or leader of the drug enterprise.[19] He must have provided the government with all the information and evidence at his disposal.[20] Finally, the offense may not have resulted in serious injury or death.[21]

Disqualifying Criminal History Point Total

> [T]he 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 sentencing guidelines. 18 U.S.C. § 3553(f)(1).[22]

The criminal history point disqualification refers to the defendant's prior criminal record. The Sentencing Guidelines assign criminal history points based on a defendant's past criminal record. Prior sentences of imprisonment or juvenile detention of less than 60 days are assigned a *single criminal history point*.[23]

Prior sentences of imprisonment or juvenile detention of from 60 days up to a year and a month are assigned *two criminal history points*; as are sentences imposed for offenses committed while the defendant was in prison, was an escaped prisoner, or was on probation, parole, or supervised release.[24]

Ramirez, 783 F.3d 687, 692 (7th Cir. 2015); United States v. Schmitt, 765 F.3d 841, 842 (8th Cir. 2014); *Harakaly*, 734 F.3d at 98; United States v. Towns, 718 F.3d 404, 412 (5th Cir. 2013); United States v. Rodriguez, 676 F.3d 183, 191 (D.C. Cir. 2012); United States v. Pena, 598 F.3d 289, 292 (6th Cir. 2010); United States v. Mejia-Pimental, 477 F.3d 1100, 1104 (9th Cir. 2007).

[17] 18 U.S.C. § 3553(f)(1) ("the 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 sentencing guidelines.").

[18] *Id.* § 3553(f)(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.").

[19] *Id.* § 3553(f)(4) ("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 section 408 of the Controlled Substances Act.").

[20] *Id.* § 3553(f)(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.").

[21] *Id.* § 3553(f)(3) ("the offense did not result in death or serious bodily injury to any person.").

[22] Before the First Step Act amended 18 U.S.C. § 3553(f)(1), it read, "the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines." *See also* U.S.S.G. § 5C1.2(a)(1).

[23] U.S.C.G. §§ 4A1.1(c); 4A1.2; United States v. Brooks, 722 F.3d 1102, 1108 (8th Cir. 2013) (the calculation includes "any sentence imposed for conduct not part of the instant offense").

[24] U.S.S.G. §§ 4A1.1 (b), (d); 4A1.2(d). United States v. Yepez, 704 F.3d 1087, 1089-90 (9th Cir. 2012) (a federal crime committed while the offender is on state probation is no less so because a state court subsequently terminates the probationary term as of the time it was originally ordered (*i.e.*, before the federal crime was committed).).

Prior sentences of imprisonment for a year and a month or more are assigned *three criminal history points*.[25]

A number of convictions do not count, including the following:

- Stale convictions
    - 15-year-old, three-point convictions,[26]
    - 10-year-old, one- or two-point convictions,[27] or
    - 5-year-old, one- or two-point juvenile adjudications;[28]
- Summary court-martial convictions;[29]
- Foreign convictions;[30]
- Tribal convictions;[31]
- Expunged, reversed, vacated, or invalidated convictions;[32] and
- Certain petty offenses or minor misdemeanors:
    - Hunting and fishing violations, juvenile truancy, and the like, regardless of the sentence imposed.[33]
    - Gambling, prostitution, and the like if the offender was sentenced no more severely than to imprisonment for 30 days or less or to probation for less than a year.[34]

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[25] *Id.* at § 4A1.1(a).

[26] *Id.* at § 4A1.2(e) ("(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period … (3) Any sentence not within the time periods specified above is not counted…").

[27] *Id.* ("… (2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted").

[28] *Id.* at § 4A1.2(d) ("Offenses committed prior to age eighteen. (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 [criminal history] points under §4A1.1(a) for each such sentence. (2) In any other case, (A) add 2 points under §4A1.1(b) for each adult or juvenile sentence of confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A)."). *See, e.g.*, United States v. Harris, 908 F.3d 1151, 1156 (8th Cir. 2018).

[29] U.S.S.G. § 4A1.2(g).

[30] *Id.* at § 4A1.2(h). *See, e.g.*, United States v. Port, 532 F.3d 753, 754 (8th Cir. 2008).

[31] U.S.S.G. § 4A1.2(*i*). United States v. White, 840 F.3d 550, 554 (8th Cir. 2016).

[32] U.S.S.G. §§ 4A1.2(j), 4A1.2, cmt. n.6.

[33] *Id.* at §4A1.2(c) (The full list includes "fish and game violations, hitchhiking, juvenile status offenses and truancy, local ordinance violations (except those violations that are also violations under state criminal law), loitering, minor traffic infractions (e.g., speeding), public intoxication, [and] vagrancy,").

[34] *Id.* (The full list consists of "careless or reckless driving, contempt of court, disorderly conduct or disturbing the peace, driving without a license or with a revoked or suspended license, false information to a police officer, gambling, hindering or failure to obey a police officer, insufficient funds check, leaving the scene of an accident, non-support, prostitution, resisting arrest, [and] trespassing,"). *E.g.*, United States v. Vazquez, 719 F.3d 1086, 1092-93 (9th Cir. 2013) (a suspended sentence following conviction for driving with a suspended license does not count when the defendant is not sentenced to probation and the applicable state law does not consider probation an implicit component of a suspended sentence).

- Similar offenses to those listed "by whatever name they are known."[35]

Only the Nonviolent

> [T]he 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, 18 U.SC. 3553(f)(2).[36]
>
> [T]he offense did not result in death or serious bodily injury to any person, 18 U.S.C. § 3553(f)(3).[37]

The safety valve has two disqualifications designed to reserve its benefits to the nonviolent. The weapon or threat-of-violence disqualification turns upon the defendant's conduct or the conduct of those he "aided or abetted, counseled, commanded, induced, procured, or willfully caused."[38] It is not triggered by the conduct of a co-conspirator, unless the defendant aided, abetted, or counselled the co-conspirator's violence or possession.[39] Disqualifying firearm possession may be either actual or constructive.[40] Constructive possession is the dominion or control over a

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[35] U.S.S.G. §§ 4A1.2(c)(1), (c)(2). The Sentencing Guidelines suggest a number of factors to assist in the determination of whether an unlisted offense may be consider "similar" for purposes of Section 4A1.2(c): "(i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct," U.S.S.G. §4A1.2, cmt. n.12(A). *See, e.g.*, United States v. Hagen, 911 F.3d 891, 895-96 (7th Cir. 2019) (applying the five-factor analysis and concluding that convictions of a guardian for allowing child truancy should not have counted in the calculation of the defendant's criminal history score); United States v. Kohl, 910 F.3d 978, 981 (7th Cir. 2018) (state law prohibiting operation of a motor vehicle with a detectable amount of a restricted controlled substance in the blood is similar to driving under the influence of an intoxicant); United States v. Ruacho, 746 F.3d 850, 854-55 (8th Cir. 2014) (petty-misdemeanor conviction for possession of a small amount of marijuana is not sufficiently similar to public intoxication or disorderly conduct); United States v. Foote, 705 F.3d 305, 307-308 (8th Cir. 2013) (possession of small amount of marijuana punishable by a small fine is not a similar offense to a similarly fined traffic offense); United States v. Burge, 683 F.3d 829, (7th Cir. 2012) (abandonment of a llama in violation of the state wildlife code is sufficiently similar to fish and game violations); United States v. DeJesus-Concepcion, 607 F.3d 303, 305-306 (2d Cir. 2010) (third degree unauthorized use of a vehicle is not a similar offense to careless or reckless driving); United States v. Calderon Espinosa, 569 F.3d 1005, 1008 (9th Cir. 2009) (offense of loitering for drug activities is loitering "by whatever name it is known"); United States v. Russell, 564 F.3d 200, 206 (3d Cir. 2009) (misdemeanor marijuana possession is not similar to public intoxication); United States v. Pando, 545 F.3d 682, 684 (8th Cir. 2008) (driving while intoxicated is not similar to careless or reckless driving, citing U.S.S.G. §4A1.2, cmt. n.5); United States v. McKenzie, 539 F.3d 15, 17-18 (1st Cir. 2008) (shoplifting is not similar to "insufficient funds check"); United States v. Garrett, 528 F.3d 525, 527-29 (7th Cir. 2008) (bail jumping is similar to contempt of court); United States v. Sanchez-Cortez, 530 F.3d 357, 359-60 (5th Cir. 2008) (military AWOL offense was not similar to truancy); United States v. Cole, 418 F.3d 592, 599-600 (6th Cir. 2005) (underage (over 18 but under 21) possession of alcohol was similar to a juvenile status offense).

[36] *See also* U.S.S.G. § 5C1.2(a)(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.").

[37] *Id.* at § 5C1.2(3) ("the offense did not result in death or serious bodily injury to any person.").

[38] *Id.* at § 5C1.2, cmt., n.4.

[39] United States v. Denis, 560 F.3d 872, 873 (8th Cir. 2009); United States v. Figueroa-Encarnacion, 343 F.3d 23, 34 (1st Cir. 2003); United States v. Sarabia, 297 F.3d 983, 989 (10th Cir. 2002); *but see* United States v. Ramirez, 783 F.3d 687, 695 (7th Cir. 2015) ("[T]he scope of the 'no firearms condition . . . [is] an open question. . . . [and] remains unsettled in this circuit. Given the lack of guiding circuit precedent, the district court cannot be faulted for failing to raise and apply the safety valve sua sponte [in a case in which a co-conspirator rather than the defendant was armed with a firearm at the time of the offense].").

[40] United States v. Jackson, 552 F.3d 908, 909-10 (8th Cir. 2009) (citing in accord United States v. Matias, 465 F.3d 169, 173-74 (5th Cir. 2006); United States v. Herrera, 446 F.3d 283, 287 (2d Cir. 2006); United States v. McLean, 409 F.3d 492, 501 (1st Cir. 2005); United States v. Gomez, 431 F.3d 818, 820-22 (D.C. Cir. 2005); United States v.

firearm or the place where one is located.[41] Disqualification requires the threat of violence or possession of a firearm "in connection with the offense," sometimes characterized as "active possession."[42] In many instances, possession of a firearm in a location where drugs are stored or transported, or where transactions occur, will be enough to support an inference of possession in connection with the drug offense of conviction.[43] "[E]ven a single intimidating confrontation [is] enough to constitute a credible threat" and is consequently safety valve disqualifying.[44] Conversely, a sentencing enhancement for a co-conspirator's possession does not automatically preclude qualification.[45]

The Sentencing Guidelines define "serious bodily injury" for purposes of Section 3553(f)(3) as an "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation."[46] On its face, the definition would include serious bodily injuries, such as hospitalization, suffered by the defendant as a result of the offense.[47]

Moreover, a defendant is more likely to be disqualified under Section 3553(f)(3) if a fellow conspirator seriously injures a victim than would be the case under Section 3553(f)(2) if the conspirator merely carries a firearm.[48]

Stewart, 306 F.3d 295, 327 n.19 (6th Cir. 2002), but noting in apparent disagreement United States v. Zavalza-Rodriguez, 379 F.3d 1182, 1186-187 (10th Cir. 2004)).

[41] United States v. Stewart, 306 F.3d 295, 326 (6th Cir. 2002).

[42] 18 U.S.C. § 3553(f)(2). United States v. Hargrove, 911 F.3d 1306, 1329 (10th Cir. 2019) (internal citations omitted) ("As for 'active possession' of a firearm—which, as noted, entails a 'close connection linking the individual defendant, the weapon and the offense'—we reasoned that this requirement prevents mere constructive possession (without more) from satisfying the safety-valve provisions, though it might satisfy … [W]e acknowledged that, when a defendant 'did not argue that the gun was not actually his nor that it was merely constructively possessed, a gun's proximity and potential to be used in connection with the offense' may well be sufficient to bar safety-valve relief."); United States v. Leanos, 827 F.3d 1167, 1170 (8th Cir. 2016) ("We have held that a defendant possesses a firearm in connection with a drug offense if the firearm has the potential to facilitate the offense. Moreover, constructive possession of a firearm is sufficient to render a defendant ineligible for the safety valve [as] … when a firearm is located 'where it could be used to protect drugs … For example, where a firearm was located five feet away from a drug stack in a defendant's home—even though the defendant asserted that he never touched the firearm and that it did not belong to him…"); *see also,* United States v. Bolton, 858 F.3d 905, 914 (4th Cir. 2017) ("[A]t least five of our sister circuits have held that a weapon enhancement pursuant to § 2D1.1(b)(1) does not foreclose a safety valve reduction despite § 5C1.2(a)(2)'s requirement that defendant did not possess a firearm in connection with the offense.") (citing cases from the First, Sixth, Ninth, Tenth and Eleventh circuits).

[43] *Hargrove*, 911 F.3d at 1330 (internal citations omitted) (emphasis of the court) ("In sum, our cases teach that a firearm is used 'in connection with an offense' when it facilitates or has the 'potential to facilitate' that offense. The focus of our inquiry is 'the defendant's *own conduct* for purposes of evaluating eligibility for the safety valve. And the kind of firearms possession that bars application of the safety valve is 'active possession whereby there is a close connection linking the individual defendant, the weapon, and the offense.' Lastly, in circumstances where the defendant's own conduct evinces actual possession of the firearm, we have recognized that active possession may be shown by evidence of '[that] firearm's proximity and potential to facilitate the offense.'"); *Jackson,* 552 F.3d at 910; United States v. Stark, 499 F.3d 72, 80 (1st Cir. 2007); *Stewart,* 306 F.3d at 327.

[44] Talavera v. United States, 842 F.3d 556, 559 (8th Cir. 2016); United States v. Ortiz, 775 F.3d 964, 969 (7th Cir. 2015).

[45] *Hargrove,* 911 F.3d at 1328-29.

[46] U.S.S.G. §5C1.2, cmt. n.2; §1B1.1, cmt. n.1(L).

[47] The Eleventh Circuit in a nonbinding opinion seems to have come to the same conclusion. United States v. Valencia-Vergara, 264 Fed. Appx. 832, 836 (11th Cir. 2008) ("The district court did not clearly err in denying Valencia-Vergara a reduction under the safety valve provisions. The evidence shows that both he and one of his codefendants sustained second and third degree burns on their bodies, for which they had to be treated at a hospital.").

[48] *Compare* 18 U.S.C. §3553(f)(3) ("the offense did not result in death or serious bodily injury") *with id.*§ 3553(f)(2)

Only Single or Low-Level Offenders

> [T]he 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 Section 408 of the Controlled Substances Act, 18 U.S.C. § 3553(f)(4)(emphasis added).[49]

The defendant must also establish that he or she was not "an organizer, leader, manager, or supervisor of others in the offense."[50] The term *supervisor* is construed broadly and encompasses anyone who exercises control or authority of another during the commission of the offense.[51] The Sentencing Guidelines disqualify anyone who receives a guideline level increase for their aggravated role in the offense.[52] Thus, by implication, it does not require a defendant to have received a guideline increase based on his minimal or minor participation in a group offense, nor does it disqualify a defendant who acted alone.[53]

Tell All

> [N]ot 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, 18 U.S.C. § 3553(f)(5).[54]

At one time the most heavily contested safety valve prerequisite, Section 3553(f)(5) requires full disclosure on the part of the defendant. As in the case of the other prerequisites, the defendant here bears the burden of establishing his qualification for safety valve relief.[55] The requirement

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(emphasis added) ("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),"). *See* United States v. Grimmett, 150 F.3d 958, 960 (8th Cir. 1998) (reversing on other grounds a district court decision that included that denial of safety valve relief "because of Kerns' murder by conspirators").

[49] *See also* U.S.S.G. § 5C1.2(a)(4) ("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."); U.S.S.G. § 5C1.2 cmt. n.6 ("As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this [safety valve] section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who 'engaged in a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'").

[50] 18 U.S.C. § 3553(f)(4); *see also* United States v. Lynch, 903 F.3d 1061, 1083-84 (9th Cir. 2018) (holding that the district court may not find the leader of a drug trafficking organization qualified for the safety valve because the organization dealt in marijuana).

[51] United States v. Gamboa, 701 F.3d 265, 267 (8th Cir. 2012).

[52] U.S.S.G. §5C1.2, cmt. n.5 ("'Organizer ... supervisor of others in the offense, as determined under the sentencing guidelines' as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role)"). *E.g.*, United States v. Doe, 778 F.3d 814, 826 (9th Cir. 2015); United States v. May, 748 F.3d 758, 760-61 (7th Cir. 2014); United States v. Bonilla-Filomeno, 579 F.3d 852, 858 (8th Cir. 2009).

[53] U.S.S.G. § 3B1.2 (Mitigating Role).

[54] *See also* U.S.S.G. § 5C1.2(a)(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.").

[55] United States v. Cruz-Romero, 848 F.3d 399, 402 (5th Cir. 2017); United States v. Ortiz, 775 F.3d 964, 967 (7th Cir. 2015); United States v. Claxton, 766 F.3d 280, 306 (3d Cir. 2014).

extends not only to information concerning the crime of conviction, but also to information concerning other crimes that "were part of the same course of conduct or of a common scheme or plan," including uncharged related conduct.[56]

Neither Section 3553(f) nor the Sentencing Guidelines explain what form the defendants' full disclosure must take. At least one court has held that under rare circumstances disclosure through the defendant's testimony at trial may suffice.[57] Most often the defendant provides the information during an interview with prosecutors or by a proffer. The defendant must disclose the information to the prosecutor, however. Disclosure to the probation officer during preparation of the presentence report is not sufficient.[58] Moreover, a defendant does not necessarily qualify for relief merely because he has proffered a statement and invited the prosecution to identify any additional information it seeks; for "the government is under no obligation to solicit information from a defendant."[59] The defendant must provide the government with *all* the relevant information in his possession.[60] And, he must do so "no later than the time of the sentencing hearing."[61] Information offered after the sentencing hearing does not qualify,[62] although information offered following appellate remand for resentencing and prior to the resentencing hearing may qualify.[63] On the other hand, past lies do not render a defendant ineligible for relief under the truthful disclosure criterion of the safety valve, although they may undermine his credibility.[64]

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[56] 18 U.S.C. § 3553(f)(5); U.S.S.G. § 5C1.2(a)(5); United States v. Ceballos, 605 F.3d 468, 472 (8th Cir. 2010); United States v. Altamirano-Quintero, 511 F.3d 1087, 1096 (10th Cir. 2007) (citing United States v. Montes, 381 F.3d 631, 635-36 (7th Cir. 2004); United States v. Johnson, 375 F.3d 1300, 1302-303 (11th Cir. 2004); United States v. Cruz, 156 F.3d 366, 371 (2d Cir. 1998); United States v. Miller, 151 F.3d 957, 958 (9th Cir. 1998); United States v. Sabir, 117 F.3d 750, 753 (3d Cir. 1997).

[57] United States v. DeLaTorre, 599 F.3d 1198, 1206 (10th Cir. 2010); but see United States v. Diaz, 736 F.3d 1143, 1152 (8th Cir. 2013) ("Diaz did not separately proffer his knowledge to the government and relies solely on this trial testimony to support safety valve relief. We do not address the appropriateness of such an unusual procedure"); United States v. Delgrosso, 852 F.3d 821, 830 (8th Cir. 2017) (affirming the district court holding that the defendant's trial testimony and his letter to the IRS purporting to "truthfully provide all [the] information he had" did not suffice to satisfy the requirements of 18 U.S.C. § 3553(f)(5)).

[58] United States v. Cervantes, 519 F.3d 1254, 1257 (10th Cir. 2008) ("In making this determination, we join the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits in ruling that a probation officer is not the government for purposes of the safety valve.") (citing United States v. Wood, 378 F.3d 342, 351 (4th Cir. 2004); Emezuo v. United States, 357 F.3d 703, 706 n.2 (7th Cir. 2004); United States v. Contreras, 136 F.3d 1245, 1246 (9th Cir. 1998); United States v. Jimenez Martinez, 83 F.3d 488, 495-66 (1st Cir. 1996); United States v. Rodriguez, 60 F.3d 193, 195-96 (5th Cir. 1995); and United States v. Smith, 174 F.3d 52, 56 (2d Cir. 1999)).

[59] United States v. Milkintas, 470 F.3d. 1339, 1345 (11th Cir. 2006) (citing United States v. O'Dell, 247 F.3d 655, 675 (6th Cir. 2001); United States v. Ortiz, 136 F.3d 882, 884 (2d Cir. 1997); United States v. Flanagan, 80 F.3d 143, 146-47 (5th Cir. 1996); United States v. Ivester, 75 F.3d 182, 185-86 (4th Cir. 1996)); *see also Claxton*, 766 F.3d at 306 ("The mere fact that the investigators did not ask the 'right' questions for purposes of Claxton's safety valve claim did not relieve him of his burden under the safety valve provision.").

[60] United States v. Ortiz, 775 F.3d 964, 967-68 (7th Cir. 2014).

[61] 18 U.S.C. § 3553(f)(5).

[62] *Ortiz*, 775 F.3d at 967-68.

[63] United States v. Figueroa-Labrada, 780 F3d 1294, 1300-303 (10th Cir. 2015).

[64] United States v. Rodriguez, 676 F.3d 183, 190-91 (D.C. Cir. 2012) ("The provision does not distinguish between defendants who provide the authorities only with truthful information and those who provide false information before finally telling the truth."); United States v. Wu, 668 F.3d 882, 888 (7th Cir. 2011) ("Here, in contrast, the district court denied the reduction. It believed that Wu's credibility had been undermined by inconsistencies in his statements and his ultimate retraction."); United States v. Padilla-Colon, 578 F.3d 23, 31-2 (1st Cir. 2009) ("Inconsistencies between statements made during the proffer and statements made to the authorities on other occasions are not necessarily disqualifying. But the court may legitimately consider such inconsistencies in deciding on the truthfulness of the

Substantial Assistance

Background

Three provisions authorize federal courts to reduce a defendant's sentence on the motion of the government for substantial assistance: Rule 35(b) of the Federal Rules of Criminal Procedure, 18 U.S.C. § 3553(e), and Section 5K1.1 of the U.S. Sentencing Guidelines. Only Section 3553(e) and Rule 35(b) authorize sentences below otherwise applicable mandatory minimums. Unlike the safety valve, neither Section 3553(e) nor Rule 35(b) is limited to mandatory minimums established for controlled substance offenses.[65]

18 U.S.C. § 3553(e)

The substantial assistance provision, 18 U.S.C. § 3553(e), passed with little fanfare in the twilight of the 99th Congress as part of the massive Anti-Drug Abuse Act of 1986, legislation that established or increased a number of mandatory minimum sentencing provisions.[66] The section continues in its original form virtually unchanged:

> (e) Limited Authority To Impose a Sentence Below a Statutory Minimum. - Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.[67]

The section passed between the date authorizing creation of the Sentencing Guidelines and the date they became effective. Rather than replicate the language of Section 3553(e), the guidelines contain an overlapping section that authorizes a sentencing court to depart from the minimum sentence called for by the guidelines.[68]

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proffer."); United States v. Mejia-Pimental, 477 F.3d 1100, 1108 (9th Cir. 2007) ("The district court therefore erred, as a matter of law, in finding Mejia-Pimental ineligible for safety valve relief on the basis of the lies and delays that preceded his final proffer."); United States v. Jeffers, 329 F.3d 94, 99-100 (2d Cir. 2003) ("[A] sentencing court may not disqualify a defendant at the threshold from eligibility for safety valve relief based solely on his commission of perjury at trial, where the defendant otherwise fulfills the statutory criteria under 18 U.S.C. § 3553(f)(1)-(5). To do so would contradict the plain language of the statute and contravene the statutory deadline for full compliance with its criteria at the time of the commencement of the sentencing hearing. A court may, of course, consider the relevance of the prior perjury or other obstructive behavior in making a factual finding as to whether the defendant has made a complete and truthful proffer in compliance with 18 U.S.C. § 3553(f)(5).").

[65] 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b)(4) ("When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.").

[66] Section 1007(a) of P.L. 99-570, 100 Stat. 3207-7 (1986).

[67] In the only amendment to Section 3553(e), Section 4002(a)(8) of P.L. 107-273 (2002) changed the phrase "as minimum sentence" to "as a minimum sentence."

[68] U.S.S.G. § 5K1.1: "Substantial Assistance to Authorities (Policy Statement). Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

"(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

"(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

"Upon the Motion of the Government"

As a general rule, a defendant is entitled to a sentence below an otherwise applicable statutory minimum under the provisions of Section 3553(e) only if the government and the court agree.[69] The courts have acknowledged that due process or equal protection or other constitutional guarantees may provide a narrow exception. "Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."[70] A defendant is entitled to relief if the government's refusal constitutes a breach of its plea agreement.[71] A defendant is also "entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end."[72] Some courts have suggested that a defendant is entitled to relief if the prosecution refuses to move under circumstances that "shock the conscience of the court," or that demonstrate bad faith, or for reasons unrelated to substantial assistance.[73] A majority of the judges who answered the Sentencing Commission's survey agreed that relief under Section 3553(e) should be available even in the absence of motion from the prosecutor.[74]

Despite their similarities, Section 3553(e) and U.S.S.G. Section 5K1.1 are not the same. A motion under Section 3553(e) authorizes a sentence beneath the mandatory minimum, and a motion

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"(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

"(3) the nature and extent of the defendant's assistance;

"(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

"(5) the timeliness of the defendant's assistance."

[69] Melendez v. United States, 518 U.S. 120, 125-26 (1996) ("We believe that §3553(e) requires a government motion requesting or authorizing the district court to impose a sentence below a level established by statute as a minimum sentence before the court may impose such a sentence"); *see also* United States v. Sealed Appellee, 887 F.3d 707, 709 (5th Cir. 2018); United States v. Melton, 861 F.3d 1320, 1329 (11th Cir. 2017).

[70] Wade v. United States, 504 U.S. 181, 186 (1992); United States v. Gomez, 705 F.3d 68, 79 (2013).

[71] United States v. Motley, 587 F.3d 1153, 1159 (D.C. Cir. 2009); United States v. Smith, 574 F.3d 521, 525 (8th Cir. 2009); United States v. Doe, 445 F.3d 202, 207 (2d Cir. 2006); *cf.* United States v. Doe, 865 F.3d 1295, 1296 (10th Cir. 2017).

[72] *Wade*, 504 at 186; United States v. Zeaiter, 891 F.3d 1114, 1125 (8th Cir. 2018) (internal citation omitted) ("A district court can review the government's decision not to file a substantial assistance motion only if a defendant has made a substantial threshold showing that the decision was based on an unconstitutional motive or was not reasonably related to any legitimate Government end."); *Sealed Appellee*, 887 F.3d at 709.

[73] United States v. Freemont, 513 F.3d 884, 889 (8th Cir. 2008) ("The district court may review the government's refusal to make a motion in limited circumstances. First, the district court may review the government's decision for an unconstitutional motive.... Second, a district court can compel a §3553(e) motion if the government acknowledges the defendant provided substantial assistance, but refuses to make a motion expressly because the defendant engaged in unrelated misconduct—a reason unrelated to the quality of the defendant's assistance.... Third, the district court may be able to compel a motion if the government acted in bad faith by refusing to make a motion"); United States v. Henry, 758 F.3d 427, 431 (D.C. Cir. 2014) ("[T]he Government's decision not to file a section 5K1.1 motion like any other prosecutorial decision is subject to constitutional limitations, plea agreements provide additional protection for defendants. The bargained-for promises are bolstered by an implied obligation of good faith and fair dealing. Where the government breaches a plea agreement, remand for specific performance of the agreement or withdrawal of the guilty plea may be warranted."); United States v. Doe, 741 F.3d 359, 362-64 (2d Cir. 2013); *but see* United States v. Perez, 526 F.3d 1135, 1138 (8th Cir. 2008) (citing cases evidencing a split within the circuit over whether bad faith provides a sufficient based to compel a government motion); *see also* United States v. Fields, 763 F.3d 443, 454 (6th Cir. 2014) ("Indeed, unlike other circuits, we do not review for bad faith when the decision to file a motion vests within the sole discretion of the government.").

[74] *Survey, Question 15. Substantial Assistance*. Only 35% of the respondents disagreed with the statement that "Congress should amend 18 USC §3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion," *Id.*

under U.S.S.G. Section 5K1.1 authorizes a sentence beneath the applicable Sentencing Guideline range. Thus, a motion under Section 5K1.1 will ordinarily not be construed as a motion under Section 3553(e), in order to permit a court sentence below an otherwise applicable mandatory minimum sentencing requirement.[75]

"To Reflect a Defendant's Substantial Assistance"

Any sentence imposed below the statutory minimum by virtue of Section 3553(e) must be based on the extent of the defendant's assistance; it may not reflect considerations unrelated to such assistance.[76] It has been suggested, however, that a court may use the Section 5K1.1 factors for that determination, that is, "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; [and] (5) the timeliness of the defendant's assistance."[77]

The substantial assistance exception makes possible convictions that might otherwise be unattainable. Yet, it may also lead to "inverted sentencing," that is, a situation in which "the more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he had to offer to a prosecutor"; while in contrast the exception is of no avail to the peripheral offender who can provide no substantial assistance.[78] Perhaps for this reason, most of the judges who responded to the Sentencing Commission survey agreed that a sentencing court should not be limited to assistance-related factors and should be allowed to use the generally permissible sentencing factors when calculating a sentence under Section 3553(e).[79]

Rule 35(b)

In the before-and-after sentencing tale of avoiding a statutory mandatory minimum for substantial assistance, Rule 35(b) is the after. It is available only after sentencing. If the defendant's sentence is vacated on appeal, a Section 3553(e) motion rather than a Rule 35(b) motion is the appropriate

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[75] Melendez v. United States, 518 U.S. 120, 126 (1996); United States v. Lee, 725 F.3d 1159, 1167-168 (9th Cir. 2013); United States v. Barnes, 730 F.3d 456, 457-58 (5th Cir. 2013).

[76] United States v. Spinks, 770 F.3d 285, 287 (4th Cir. 2014); United States v. Burns, 577 F.3d 887, 894 (8th Cir. 2009) (en banc) ("Where a court has authority to sentence below a statutory minimum only by virtue of a government motion under §3553(e), the reduction below the statutory minimum must be based exclusively on assistance-related considerations."); *see also* United States v. Spann, 682 F.3d 565, 566 (7th Cir. 2012); United States v. Winebarger, 664 F.3d 388, 392-93 (3d Cir. 2011); United States v. Jackson, 577 F.3d 1032, 1036 (9th Cir. 2009).

[77] United States v. Gabbard, 586 F.3d 1046, 1051 (6th Cir. 2009) (citing United States v. Richardson, 521 F.3d at 159) ("According to the Second Circuit in *Richardson*, considering U.S.S.G. §5K1.1's factors is appropriate in determining the extent of a departure below the statutory minimum pursuant to 18 U.S.C. §3553(e)."); *but see* United States v. Concha, 861 F.3d 116, 120 (4th Cir. 2017) ("A court acting under § 3553(e) to reduce a sentence below a statutory minimum must likewise consider only assistance-related factors when determining the extent of the departure.").

[78] *Hearing, Testimony of Jeffrey B. Steinback on behalf of the Practitioner's Advisory Group* at 8, quoting *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992); see also, *Hearing, Written Statement of Cynthia Hujar Orr, President of the National Ass'n of Criminal Defense Lawyers* at 3 (defendants "who have little or no information to provide the government, end up with far more severe sentences than leaders of conspiracies who run the operations and know the other participants.").

[79] *Survey, Question 15. Substantial Assistance*. Only 24% of the respondents disagreed with the statement that "In determining the extent of a reduction below the statutory mandatory minimum under 18 USC §3553(e) ... the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 USC §3553(a)," *Id.*

vehicle for relief during resentencing.[80] The rule features a two-pronged postsentence authorization for sentence reduction at the behest of the government. First, the government may always file a motion for sentence reduction including reduction below an otherwise applicable mandatory minimum if it does so within a year of sentencing.[81] Second, the government may file a comparable motion a year after sentencing, but only under narrow circumstances that excuse the failure to make a more timely motion.[82] Here, too, a motion by the government is a prerequisite to relief, and the government's decision to refuse to move can be overcome only where the government's silence is unconstitutionally grounded or based on some rationale not reasonably related to a legitimate government end.[83]

A district court, faced with a Rule 35(b) motion, must determine whether the defendant in fact rendered substantial assistance and if so what level of reduction, if any, is warranted. As part of its assessment, the court may, but is not required to, consider the general sentencing factors found in 18 U.S.C. § 3553(a).[84] There is some authority for the proposition that the defendant has no right to notice and hearing following the submission of a Rule 35(b) motion.[85]

Moreover, Rule 35(b) does not authorize a court to reduce the amount of restitution previously ordered.[86]

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[80] United States v. Tidwell, 827 F.3d 761, 762 n.2 (8th Cir. 2016).

[81] FED. R. CRIM. P. 35(b)(1), (4).

[82] *Id.* at 35(b)(2), (4) ("Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved: (A) information not known to the defendant until one year or more after sentencing; (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant. … (4) When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute."). A court may not grant the government's motion, filed more than a year after sentencing, unless the case falls within one of three narrow and narrowly construed exceptions noted above. United States v. Baker, 769 F.3d 1196, 1201-202 (10th Cir. 2014).

[83] United States v. Scarpa, 861 F.3d 59, 67-8 (2d Cir. 2017); *cf.* United States v. Marks, 768 F.3d 1215, 1217-18 (8th Cir. 2014).

[84] United States v. Katsman, 905 F.3d 672, 675 (2d Cir. 2018); United States v. McMahan, 872 F.3d 717, 718 (5th Cir. 2017) (internal citations omitted) ("The government is under no obligation to file a Rule 35(b) motion, and if it does, 'the sentencing court is not bound by the government's recommendation on whether or how much to depart but must exercise its independent discretion.'"); United States v. Concha, 861 F.3d 116, 120 (4th Cir. 2017) (internal citations omitted) (emphasis of the court) ("Regarding departures under Rule 35(b), this court has explained that, when making the threshold decision of *whether* to grant a departure the district court may consider only factors related to the defendant's assistance, but that the court may take other factors into account when determining the *extent* of the departure."); United States v. Lightfoot, 724 F.3d 593, 597 (5th Cir. 2013) ("Congress has not required district courts to consider that § 3553(a) factors when reducing a sentence under Rule 35(b).").

[85] *McMahan*, 872 F.3d at 720 (refusing to recognize such a right with the observation that "In fact, no other circuit besides the Second Circuit [in United States v. Gangi, 45 F.3d 28 (2d Cir. 1995)] has found that [U.S.S.G.] § 5K1.1 compels a reading of Rule 35(b) to require a right to be heard.").

[86] United States v. Puentes, 803 F.3d 597, 599 (11th Cir. 2015).

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