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Mandatory Minimum Sentencing of Federal Drug Offenses in Short

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Summary

As a general rule, federal judges must impose a minimum term of imprisonment upon defendants convicted of various controlled substance (drug) offenses and drug-related offenses. The severity of those sentences depends primarily upon the nature and amount of the drugs involved, the defendant's prior criminal record, any resulting injuries or death, and in the case of the related firearms offenses, the manner in which the firearm was used.

The drug offenses reside principally in the Controlled Substances Act or the Controlled Substances Import and Export Act. The drug-related firearms offenses involve the possession and use of firearms in connection with serious drug offenses and instances in which prior drug convictions trigger mandatory sentences for unlawful firearms possession.

The minimum sentences range from imprisonment for a year to imprisonment for life. Although the sentences are usually referred to as mandatory minimum sentences, a defendant may avoid them under several circumstances. Prosecutors may elect not to prosecute. The President may choose to pardon the defendant or commute his sentence. The defendant may qualify for sentencing for providing authorities with substantial assistance or under the so-called "safety valve" provision available to low-level, nonviolent, first-time offenders.

Over time, defendants, sentenced to mandatory terms of imprisonment for drug- related offenses, have challenged Congress's legislative authority to authorize them and the government's constitutional authority to enforcement. The challenges have met with scant success. Generally, courts have concluded that the provisions fall within congressional authority under the Commerce, Necessary and Proper, Treaty, and Territorial Clauses of the Constitution. By and large, courts have also found no impediment to mandatory minimum sentences under the Due Process, Equal Protection, or Cruel and Unusual Punishment Clauses, or the separation-of-powers doctrine.

Proposals to amend drug-related mandatory minimum sentence provisions surfaced during the 114th Congress. In the 115th Congress, Senator Grassley introduced the successor to those proposals for himself and a bi-partisan list of co-sponsors as S. 1917, the Sentencing Reform and Corrections Act of 2017. Many of the same issues are addressed in H.R. 4261 introduced by Representative Scott of Virginia. This is an overview of the law from which those proposals spring.

This report is an abridged version of a longer report, CRS Report R45074, *Mandatory Minimum Sentencing of Federal Drug Offenses*, without the citations to authority and origin of quotations found in the parent report.

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Introduction

This is a brief discussion of the law associated with the mandatory minimum sentencing provisions of federal controlled substance (drug) laws and drug-related federal firearms and recidivist statutes. These mandatory minimums, however, are not as mandatory as they might appear. The government may elect not to prosecute the underlying offenses. Federal courts may disregard otherwise applicable mandatory sentencing requirements at the behest of the government. The federal courts may also bypass some of them for the benefit of certain low-level, nonviolent, offenders with virtually spotless criminal records under the so-called "safety valve" provision. Finally, in cases where the mandatory minimums would usually apply, the President may pardon the offenders or commute their sentences before the minimum term of imprisonment has been served.

Be that as it may, sentencing in drug cases, particular mandatory minimum drug sentencing, has contributed to an explosion in the federal prison population and attendant costs. The federal inmate population at the end of 1976 was 23,566. On January 4, 2018, the federal inmate population was 183,493. As of September 30, 2016, 49.1% of federal inmates were drug offenders and 72.3% of those were convicted of an offense carrying a mandatory minimum. In 1976, federal prisons cost $183.914 million; in 2016, federal prisons cost over $6.750 billion.

Mandatory Minimums for Drug Crimes

Table 1 below describes the mandatory minimum sentencing provisions for various drug and drug-related offenses.

Table 1. Federal Drug Offenses: Mandatory Minimum Terms of Imprisonment

Substance	Minimum	Maximum
Trafficking 21 U.S.C. § 841(b)(1)(A)/960(b)(1) substances (e.g., 1 kilo or more of heroin)	10 years	life
if death or serious injury results	20 years	life
with prior drug felony conviction	20 years	life
with prior drug felony conviction if death or serious injury results, or with two or more drug felony convictions	life	life
Trafficking 841(b)(1)(B)/960(b)(2) substances (e.g., 100 grams or more of heroin)	5 years	40 years
if death or serious injury results	20 years	life
repeat offender	10 years	life
repeat offender if death or serious injury results	life	life
Trafficking lesser amounts of 841(b)(1)/960(b) substances; other Schedule I or II substances; analogues; or date rape drugs: if death or serious injury results	20 years	life
repeat offender if death or serious injury results	life	life
Simple possession of a controlled substance with 1 prior conviction	15 days	2 years
Simple possession of a controlled substance with 2 or more priors	90 days	3 years
Drug kingpin	20 years	life
repeat offender	30 years	life
large operation (e.g., gross $10 million + per year)	life	life
killing in furtherance	20 years	life/death
Unless a higher minimum applies, distribution of a controlled substance to a pregnant woman, or using a child	1 year	2x usual penalty
repeat offender	3 years	3x for repeat offenders
Unless a higher minimum applies, distribution of a controlled substance proximate to a school or other prohibited location	1 year	2x usual penalty
repeat offender	3 years	3x usual penalty
Narco-terrorism involving 841(b)(1) substances	2x usual minimum	life
Firearm possession in furtherance of drug trafficking (varying by use, firearm, recidivism)	7 years–life	life

Substance	Minimum	Maximum
Unlawful firearm possession with 3 or more prior serious drug or violent felony convictions	15 years	life
Serious violent felony with 2 or more prior serious drug and/or violent felony convictions	life	life

Source: CRS analysis of statutes cited below.

Note: The same minimum and maximum penalties generally apply to attempt, conspiracy, or aiding and abetting the offenses described above.

Domestic Manufacture or Distribution (21 U.S.C. § 841(a))

Section 841(a) outlaws knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the intent to distribute or dispense controlled substances except as otherwise authorized by the Controlled Substances Act.

Knowingly or Intentionally

The government may establish the knowledge element of Section 841(a) in either of two ways. First, the "knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the [controlled substance] schedules." Second, "[t]he knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows that he is distributing heroin but does not know that heroin is listed on the schedules." As long as the government proves the defendant knows he was dealing in heroin, it need not prove that the defendant knew the particular type or quantity of the controlled substance he intended to distribute.

When a defendant claims no guilty knowledge, the circumstances may warrant a willful blindness instruction to the jury. The willful blindness instruction, sometimes called the deliberate ignorance or "ostrich head in the sand" instruction, is warranted if "(1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge is mandatory."

Manufacture, Distribute, Dispense, or Possess

Manufacture: For purposes of Section 841(a), "'manufacture' means the production … or processing of a drug, and the term 'production' includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance."

Distribute or Dispense: The Controlled Substances Act defines the term "distribute" broadly. The term encompasses any transfer of a controlled substance other than dispensing it. It reaches both sales and transfers without compensation. To "dispense" is "to deliver a controlled substance to an ultimate user …by, or pursuant to the lawful order of, a practitioner…" The Controlled Substances Act outlaws practitioners' proscribing controlled substances for other than legitimate medical purposes.

Possession with Intent to Distribute or Dispense: The government may satisfy the possession element with evidence of either actual or constructive possession. "Actual possession is the knowing, direct, and physical control over a thing." "Constructive possession exists when a person knowingly has the power and intention at a given time to exercise dominion and control over an object either directly or through others."

The escalating mandatory minimums that apply to offenders with "a prior conviction for a felony drug offense" extend to offenses classified as misdemeanors under state law, but punishable by imprisonment for more than a year. They also apply even though the underlying state felony conviction has been expunged. On the other hand, there is apparently a division among the circuits over whether the government's failure to comply with the procedure for establishing a prior conviction, and therefore to alert the defendant to the prospect of an enhanced mandatory minimum, precludes imposition of the enhanced sentence.

Sentencing: Sentencing for violations of Section 841(a) is governed by the nature and volume of the substance involved, the defendant's criminal record, and injuries attributable to the offense. The most severe penalties are reserved for high-volume trafficking of the eight substances thought most susceptible to abuse and least appropriate for medicinal use without tight controls and that are assigned to Controlled Substance Schedules I and II.

The eight substances are heroin, powder cocaine, cocaine base (crack), PCP, LSD, fentanyl, methamphetamine, and marijuana. Each comes with one set of mandatory minimums for trafficking in a very substantial amount listed in Section 841(b)(1)(A) and a second, lower set of mandatory minimums for trafficking in a lower but still substantial amount listed in Section 841(a)(1)(B). The first set (841(b)(1)(A) level) features the following thresholds:

- heroin - 1 kilogram;
- powder cocaine - 5 kilograms;
- crack - 280 grams;
- PCP - 100 grams;
- LSD - 10 grams;
- fentanyl - 400 grams;
- methamphetamine - 50 grams;
- marijuana - 1,000 kilograms.

The second set (841(b)(1)(B) level) has thresholds that are one-tenth of those of the higher set:

- heroin - 100 grams;
- powder cocaine - 500 grams;
- crack - 28 grams;
- PCP - 100 grams;
- LSD - 1 gram;
- fantanyl - 40 grams;
- methamphetamine - 5 grams;
- marijuana - 100 kilograms.

A Section 841(a) violation involving one of the eight drugs at the higher 841(b)(1)(A) level is punishable by imprisonment for:

- not less than 10 years;
- not less than 20 years if the offense results in death or serious bodily injury or if the offender has a prior felony drug conviction; and
- a mandatory term of life imprisonment if the offender has a prior felony drug conviction and the offense resulted in death or serious bodily injury or if the offender has two or more prior felony drug convictions.

A Section 841(a) violation involving one of the eight drugs at the lower 841(b)(1)(B) level is punishable by imprisonment for:

- not less than 5 years;
- not less than 10 years, if the offender has a prior felony drug conviction;
- not less than 20 years if the offense results in death or serious bodily injury; and
- a mandatory term of life imprisonment if the offender has a prior felony drug conviction and the offense resulted in death or serious bodily injury.

A Section 841(a) violation involving one of the eight drugs in lesser amounts, or some other Schedule I or II drug, or a date rape drug is punishable by imprisonment for:

- not less than 20 years if death or serious bodily injury results; and
- life if the offender has a prior felony drug conviction and death or serious bodily injury results.

The felony drug convictions that trigger the sentencing enhancement include federal, state, and foreign convictions. The "serious bodily injury" enhancement is confined to bodily injuries which involve "(A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." And, the "if death results" enhancement is available only if the drugs provided by the defendant were the "but-for" cause of death; it is not available if the drugs supplied were merely a contributing cause. The same "but for" standard presumably applies with equal force to the "serious bodily injury" enhancement.

Attempt, Conspiracy, and Aiding and Abetting: The mandatory minimums of Section 841 apply with equal force to those who attempt to possess with intent to distribute; who conspire to do so; or who aid and abet a violation of Section 841 by others.

To prove an attempt to violate Section 841(a), "the government must establish beyond a reasonable doubt that the defendant (a) had the intent to commit the object crime and (b) engaged in conduct amounting to a substantial step towards its commission. For a defendant to have taken a substantial step, he must have engaged in more than mere preparation, but may have stopped short of the last act necessary for the actual commission of the substantive crime."

Conspiracy is an agreement to commit a crime. "To establish that a defendant conspired to distribute drugs under 21 U.S.C. § 846, the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the defendant knew of the conspiracy; and (3) that the defendant intentionally joined the conspiracy." The existence of the conspiracy need not be shown by written agreement or any other form of direct evidence, but may be inferred from the circumstances. Moreover, each of the conspirators need not be fully aware of the roles or activities of all of their cohorts. Each conspirator, however, is punishable for the foreseeable offenses committed in furtherance of the common scheme.

Although it technically demonstrates an agreement to distribute a controlled substance, proof of a small, one-time sale of a controlled substance is ordinarily not considered sufficient for a conspiracy conviction. "[T]he factors that demonstrate a defendant was part of a conspiracy rather than in a mere buyer/seller relationship with that conspiracy include: (1) the length of affiliation between the defendant and the conspiracy; (2) whether there is an established method of payment; (3) the extent to which transactions are standardized; (4) whether there is a demonstrated level of mutual trust; (5) whether transactions involved large amounts of drugs; and (6) whether the defendant purchased his drugs on credit."

Accomplices who aid and abet the crime of another receive the same punishment as the offender they assist. To prove, aiding and abetting, the government must show that the defendant knowingly embraced and assisted in the commission of the crime.

Special Circumstances

Trafficking offenses that ordinarily do not trigger mandatory minimum sentences may do so if they involve special circumstances. Thus, trafficking to pregnant women, children, or in proximity of a school, playground or other prohibited location, or using a child to manufacture or traffic, are punishable with a one-year mandatory minimum term of imprisonment and in most instances a three-year mandatory minimum for repeat offenders.

Import/Export Offenses

Sections 960 and 963 of the Controlled Substances Import and Export Act, and by cross-reference Section 70506 of the Maritime Drug Law Enforcement Act (MDLEA), largely track the penalties found in the Section 841(b) of the Controlled Substances Act, including the mandatory minimum sentences of imprisonment.

Section 960: Section 960 sets the penalties for three categories of offenses: (1) importing or exporting a controlled substance in violation of 21 U.S.C. § 825 (labeling and packaging), § 952 (importing controlled substances), § 953 (exporting controlled substances), or § 967 (smuggling controlled substances); (2) possession of a controlled substance aboard a vessel or aircraft in violation of 21 U.S.C. § 955; and (3) possession with intent to distribute in violation of 21 U.S.C. § 959.

Of these, violations of Sections 952 and 959 appear to be the most commonly prosecuted. "To sustain a conviction for the importation of a controlled substance[under Section 952], the government must prove: (1) the defendant played a role in bringing a quantity of a controlled substance into the United States; (2) the defendant knew the substance was controlled; and (3) the defendant knew the substance would enter the United States." The government, however, need not prove that the defendant knew which controlled substance was being imported or its quantity.

Section 959 proscribes two offenses: manufacturing or distributing a controlled substance for import purposes and possession aboard an aircraft by a U.S. citizen or aboard a U.S. aircraft. The section specifically states that it governs offenses committed outside the territory of the United States.

Attempt, Conspiracy, and Aiding and Abetting: Section 963 outlaws attempts and conspiracies to violate the prohibitions covered by Section 960, and calls for the same penalties, including mandatory minimums, as apply to the underlying substantive offenses.

Maritime Drug Law Enforcement Act (MDLEA) (46 U.S.C. §§ 70503, 70506): MDLEA outlaws possession of a controlled substance aboard a vessel subject to U.S. jurisdiction or attempting or conspiring to do so. Here, too, violations carry the same penalties, including mandatory minimums, as the underlying substantive offenses.

The term "vessel subject to the jurisdiction of the United States" includes vessels within U.S. territorial or customs waters, and vessels of foreign registration or vessels located in foreign territorial waters when the foreign nation has consent to application of U.S. law, as well as vessels for which no claim of registration or false claim of registration is presented. Most of the lower federal appellate courts to consider the issue have held that the government need not establish any other nexus to the United States. The type and volume of controlled substances ordinarily involved in MDLEA cases usually trigger the more severe mandatory minimum sentences.

Narco-Terrorism (21 U.S.C. § 960a)

Section 960a doubles the otherwise applicable mandatory minimum sentence for drug trafficking (including an attempt or conspiracy to traffic) when the offense is committed in order to fund a terrorist activity or terrorist organization. The merging of drug trafficking and terrorism offenses in Section 960a does not preclude conviction of the defendant for drug trafficking and terrorism offenses as well. Here too, the controlled substances involved ordinarily require imposition of a mandatory minimum term of imprisonment.

Drug Kingpin (21 U.S.C. § 848)

Conviction of a Continuing Criminal Enterprise (CCE or Drug Kingpin) offense results in imposition of a 20-year mandatory minimum; the mandatory minimum for repeat offenders is 30 years. Drug kingpins of enormous enterprises, however, face a mandatory sentence of life imprisonment.

To secure a conviction, the government must establish, "1) a felony violation of the federal narcotics laws; 2) as part of a continuing series of three or more related felony violations of federal narcotics laws; 3) in concert with five or more other persons; 4) for whom [the defendant] is an organizer, manager or supervisor; [and] 5) from which [the defendant] derives substantial income or resources."

The homicide mandatory minimum found in the drug kingpin statute sets a 20-year minimum term of imprisonment for killings associated with a kingpin offense or for killings of law enforcement officers associated with certain other controlled substance offenses. Neither prohibition requires the defendant to have been manufacturing or distributing controlled substances at the time of the killing.

Drug-Related Mandatory Minimums

Firearm Possession in Furtherance (18 U.S.C. § 924(c))

Mandatory minimums are found in two federal firearms statutes. One, the Armed Career Criminal Act, deals exclusively with recidivists. The other, Section 924(c), attaches one of several mandatory minimum terms of imprisonment whenever a firearm is used or possessed during and in relation to a federal crime of violence or drug trafficking.

Section 924(c), in its current form, establishes one of several different minimum sentences when a firearm is used or possessed in furtherance of another federal crime of violence or drug trafficking. The mandatory minimums must be imposed in addition to any sentence imposed for the underlying crime of violence or drug trafficking and vary depending upon the circumstances, *i.e.*, (1) imprisonment for not less than five years, unless one of the higher mandatory minimums below applies; (2) imprisonment for not less than seven years if a firearm is brandished; (3) imprisonment for not less than 10 years if a firearm is discharged; (4) imprisonment for not less than 10 years if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon; (5) imprisonment for not less than 15 years if the offense involves the armor piercing ammunition; (6) imprisonment for not less than 25 years if the offender has a prior conviction for violation of Section 924(c); (7) imprisonment for not less than 30 years if the firearm is a machine gun or destructive device or is equipped with a silencer; and (8) imprisonment for life if the offender has a prior conviction for violation of Section 924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.

Firearm: Section 924(c) outlaws possession of a firearm in furtherance of, or use of a firearm during and in relation to, a predicate offense. A "firearm" for purposes of Section 924(c) includes not only guns ("weapons ... which will or [are] designed to or may readily be converted to expel a projectile by the action of an explosive"), but silencers and explosives as well. It includes firearms that are not loaded or that are broken. It does not include toys or imitations. Nevertheless, the government need not produce the gun itself at trial. The courts have said that it need do no more than "present sufficient testimony, including the testimony of lay witnesses, in order to prove beyond a reasonable doubt that a defendant used, possessed or carried a 'firearm' as that term is defined for purposes of §924(c)." Yet conviction must rest on some evidence of the presence of a firearm.

Predicate Offenses: Section 924(c) is triggered when a firearm is used or possessed in furtherance of a predicate offense. The predicate offenses are crimes of violence and certain drug trafficking crimes. The drug trafficking predicates include any felony violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. A defendant may be convicted under Section 924(c), however, even though not convicted or even prosecuted for the predicate offense.

Possession in Furtherance: Section 924(c) has two alternative firearm-nexus elements: (a) possession in furtherance and (b) carrying or use. The possession-in-furtherance version of the offense requires that the defendant "(1) committed a drug trafficking crime; (2) knowingly possessed a firearm; and (3) possessed the firearm in furtherance of the drug trafficking crime [or other predicate offense]." The "possession" component may take the form of either actual or constructive possession. "Constructive possession exists when a person does not have possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others."

The in-furtherance component compels the government to show some nexus between possession of a firearm and a predicate offense – that is, to show that the firearm furthered, advanced, moved forward, promoted, or in some way facilitated the predicate offense. This requires more than proof of the presence of a firearm in the same location as the predicate offense. Most circuits have identified specific factors that commonly allow a court to distinguish guilty possession from innocent "possession at the scene," particularly in a drug case, they include "(1) type of criminal activity that is being conducted; (2) accessibility of the firearm; (3) the type of firearm; (4) whether the firearm is stolen; (5) the status of the possession (legitimate or illegal); (6) whether the firearm is loaded; (7) the time and circumstances under which the firearm is found; and (8) the proximity to the drugs or drug profits."

Although the Supreme Court has determined that acquiring a firearm in an illegal drug transaction does not constitute "use" in violation of Section 924(c), several of the circuits have found that such acquisition may constitute "possession in furtherance."

Use or Carry: The "use" outlawed in the use-or-carriage branch of Section 924(c) requires that a firearm be actively employed "during and in relation to" a predicate offense – that is, either a crime of violence or a drug trafficking offense. A defendant "uses" a firearm during or in relation to a drug trafficking offense when he uses it to acquire drugs in a drug deal; when he uses it as collateral in a drug deal; or when he sells both drugs and firearms; but not when he accepts a firearm in exchange for drugs in a drug deal. The "carry[ing]" that the section outlaws encompasses instances when a firearm is carried on the defendant's person as well as when it is simply readily accessible in a vehicle during and in relation to a predicate offense.

A firearm is used or carried "during and in relation" to a predicate offense when it has "some purpose or effect with respect" to the predicate offense; "its presence or involvement cannot be

the result of accident or coincidence." The government must show that the availability of the firearm played an integral role in the predicate offense. It need not show that the firearm was used "in furtherance" of the predicate offense.

Discharge and Brandish: The basic 5-year mandatory minimum penalty for using, carrying, or possessing a firearm in the course of a predicate offense becomes a 7-year mandatory minimum if a firearm was brandished during the course of the offense and becomes a 10-year mandatory minimum if a firearm is discharged during the course of the offense. The discharge provision applies even if the firearm is discharged inadvertently. Whether a firearm is discharged or brandished is a question that after *Alleyne v. United States* must be presented to the jury and proven beyond a reasonable doubt. A firearm is brandished for these purposes when (1) it is displayed or its presence made known (2) in order to intimidate another. Intimidation is a necessary feature of brandishing, but it is no less present when the fear is induced by using a gun as a club rather than merely displaying it.

Short Barrels, Semiautomatics, Machine Guns, and Bombs: For some time, Section 924(c) consisted of a single long paragraph. When Congress added the "possession in furtherance" language, it parsed the section. Now, the general, brandish, and discharge mandatory penalties provisions appear in one part. The provisions for offenses involving a short-barreled rifle or shotgun, a semiautomatic assault weapon, a silencer, a machine gun, or explosives appear in a second part. The provisions for second and consequent convictions appear in a third part.

The circuits are apparently divided over the question of whether the government must show that the defendant knew that the firearm at issue was of a particular type (*i.e.*, short-barreled rifle or shotgun, machine gun, or bomb).

Prior to the division, the Supreme Court had identified as an element of a separate offense (rather than a sentencing factor) the question of whether a machinegun was the firearm used during and in relation to a predicate offense. The use of a short-barreled rifle, semiautomatic assault weapon, silencer, machine gun, or bomb is not a sentencing factor, but an element of a separate offense to be charged and proved to the jury beyond a reasonable doubt. The question of whether a second or subsequent conviction has occurred, however, remains a sentencing factor.

Aiding, Abetting, and Conspiracy: As a general rule, anyone who commands, counsels, aids, or abets the commission of a federal crime by another is punishable as though he had committed the crime himself. The Supreme Court has said that "in order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seeks by his action to make it succeed."

The Supreme Court has said in *Rosemond v. United States* that to aid or abet a violation of Section 924(c), the assistance may be shown to have advanced either the predicate offense or the firearm use. However, the defendant must be shown to have intended his efforts to contribute to the success of the Section 924(c) violation – that is, commission of a predicate offense while armed. Thus, the defendant must be shown to have known before the commission of the predicate offense that his confederate was armed.

In similar manner, conspirators are liable for any foreseeable crimes committed by any of their co-conspirators in furtherance of the conspiracy. The rule applies when a defendant's co-conspirator has committed a violation of Section 924(c).

Sentencing Considerations: The penalties under Section 924(c) were once flat sentences. For example, the penalty for use of a firearm during the course of a predicate offense was a five-year

term of imprisonment. Now, they are simply mandatory minimums, each carrying an unspecified maximum term of life imprisonment.

A court may not avoid the mandatory minimums called for in Section 924(c)(1) by imposing a probationary sentence, or by ordering that a Section 924(c)(1) minimum mandatory sentence be served concurrently with some other sentence. A court may, however, take Section 924(c)'s mandatory minimum into account when calculating the appropriate sentence for the underlying predicate offense.

If a criminal episode involves more than one predicate offense, more than one violation of Section 924(c) may be punished. Moreover, the second or subsequent convictions which trigger enhanced mandatory minimum penalties need not be the product of separate trials, but may be part of the same verdict. Thus, a defendant charged and convicted in a single trial on several counts may be subject to multiple, consecutive, mandatory minimum terms of imprisonment.

A number of defendants have sought refuge in the clause of Section 924(c), which introduces the section's mandatory minimum penalties with an exception: "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." Defendants at one time argued that the mandatory minimums of Section 924(c) become inapplicable when the defendant was subject to a higher mandatory minimum under the predicate drug trafficking offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)), or some other provision of law. The Supreme Court rejected the argument in *Abbott v. United States*. The clause means that the standard five-year minimum applies except in cases where the facts trigger one of Section 924(c)'s higher minimums.

Armed Career Criminal Act (18 U.S.C. § 924(e))

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.... 18 U.S.C. 924(e)(1).

Section 922(g) outlaws the possession of firearms by felons, fugitives, and various other categories of individuals. The Armed Career Criminal Act (ACCA), quoted above, visits a 15-year mandatory minimum term of imprisonment upon anyone who violates Section 922(g), having been convicted three times previously of a violent felony or serious drug offense. The section most often ensnarls felons found in possession of a firearm who have three qualifying prior convictions. More often than not, the prior convictions are for violations of state law.

Section 924(e) begins with unlawful possession of a firearm ("a person who violates section 922(g)"). The threshold possession offense need not itself involve a drug or violent crime. Section 924(e)'s 15-year mandatory minimum term of imprisonment instead flows as a consequence of the offender's prior criminal record ("three prior convictions ... referred to in section 922(g)(1) ... for a violent felony or a serious drug offense"). Not all violent felonies or serious drug offenses count. Certain convictions, principally those which have been overturned, pardoned, or otherwise set aside as a matter of state law, are exempt by definition.

Moreover, the qualifying violent felonies or serious drug offenses must have been committed on different occasions. "[T]o trigger a sentence enhancement under the ACCA, a defendant's prior felony convictions must involve separate criminal episodes. However, offenses are considered distinct criminal episodes if they occurred on occasions different from one another. Two offenses are committed on occasions different from one another if it is possible to discern the point at which the first offense is completed and the second offense begins." Thus, separate drug deals on

separate days will constitute offenses committed on different occasions though they involve the same parties and location. The fact that two crimes occurred on different occasions, however, must be clear on the judicial record; recourse to police records will not do.

There is "no authority to ignore [an otherwise qualified] conviction because of its age or its underlying circumstances. Such considerations are irrelevant ... under the Act." Moreover, application of Section 924(e) provides no opportunity to challenge the validity of the underlying predicate offenses.

The section defines serious drug offenses as those violations of state or federal drug law punishable by imprisonment for 10 years or more. Conviction under a statute which carries a 10-year maximum for repeat offenders qualifies, even though the maximum term for first-time offenders is 5 years. It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines calls for a term of less than 10 years, or when the defendant was in fact sentenced to a lesser term of imprisonment. To qualify as a predicate drug offense, the crime must have been at least a 10-year felony at the time of conviction for the predicate offense. The term "serious drug offense" includes attempts or conspiracies to commit a serious drug offense, as long as the attempt or conspiracy is punishable by imprisonment for 10 years or more. By the same token, there is no need to prove that the defendant knew of the illicit nature of the controlled substance involved in his predicate serious drug offense if the serious drug offense satisfied the 10-year requirement and, in the case of state law predicate, involved the manufacture, distribution, or possession with intent to distribute a controlled substance.

The Supreme Court in *Johnson v. United States* found unconstitutionally vague Section 924(e)'s violent felony residual clause ("the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year … that … involves conduct that presents a serious potential risk of physical injury to another."). The decision raises no question as to the validity of the mandatory minimum sentences imposed under the serious drug offense prong of Section 924(e).

Safety Valve

Low-level drug offenders can escape some of the mandatory minimum sentences for which they qualify under 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 have resulted in equally severe penalties for both the more and the less culpable offenders. It is available to qualified offenders convicted of violations of the possession-with-intent, simple possession, attempt, or conspiracy provisions of the Controlled Substances or Controlled Substances Import and Export Acts.

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. He may not have more than one criminal history point. He may not have used violence or a dangerous weapon in connection with the offense. He may not have been an organizer or leader of the drug enterprise. He must have provided the government with all the information and evidence at his disposal. Finally, the offense may not have resulted in serious injury or death.

One Criminal History Point: More than one "criminal history point" is safety valve disqualifying. The criminal history point qualification refers to the defendant's 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. A single point is assigned for every other federal or state prior sentence of conviction, subject to certain exceptions. Foreign sentences of imprisonment are not counted; nor are sentences imposed by tribal courts; nor summary court martial sentences; nor sentences imposed for expunged, reversed, vacated, or invalidated convictions; nor sentences for certain petty offenses or minor misdemeanors.

Only the Nonviolent: The safety valve has two disqualifications designed to reserve its benefits to the nonviolent. One involves instances in which the offense resulted in death or serious bodily injury. The other involves the use of violence, threats, or the possession of weapons. 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." It is not triggered by the conduct of a co-conspirator unless the defendant "aided, abetted, [or] counsel ..." the co-conspirator's violence or possession. Disqualifying firearm possession may be either actual or constructive. Constructive possession is the dominion or control over a firearm or the place where one is located. Disqualification requires that the threat of violence or possession of a firearm be "in connection with the offense," and may include threats against witnesses. 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.

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." On its face, the definition would include serious bodily injuries, such one that required hospitalization, suffered by the defendant as a result of the offense. 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.

Only Single or Low Level Offenders: The Guidelines disqualify anyone who acted as a manager of the criminal enterprise or who receives a Guideline level increase for his aggravated role in the offense. Thus, by implication, it does not disqualify a defendant to have received a Guideline decrease based on his minimal or minor participation in a group offense or a defendant who acted alone.

Tell All: 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, 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. Neither Section 3553(f) nor the Sentencing Guidelines explains what form the defendant's full disclosure must take. At least one court has held that under rare circumstances disclosure through the defendant's testimony at trial may suffice. The stipulation of facts in a plea bargain without more ordinarily will not qualify. 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. 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." A defendant's proffer must be "truthful." 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.

Substantial Assistance

> 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. 18 U.S.C. § 3553(e).

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 agrees. The courts have acknowledged that due process or equal protection or other constitutional guarantees may provide a narrow exception. A defendant is entitled to relief if the government's refusal constitutes a breach of its plea agreement. A defendant is also "entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." 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.

The court is under no obligation to grant the government's substantial assistance motion and the defendant is not entitled to be heard on the issue.

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. The district court appears to have some latitude as to the method used to calculate the reduction for substantial assistance, *e.g.*, "offense-level-based reductions, month-based reductions, and percentage-based reductions."

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 far less substantial assistance.

Constitutional Considerations

Defendants sentenced to mandatory minimum terms of imprisonment have challenged their sentences on a number of constitutional grounds beginning with Congress's legislative authority and ranging from cruel and unusual punishment through ex post facto and double jeopardy to equal protection and due process. Each constitutional provision defines outer boundaries that a mandatory minimum sentence and the substantive offense to which it is attached must be crafted to honor. Thus far, constitutional challenges have largely been to no avail.

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