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

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Summary

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 two exceptions. One is available in all cases when the prosecutor asserts that the defendant has provided substantial assistance in the criminal investigation or prosecution of another, 18 U.S.C. 3553(e). The other, commonly referred to as the safety value, 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, 18 U.S.C. 3553(f).

Qualification for the substantial assistance exception 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 or 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.

Congress has instructed the United States Sentencing Commission to report on the operation of federal mandatory minimum sentencing provisions. A majority of the federal judges responding to a Commission survey agree that the two exceptions should be expanded. A number of Commission hearing witnesses have also urged that the provisions be amended. The Commission's report suggested that Congress consider expanding the safety valve to cover other offenses and to reach offenders with a slightly more extensive criminal record.

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Introduction

Depending on how the class is defined, there are hundreds of federal mandatory minimum offenses.[1] Yet only a handful are prosecuted with any regularity, including under 21 U.S.C. 841 (trafficking in controlled substances), 844 (possession of controlled substances), and 960 (smuggling controlled substances). Congress has provided two escape hatches under which a court may sentence a defendant below the statutory mandatory minimum. One, 18 U.S.C. 3553(e), is available only on the motion of the prosecutor based on the defendant's substantial assistance to the government and without regard to the offense charged. The second, 18 U.S.C. 3553(f), requires neither substantial assistance nor the prosecutor's endorsement, but is limited to the mandatory minimum sentences required in five sections of the federal drug law. Each of the sections is reflected in a parallel provision in the United States Sentencing Guidelines.[2]

In October 2009, Congress instructed the United States Sentencing Commission to prepare a report on the mandatory minimum sentencing provisions under federal law.[3] 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.[4] The Commission also held a public hearing at which several witnesses urged adjustments in the safety valve and substantial assistance provisions.[5] 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.[6]

Safety Valve

Background

Low level drug offenders can escape some of the otherwise applicable mandatory minimum sentences if they qualify for the safety valve found in 18 U.S.C. 3553(f). Congress created the safety valve after it became concerned that the mandatory minimum sentencing provisions could

[1] See generally, United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm; CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, by Charles Doyle; Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AMERICAN JOURNAL OF CRIMINAL LAW 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.S.G. §5C1.2 (Safety Valve); U.S.S.G. §5K1.1(Substantial Assistance).

[3] 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).

[4] See, United States Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010: Question 2. Safety Valve* (June 2010)(*Survey*) available on July 5, 2010 at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_20106.pdf.

[5] United States Sentencing Commission, *Public Hearing Agenda Thursday, May 28, 2010* (*Hearing*) available on July 5, 2010 at http://www.ussc.gov/AGENDA/20100527/Agenda.htm.

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

have resulted in equally severe penalties for both the more and the less culpable offenders.[7] It is available to qualified offenders convicted of violations of the possession with intent, the simple possession, attempt, or conspiracy provisions of the Controlled Substances or Controlled Substances Import and Export Acts.[8]

It is not available to avoid the mandatory minimum sentences that attend other controlled substance offenses, even those closely related to the covered offenses. For instance, §860 (21 U.S.C. 860), which outlaws violations of §841 near schools, playgrounds, or public housing facilities and sets the penalties for violation at twice what they would be under §841, is not covered. Those charged with a violation of §860 are not eligible for relief under the safety valve provisions.[9] In addition, safety valve relief is 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 punished under §960 and §963.[10]

The Supreme Court held in *Alleyne* "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.[11] Subsequent lower appellate courts, however, have held that *Alleyne* does not require the presentation to the jury or application of the reasonable doubt standard.[12] Thus, for the convictions to which the safety valve does apply, the defendant must convince the sentencing court by a preponderance of the evidence that he satisfies each of the safety valve's five requirements.[13] He may not have more than one criminal history point.[14] He may not have used violence or a dangerous weapon in connection with the offense.[15] He may not have been an organizer or leader of the drug enterprise.[16] He must have provided the government with all the

[7] H.Rept. 103-460, at 4 (1994); *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).

[8] 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....").

[9] *United States v. Phillips*, 382 F.3d 489, 499-500 (5th Cir. 2004); *United States v. Koons*, 300 F.3d 985, 993 (8th Cir. 2002); *United States v. Kakatin*, 214 F.3d 1049, 1050-51 (9th Cir. 2000); *United States v. Anderson*, 200 F.3d 1344, 1346-348 (11th Cir. 2000); *United States v. McQuilkin*, 78 F.3d 105, 108 (3d Cir. 1996). One 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.

[10] *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496-503 (9th Cir. 2007).

[11] *Alleyne v. United States*, 133 S.Ct. 2121, 2155, 2163 (2013).

[12] *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); see also, *United States v. King*, 773 F.3d 48, 55 (5th Cir. 2014).

[13] *United States v. Ramirez*, 783 F.3d 687, 692 (7th Cir. 2015); *United States v. Schmitt*, 765 F.3d 841, 842 (8th Cir. 2014); *United States v. 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. Aidoo*, 670 F.3d 600, 606-607 (4th Cir. 2012); *United States v. Pena*, 598 F.3d 289, 292 (6th Cir. 2010); *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1098 (10th Cir. 2007); *United States v. Mejia-Pimental*, 477 F.3d 1100, 1104 (9th Cir. 2007).

[14] 18 U.S.C. 3553(f)(1)("the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines").

[15] 18 U.S.C. 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").

[16] 18 U.S.C. 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").

information and evidence at his disposal.[17] Finally, the offense may not have resulted in serious injury or death.[18]

One Criminal History Point

> [T]he defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines, 18 U.S.C. 3553(f)(1).[19]

The criminal history point qualification refers to the defendant's prior criminal record. The Sentencing Guidelines assign criminal history points based on a defendant's past criminal record. Two or more points are assigned for every prior sentence of imprisonment or juvenile confinement of 60 days or more or for offenses committed while the defendant was in prison, was an escaped prisoner, or was on probation, parole, or supervised release.[20] A single point is assigned for every other federal or state prior sentence of conviction, subject to certain exceptions.[21]

Foreign sentences of imprisonment are not counted;[22] nor are sentences imposed by tribal courts;[23] nor summary court martial sentences;[24] nor sentences imposed for expunged, reversed, vacated, or invalidated convictions;[25] nor sentences for certain petty offenses or minor misdemeanors.[26] The Sentencing Guidelines list two classes of these minor misdemeanor or petty offenses that are not counted for criminal history purposes and thus for safety valve purposes. One class consists of eight types of minor offenses, like hunting and fishing violations or juvenile truancy, that are not counted regardless of the sentence imposed.[27] The other class consists of arguably more serious offenses, such as gambling or prostitution, that are only excused if the offender was sentenced no more severely than to imprisonment for 30 days or less or to probation

[17] 18 U.S.C. 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").

[18] 18 U.S.C. 3553(f)(3)("the offense did not result in death or serious bodily injury to any person").

[19] See also U.S.S.G. §5C1.2(a)(1).

[20] U.S.S.G. §§4A1.1(a), (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)).

[21] 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").

[22] U.S.S.G. §4A1.2(h).

[23] U.S.S.G. §4A1.2(i).

[24] U.S.S.G. §4A1.2(g). Sentences imposed by general and special courts martial are counted, *id.*

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

[26] U.S.S.G. §4A1.2(c).

[27] 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," U.S.S.G. §4A1.2(c)(2).

for less than a year.[28] Both classes also include similar offenses to those listed "by whatever name they are known."[29]

Two-thirds of the judges who responded to the Commission's survey favored expanding the safety valve criminal history criterion to encompass those with 2 or 3 criminal history points,[30] although less than one-quarter favored expansion of the criterion further.[31] Some of the Commission's hearing witnesses concurred.[32] The Commission's report on mandatory minimums, in fact, recommends that Congress "consider expanding the safety valve ... to include certain offenders who receive two, or perhaps three, criminal history points under the guidelines."[33]

[28] Again, 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," U.S.S.G. §4A1.2(c)(1); 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).

[29] 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. 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).

[30] *Survey, Question 2. Safety Valve*. Only 22% disagreed and another 12% were neutral, *Id.*

[31] *Id.* Asked whether the criterion should be expanded to include offenders with 4, 5 or 6 criminal history points, only 22% agreed; 60% disagreed; and 18% were neutral, *Id.*

[32] *Hearing, Statement of Michael Nachmanoff, Federal Public Defender for E.D. Va.* at 30-31 ("In fiscal year 2009, only 5,447 (35%) of defendants subject to a mandatory minimum qualified for the safety valve, while 10,085 (65%) did not. Yet, 83.2% of all drug trafficking offenses involved no weapon, 94.1% of drug trafficking defendants played no aggravated role or a mitigated role, 51.4% had zero to one criminal history points, and another 11.7% had two to three criminal history points. By requiring no more than one criminal history point, the safety valve excludes many offenders who were not involved in any violence and whose role in the offense was not serious. The safety valve does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes among low-level offenders who differ little from each other, that is, by one criminal history point"); *Statement of Jay Rorty, American Civil Liberties Union* at 4.

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

Only the Non-violent

> [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).[34]
>
> [T]he offense did not result in death or serious bodily injury to any person, 18 U.S.C. 3553(f)(3).[35]

The safety valve has two disqualifications designed to reserve its benefits to the non-violent. 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."[36] It is not triggered by the conduct of a co-conspirator, unless the defendant aided, abetted, counselled ... the co-conspirator's violence or possession.[37] Disqualifying firearm possession may be either actual or constructive.[38] Constructive possession is the dominion or control over a firearm or the place where one is located.[39] Disqualification requires the threat of violence or possession of a firearm "in connection with the offense."[40] 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.[41] "[E]ven a single intimidating confrontation [is] enough to constitute a credible threat" and is consequently safety valve disqualifying.[42]

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,

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[34] See also, U.S.S.G. §5C1.2(a)(2).

[35] See also, U.S.S.G. §5C1.2(3).

[36] U.S.S.G. §5C1.2, cmt., n.4.

[37] *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]").

[38] *United States v. Ochoa*, 643 F.3d 1153, 1158 (8th Cir. 2011*); 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. 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).

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

[40] 18 U.S.C. 3553(f)(2). *United States v. Sandoval-Sianuqui*, 632 F.3d 438, 443 (8th Cir. 2011)(the disqualifying violence or threat of violence extends to efforts to avoid detection or conviction). *But see, United States v. Carillo-Ayala*, 713 F.3d 82, 91 (11th Cir. 2013)("At least one of our sister circuits appears to hold that imposition of the enhancement under [U.S.S.G] §2D1.1(b)(1)[(enhancement under the drug conviction guideline for *possession* of a dangerous weapon without explicitly requiring that it be *possessed in connection* with the offense)] necessarily precludes safety valve relief ... See *United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010).... We hold that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from relief under subsection (a)(2) of the safety valve. Where 'a firearm was possessed' by the defendant personally, and yet the defendant also seeks the protection of the safety valve, the district court must determine whether the facts of the case show that a 'connection' between the firearm and the offense, though possible, is not probable").

[41] *United States v. Carillo-Ayala*, 713 F.3d at 92; *United States v. Jackson*, 552 F.3d 908, 910 (8th Cir. 2009); *United States v. Stark*, 499 F.3d 72, 80 (1st Cir. 2007); *United States v. Stewart*, 306 F.3d 295, 327 (6th Cir. 2002).

[42] *United States v. Ortiz*, 775 F.3d 964, 969 (7th Cir. 2015).

hospitalization, or physical rehabilitation."[43] On its face, the definition would include serious bodily injuries, such as hospitalization, suffered by the defendant as a result of the offense.[44] Unlike the gun and violence disqualification in Section 3553(f)(2), the serious injury disqualification in Section 3553(f)(3) may be triggered by the conduct of a co-conspirator.[45]

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).[46]

The defendant must also establish that he or she was not "an organizer, leader, manager, or supervisor of others in the offense."[47] The term "supervisor" is construed broadly and encompasses anyone who exercises control or authority of another during the commission of the offense.[48] The Sentencing Guidelines disqualify anyone who receives a guideline level increase for their aggravated role in the offense.[49] 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.[50]

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).[51]

The most heavily litigated safety valve criterion requires full disclosure on the part of the defendant. The requirement extends not only to information concerning the crimes of conviction,

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[43] U.S.S.G. §5c1.2, cmt. n.2; §1B1.1, cmt. n.1(L).

[44] 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").

[45] Cf., *United States v. Grimmett*, 150 F.3d 958, 960-61(8th Cir. 1998).

[46] See also, U.S.S.G. §5C1.2(a)(4), which notes that the reference to the criminal enterprise section is redundant because "[a]s 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,'" U.S.S.G. 5C1.2 cmt. n.6.

[47] 18 U.S.C. 3553(f)(4); *United States v. Doe*, 778 F.3d 814, 826 (9th Cir. 2015).

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

[49] 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. Gonzalez-Mendoza*, 584 F.3d 726, 729 (7th Cir. 2009); *United States v. Bonilla-Filomeno*, 579 F.3d 852, 858 (8th Cir. 2009); *United States v. Nobari*, 574 F.3d 1065, 1083-84 (9th Cir. 2009); *United States v. Rendon*, 354 F.3d 1320, 1333 (11th Cir. 2003).

[50] See, U.S.S.G. §3B1.2 (Mitigating Role).

[51] See also, U.S.S.G. §5C1.2(a)(5).

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.[52]

Neither §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.[53] 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.[54] 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."[55] The defendant must provide the government with *all* the relevant information in his possession.[56] And, he must do so "no later than the time of the sentencing hearing."[57] Information offered after the sentencing hearing does not qualify,[58] although information offered following appellate remand for resentencing and prior to the resentencing hearing may qualify.[59] On the other hand, past lies do not render a defendant ineligible for relief under the truthful disclosure criterion of the safety value, although they may undermine his credibility.[60]

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[52] *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. Salgado*, 250 F.3d 438, 459 (6th Cir. 2001); *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).

[53] *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").

[54] *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 the 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).

[55] *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); and *United States v. Ivester*, 75 F.3d 182, 185-86 (4th Cir. 1996); see also, *United States v. Claxton*, 766 F.3d 280, 306 (3d Cir. 2014)("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").

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

[57] 18 U.S.S. 3553(f)(5).

[58] *United States v. Ortiz*, 775 F.3d at 967-68.

[59] *United States v. Figueroa-Labrada*, 780 F3d 1294, 1997-1303 (10th Cir. 2015).

[60] *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 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

Substantial Assistance

Background

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 which established or increased a number of mandatory minimum sentencing provisions.[61] 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.[62]

The section passed between the date authorizing creation of the Sentencing Guidelines and the date they became effective. Rather than replicate the language of §3553(e), the Guidelines contain an overlapping section which authorizes a sentencing court to depart from the minimum sentence called for by the Guidelines.[63]

"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.[64]

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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)").

[61] Section 1007(a) of P.L. 99-570, 100 Stat. 32-07-7 (1986).

[62] 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."

[63] 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;

"(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."

[64] *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"); *United States v. Cook*, 698 F.3d 667, 671 n.2 (8th Cir. 2012); see also, *United States v. Pacheco*, 727 F.3d 41, 46 (1st Cir. 2013)(a government motion is also necessary for a downward departure from the applicable Guideline sentencing range under U.S.S.G. §5K1.1); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1332 (10th Cir. 2014)("Section 5K1.1 does not grant prosecutors the power to control the length of a defendant's sentence. Rather, it is emphatically for the court, not the government, to determine the

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."[65] A defendant is entitled to relief if the government's refusal constitutes a breach of its plea agreement.[66] A defendant is also "entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end."[67] 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.[68] A majority of the judges who answered the Sentencing Commission's survey agreed that relief under §3553(e) should be available even in the absence of motion from the prosecutor.[69]

Despite their similarities, §3553(e) and U.S.S.G. §5K1.1 are not the same. A motion under §3553(e) authorizes a sentence beneath the mandatory minimum and a motion under U.S.S.G. §5K1.1 authorizes a sentence beneath the applicable Sentencing Guideline range. Thus, a motion under §5K1.1 will ordinarily not be construed as a motion under §3553(e), in order to permit a court sentence below an otherwise applicable mandatory minimum sentencing requirement.[70]

"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.[71] It has been suggested, however, that a court may use the Section 5K1.1 factors for

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appropriate sentencing reward for the defendant's assistance").

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

[66] *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).

[67] *Wade v. United States*, 504 at 186.

[68] *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").

[69] *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.*

[70] *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).

[71] *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

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," U.S.S.G. §5K1.1(a).[72]

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.[73] 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).[74]

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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); *United States v. Hood*, 556 F.3d 226, 234 n.2 (4th Cir. 2009), citing *inter alia*, *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008) and *United States v. Desselle*, 450F.3d 179, 182 (5th Cir. 2006).

[72] *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)").

[73] *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").

[74] *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.*

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