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Mandatory Minimum Sentencing of Federal Drug Offenses

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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 imposition of 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 available in an abridged version, CRS Report R45075, *Mandatory Minimum Sentencing of Federal Drug Offenses in Short*, without the citations to authority and origin of quotations found here.

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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.¹ 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.² 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.³ Finally, in cases where the mandatory minimums would usually apply, the President may pardon offenders or commute their sentences before the minimum term of imprisonment has been served.⁴ Be that as it may, sentencing in drug cases, particularly mandatory minimum drug sentencing, has contributed to an explosion in the federal prison population and attendant costs. This, the federal inmate population at the end of 1976 was 23,566, and at the end of 1986 it was 36,042.⁵ On January 4, 2018, the federal inmate population was

¹ The inventory includes: 21 U.S.C. §§ 841(a), 841(b) (manufacturing, distributing, dispensing, or possessing with the intent to do so various controlled substances); *id.* §§ 841(h), 841(b) (dispensing controlled substances by way of the Internet); *id.* §§ 844(a), 841(b) (simple possession of controlled substances by repeat offenders); *id.* §§ 846, 841(b) (attempt or conspiracy to commit an offense punishable by a mandatory minimum sentence); *id.* § 848 (continuing criminal enterprise (drug kingpin)); *id.* §§ 849, 841(b) (distribution of controlled substances as truck stops); 21 U.S.C. §§ 859, 841(b) (distribution of controlled substances to an individual under 21 years of age); *id.* §§ 860, 841(b) (distribution of controlled substances at in or near schools, playgrounds, public housing projects, etc.); *id.* §§ 861, 841(b) (use of children in drug operations); 21 U.S.C. §§ 861(f), 841(b) (distribution of controlled substances to pregnant individuals); *id.* §§ 952, 960 (importing controlled substances into the U.S.); *id.* §§ 953, 960 (exporting controlled substances from the U.S.); *id.* §§ 955, 960 (possession of controlled substances aboard a ship arriving in or departing from the U.S.); *id.* §§ 959, 960 (possession abroad of controlled substances or listed substances for importation into the U.S. by vessel or plane); *id.* §§ 960a, 841(b) (narco-terrorism); *id.* §§ 963, 960 (attempt or conspiracy to commit an exporting or importing offense punishable by a mandatory minimum); 18 U.S.C. § 3261; 21 U.S.C. § 841(b) (military extraterritorial jurisdiction); 46 U.S.C. §§ 70503, 70506; 21 U.S.C. § 960 (maritime drug law enforcement act offenses). Here and throughout, the host of later amendments to the Controlled Substances Act and the Controlled Substances Import and Export Act counsel citation to the sections of those Acts as they appear in title 21 of the United States Code unless otherwise noted. 18 U.S.C. § 3559(c) (mandatory life imprisonment for defendants convicted of a serious violent felony who have a one or more prior serious drug convictions and one or more prior serious violent felony convictions); *id.* § 924(c) (mandatory minimum sentence for carrying a firearm in furtherance of a drug trafficking offense); *id.* § 924(e) (mandatory minimum sentence for conviction of unlawful possession of a firearm by a defendant with three or more prior violent felony or serious drug offense convictions). Here and throughout the terms “drug” and “controlled substance” are used interchangeably.

Various parts of the report are drawn from the author’s earlier reports, principally CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*; CRS Report RL30281, *Federal Mandatory Minimum Sentencing Statutes: A List of Citations with Captions, Introductory Comments, and Bibliography*; CRS Report R42386, *Mandatory Minimum Sentencing for Federal Sex Offenses: An Overview*; CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*; CRS Report R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*; CRS Report R41461, *Three Strike Mandatory Sentencing (18 U.S.C. 3559(c)): An Overview*.

² 18 U.S.C. § 3553(e).

³ *Id.* § 3553(f).

⁴ U.S. CONST. art. II, § 2, cl. 1. *E.g.*, *President Obama Commutes Sentences of 95 Federal Drug Offenders*, THE WASHINGTON POST, Dec. 18, 2015, https://www.washingtonpost.com/world/national-security/president-obama-commutes-sentences-of-about-100-drug-offenders/2015/12/18/9b62c91c-a5a3-11e5-9c4e-be37f66848bb_story.html?utm_term=.19c2833a2a8c.

⁵ U.S. Department of Justice, Bureau of Justice Statistics, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1987, Table 6.52 (1987).

183,493.⁶ 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.⁷ In 1976, federal prisons cost \$183.914 million; in 1986, \$550.014 million; and in 2016, \$6.751 billion (est.).⁸

Background

Federal mandatory minimum sentencing statutes have existed since the dawn of the Republic. When the first Congress assembled, it enacted several mandatory minimums, each of them a capital offense.⁹ The drug mandatory minimums are of more recent origins. The first arrived in 1914, when Congress established a mandatory minimum of five years for the manufacture of opium for smoking purposes.¹⁰ Shortly after mid-century, Congress began adding to the number of drug-related mandatory minimums. Prior to enactment of the Controlled Substances Act and the Controlled Substances Import and Export Act in 1970,¹¹ federal law included mandatory minimums for violations of the narcotics or marijuana tax regimes;¹² smuggling narcotics or marijuana;¹³ distributing heroin to a child;¹⁴ possession of narcotics aboard a U.S. vessel;¹⁵ and violations of federal drug laws using communications facilities.¹⁶ The 1970s legislation eliminated them all.¹⁷ Left in their place were only the mandatory minimums in the continuing criminal enterprise (drug kingpin) section.¹⁸

Then, in 1984, Congress enacted the Sentencing Reform Act that created the United States Sentencing Commission and authorized it to promulgate then binding sentencing guidelines.¹⁹ In many instances, the resulting Guidelines operated essentially, but briefly, to establish a mandatory minimum term of imprisonment where none had existed before.²⁰ Soon thereafter, Congress

⁶ Federal Bureau of Prisons, *Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp.

⁷ U.S. Sentencing Commission, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 4 (Oct. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.

⁸ BUDGET OF THE U.S. GOVERNMENT: APPENDIX for Fiscal Years 1978, 1988, and 2017, respectively.

⁹ The Act of April 30, 1790 declared that “persons ... adjudged guilty of treason against the United States ... shall suffer death,” 1 Stat. 112; the same sentence awaited those who committed murder within the exclusive jurisdiction of the United States, *id.* at 113, or engaged in piracy, *id.* at 113-14, or counterfeiting, *id.* at 115.

¹⁰ Act of January 17, 1914, 38 Stat. 278 (1914).

¹¹ The 1970 Comprehensive Drug Abuse Prevention and Control Act encompassed both the Controlled Substances Act and the Controlled Substances Import and Export Act, P.L. 91-513, 94 Stat. 1236 (1970).

¹² 26 U.S.C. § 7237 (1964 ed.) (imprisonment for not less than 2 years for the first offense, not less than 5 years for the second, and not less than 10 years for the third).

¹³ 21 U.S.C. §§ 174, 176a (1964 ed.) (imprisonment for not less than 5 years for the first offense and not less than 10 years for the second).

¹⁴ *Id.* § 176b (1964 ed.) (imprisonment for not less than 10 years for distributing heroin to a child).

¹⁵ *Id.* § 184a (1964 ed.) (imprisonment for not less than 5 years for the first offense and not less than 10 years for the second).

¹⁶ 18 U.S.C. § 1403 (1964 ed.) (imprisonment for not less than 2 years).

¹⁷ Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1291-92 (1970).

¹⁸ *Id.* § 408, 84 Stat. at 1265 (imprisonment for not less than 10 years for the first offense and not less than 20 years for the second).

¹⁹ P.L. 98-473, title II, §§ 211, 217, 98 Stat. 1987, 2017 (1984). Although the Sentencing Guidelines still heavily influence the sentences imposed by federal courts, *see* Gall v. United States, 552 U.S. 38 (2007), the Guidelines are no longer binding, *United States v. Booker*, 543 U.S. 220 (2005).

²⁰ 18 U.S.C. § 3553(b) (“...The court shall impose a sentence ... within the range ... unless the court finds that an (continued...)”).

began to repopulate federal drug laws with mandatory minimums, the bulk of which Congress inserted using the Anti-Drug Abuse Act of 1986.²¹ The 1986 legislation, however, included substantial assistance provisions which allow the courts to disregard the mandatory minimums in the case of cooperative defendants.²² In addition, shortly thereafter, Congress instructed the Sentencing Commission to provide it with a detailed report on federal mandatory minimum statutes.²³

The Commission's 1991 report²⁴ observed that from 1984 to 1990 four drug-related statutes accounted for roughly 94 percent of the mandatory minimum offenses regularly prosecuted.²⁵ The Commission's initial report was quickly followed by a Department of Justice study that concluded that a substantial number of those sentenced under federal mandatory minimums were nonviolent, first-time, low-level drug offenders.²⁶ Congress responded with the safety valve provisions of 18 U.S.C. § 3553(f), under which the court may disregard various drug mandatory minimums and sentence an offender within the applicable sentencing guideline range as long as the offender was a low-level, nonviolent participant with no prior criminal record who has cooperated fully with the government.²⁷

The hate crime legislation enacted in 2009 directed the U.S. Sentencing Commission to submit a second report on federal mandatory minimums.²⁸ The Commission presented its second report in October 2011.²⁹ A number of things had changed between the first and second Commission

(...continued)

aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission..."). See, e.g., *United States v. Johnson*, 908 F.2d 396, 399 (8th Cir. 1990) (sentencing under 18 U.S.C. § 1014, false statements on a loan application, no statutory mandatory minimum) ("Limiting appellate review of a district court's refusal to depart from the guidelines, 18 U.S.C. 3742(e) (1988) provides that a reviewing court must uphold a sentence unless it was : (1) imposed in violation of the law; (2) imposed because the court incorrectly applied the guidelines; (3) outside the range of the applicable guideline and was unreasonable; or (4) imposed for an offense with no applicable guideline and is plainly unreasonable. This circuit has determined that departures pursuant to section 3553(b) were intended by the Commission to be allowed only in rare cases."); *United States v. Carey*, 895 F.2d 318, 321, 326 (7th Cir. 1990) (sentencing under 18 U.S.C. § 1344, scheme to defraud a bank, no statutory mandatory minimum) ("At sentencing, the district court acknowledged that the pretrial service agency's calculation of the appropriate sentencing range at 12 to 18 months was accurate. The court, however, departed downward from the applicable range We share in the district court's apparent concern over any harshness the Guidelines create in the case at bar.... Nevertheless, the Guidelines seek to end the disparity in sentencing, see 28 U.S.C. § 991(b)(2)(B), and in doing so, mandate that departures be the exception and occur only when truly justified.").

²¹ P.L. 99-570, 100 Stat. 3207 (1986). The Act established mandatory minimums in 21 U.S.C. §§ 841 (possession with intent to distribute controlled substances); 844 (simple possession); 845 (distribution of a person under 21 years of age); 845a (distribution near a school); 845b (use of child in a drug operation); 960 (controlled substance import or export offenses) (1988 ed.); and added drug offenses to the Armed Career Criminal Act (ACCA)'s predicate offense list, 18 U.S.C. § 924(e) (1988 ed.).

²² P.L. 99-570, 100 Stat. 3207 (1986), 18 U.S.C. § 3553(e) (1988 ed.).

²³ P.L. 101-647, § 1703, 104 Stat. 4845 (1990).

²⁴ United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System: Special Report to the Congress* (Aug. 1991) (*Commission Report I*).

²⁵ *Id.* at 10 ("[F]our statutes account for approximately 94 percent of the cases ... 21 U.S.C. § 841 (manufacture and distribution of controlled substances), 21 U.S.C. § 844 (possession of controlled substances), 21 U.S.C. § 960 (penalties for the importation/exportation of controlled substances), and 18 U.S.C. § 924(c) (minimum sentence enhancements for carrying a firearm during a drug or violent crime) ...").

²⁶ *United States Department of Justice: An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, reprinted in, 54 CRIM. L. REP. 2101 (1994).

²⁷ P.L. 103-322, § 80001(a), 108 Stat. 1985 (1994).

²⁸ The Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, P.L. 111-84, § 4713, 123 Stat. 2843 (2009).

²⁹ United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*: (continued...)

reports. Sentencing under the Guidelines had been in place for only a relatively short period of time when the first report was written. By the time of the second report, the number of defendants sentenced by federal courts had grown to almost three times the number sentenced under the Guidelines when the Commission wrote its first report.³⁰ The judicial landscape has changed as well. When the Commission issued its first report, the Guidelines were considered binding upon sentencing judges.³¹ After the Supreme Court's *Booker* decision and its progeny, the Guidelines became but the first step in the sentencing process.³² In addition, the Fair Sentencing Act, passed in 2010, reduced the powder cocaine-crack cocaine ratio from 100 to 10 to roughly 18 to 1.³³

The second Commission report recommended that Congress consider expanding eligibility for the safety valve, and adjusting the scope, severity, and the prior offenses that trigger the recidivist provisions under firearm statute³⁴ and the two principal drug statutes, (21 U.S.C. § § 841 and 960).³⁵

In October 2017, the Commission issued a third report devoted exclusively to mandatory minimum penalties for drug offenses, in which it made no recommendations.³⁶ Instead, the report provided an extensive statistical analysis, summarized in ten findings:

1. Drug mandatory minimum penalties continued to result in long sentences in the federal system.
2. Mandatory minimum penalties continued to have a significant impact on the size and composition of the federal prison population.

(...continued)

Report to the Congress (Oct. 2011) (*Commission Report II*).

³⁰ *Id.* at 66 (“The total number of federal cases has almost tripled from 29,011 in fiscal year 1990 to 83,947 in fiscal year 2010”); *see also Commission Report I, supra* note 20 at 51 (noting that 29,011 defendants were sentenced under the Guidelines in fiscal year 1990). Moreover, although the second report noted that many of the mandatory minimum offenses were rarely prosecuted, it identified 195 mandatory minimum statutes. *Commission Report II, supra* note 26 at 348. The first report had identified 60. *Commission Report I, supra* note 20 at 11.

³¹ 18 U.S.C. § 3553(b)(1) (“... [T]he court shall impose a sentence of the kind, and within the range, [dictated by the Sentencing Guidelines,] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”).

³² In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that Sixth Amendment right to jury trial precluded mandatory application of the Guidelines, but permitted their discretionary application. Thereafter, it explained that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... [T]he district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *United States v. Gall*, 552 U.S. 38, 49-50 (2007). Thereafter, “the appellate court must review the sentence under the abuse of discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (improperly calculating) the Guidelines range....” *id.* at 51.

³³ P.L. 111-220, § 2(a), 124 Stat. 2372 (2010). Prior to enactment, 5000 grams of powder cocaine or 50 grams of crack cocaine triggered the Controlled Substances Act’s 10-year mandatory minimum, 21 U.S.C. §§ 841(b)(1)(A)(ii) and (iii) (2006 ed.), and 500 grams of powder or 5 grams of crack triggered its 5-year mandatory minimum. *Id.* §§ 841(b)(1)(B)(ii) and (iii) (2006 ed.). The FSA established a 5000 grams to 280 gram ratio for the 10-year mandatory minimum, 21 U.S.C. §§ 841(b)(1)(A)(ii) and (iii), and a 500 grams to 28 gram ratio for the 5-year mandatory minimum. *Id.* §§ 841(b)(1)(B)(ii) and (iii).

³⁴ 18 U.S.C. § 924.

³⁵ *Commission Report II, supra* note 26 at 355, 356, 364.

³⁶ United States Sentencing Commission, *Mandatory Minimum Penalties for Drug offenses in the Federal Criminal Justice System* (Oct. 2017).

3. Offenses carrying a drug mandatory minimum penalty were used less often, as the number and percentages of offenders convicted of an offense carrying a mandatory minimum penalty has decreased since fiscal year 2010.
4. While fewer offenders were convicted of an offense carrying a mandatory minimum penalty in recent years, the offenses of those who were tended to be more serious.
5. Drug mandatory minimum penalties applied more broadly than Congress may have anticipated.
6. Statutory relief plays a significant role in the application and impact of drug mandatory minimum penalties, and results in significant reduced sentences when applied.
7. Additionally, drug mandatory minimum penalties appear to provide criminal defendants with a significant incentive to provide substantial assistance to the government pursuant to 18 U.S.C. § 3553(e) and the related guideline provisions of USSG §5K1.1.
8. However, neither the statutory safety valve provision at 18 U.S.C. § 3553(f), nor the substantial assistance provision of 18 U.S.C. § 3553(e) fully ameliorate the impact of drug mandatory minimum penalties on relatively low-level offenders.
9. There were significant demographic shifts in the data relating to mandatory minimum penalties.
10. Although likely due in part to an older age at release, drug trafficking offenders convicted of an offense carrying a drug mandatory minimum penalty had a lower recidivism rate than those drug trafficking offenders not convicted of such an offense.³⁷

Although each house devoted considerable attention to mandatory minimum sentencing and associated issues, the 114th Congress ended without consensus.³⁸ Several proposals introduced in the 115th Congress address some of the same issues.³⁹

Mandatory Minimums for Drug Crimes

Table 1 below describes the mandatory minimum sentencing provisions for various drug and drug-related offenses.⁴⁰

³⁷ *Id.* at 4-8.

³⁸ See generally CRS Legal Sidebar, WSG1 1713, *Sentencing Reform at the End of the 114th Congress*, by Charles Doyle.

³⁹ E.g., S. 1917 (“Sentencing Reform and Corrections Act of 2017”); S. 1933 (“Smart Sentencing Act of 2017”); H.R. 3800 (“Mandatory Minimum Reform Act of 2017”); H.R. 4261 (“Safe, Accountable, Fair, Effective Justice Act”).

⁴⁰ For a chart listing the penalties for all federal controlled substance offenses see, CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

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.

Features of Mandatory Minimum Drug Offenses

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.”⁴¹ 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.”⁴² 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.⁴³

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.”⁴⁴

⁴¹ *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015). *See also* *United States v. Ways*, 832 F.3d 887, 895 (8th Cir. 2016).

⁴² *McFadden*, 135 S. Ct. at 2304; *Ways*, 832 F.3d at 895.

⁴³ *United States v. Sanders*, 668 F.3d 1298, 1310 (11th Cir. 2012) (“Although [for the mandatory minimums to apply] the jury must determine the quantity and type of drug involved, nothing in the statute, the Constitution, or *Apprendi* [*v. New Jersey*] requires the government to prove that the defendant had knowledge of the particular drug type or quantity for which a sentence is enhanced under § 841(b)”; *see also* *United States v. Qattoum*, 826 F.3d 1062, 1065 (8th Cir. 2016); *United States v. Stanford*, 823 F.3d 814, 834 (5th Cir. 2016); *McPhearson v. United States*, 675 F.3d 553, 561 (6th Cir. 2012); *United States v. Branham*, 515 F.3d 1268, 1275-76 (D.C. Cir. 2008); *cf.*, *United States v. Gil-Cruz*, 808 F.3d 274, 278-79 (5th Cir. 2015) (holding the same with respect to parallel provisions under the Controlled Substances Import and Export Act (21 U.S.C. § 960)).

⁴⁴ *United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016). *See also* *United States v. Trejo*, 831 F.3d 1090, 1095 (8th Cir. 2016) (“A willful blindness or deliberate indifference instruction is appropriate when there is evidence to support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts.”); *United States v. Haire*, 806 F.3d 991, 998 (8th Cir. 2015) (“We reject Haire’s contention that the willful blindness instruction lowered the government’s burden of proof, because the district (continued...)”).

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.”⁴⁵

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.⁴⁶ It reaches both sales and transfers without compensation.⁴⁷ To “dispense” is “to deliver a controlled substance to an ultimate user ...by, or pursuant to the lawful order of, a practitioner...”⁴⁸ The Controlled Substances Act outlaws practitioner’s proscribing controlled substances for other than legitimate medical purposes.⁴⁹

Possession with Intent to Distribute or Dispense: The government may satisfy the possession element with evidence of either actual or constructive possession.⁵⁰ “Actual possession is the knowing, direct, and physical control over a thing.”⁵¹ “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.”⁵²

(...continued)

court instructed the jury that it could not find he acted knowingly if he was merely negligent, careless, or mistaken as to the fact that his suitcase contained rug proceeds.”); *United States v. Salinas*, 763 F.3d 869, 880 (7th Cir. 2014) (“Deliberate avoidance is more than mere negligence; the defendant must have deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will. Evidence merely supporting a finding of negligence – that a reasonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge – does not support an inference that a particular defendant was deliberately ignorant.”).

⁴⁵ *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (citing 21 U.S.C. § 802(15), (22)). *See also* *United States v. Bernitt*, 392 F.3d 873, 879 (7th Cir. 2004).

⁴⁶ *United States v. Soto*, 794 F.3d 635, 659 (6th Cir. 2015) (“Title 21 U.S.C. § 802(11) defines ‘distribute’ as ‘to deliver (other than by administering or dispensing) a controlled substance.’ Subsection eight defines ‘deliver’ as ‘the actual, constructive, or attempted transfer of a controlled substance.’”).

⁴⁷ *United States v. Bobadilla-Pagan*, 747 F.3d 26, 32 (1st Cir. 2014) (“Nothing in the statute limits distribution to sale; rather it is well accepted that drugs may be distributed by giving them away for free.”).

⁴⁸ 21 U.S.C. § 802(10).

⁴⁹ *United States v. Moore*, 423 U.S. 122, 124 (1975) (“We ...hold that registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice.”). *See also* *United States v. Azmat*, 805 F.3d 1018, 1034 (11th Cir. 2015).

⁵⁰ *United States v. Ibarra-Diaz*, 805 F.3d 908, 932 (10th Cir. 2015); *United States v. Corrales-Portillo*, 778 F.3d 823, 832 (8th Cir. 2015).

⁵¹ *Id.*

⁵² *United States v. Apicelli*, 839 F.3d 75, 79 (1st Cir. 2016). *See also* *United States v. Simpson*, 845 F.3d 1059-60 (10th Cir. 2017); *United States v. Rebolledo-Delgado*, 820 F.3d 870, 875 (7th Cir. 2016) (“Construction possession is a legal fiction whereby an individual is deemed to possess contraband items even when he does not actually have immediate, physical control of the objects...Constructive possession requires proof that the defendant had the power and intent to exercise ownership, dominion, authority, or control over the contraband.”); *United States v. Facen*, 812 F.3d 280, 287 (2d Cir. 2016) (internal citations omitted) (“Mere presence at the location of contraband does not establish possession. However, presence under a particular set of circumstances which from a reasonable jury could conclude that the defendant constructively possessed contraband located there can support a conviction. Courts have considered a number of factors in determining whether a person has the power and intention to exercise dominion and control over narcotics, including: the presence of documents pertaining to the defendant in the same location as the narcotics; the defendant’s possession of a key to the location where the drugs are found; the defendant’s reaction to the presence of police; whether the defendant has complete control over the narcotics; and whether the drugs are in plain view, suggesting that the defendant is a trusted member of the narcotics operation.”).

The escalating mandatory minimums that apply to offenders with “a prior conviction for a felony drug offense” extend to those offenses classified as misdemeanors under state law, but punishable by imprisonment for more than a year.⁵³ They also apply even if the underlying state conviction has been expunged.⁵⁴ On the other hand, there is apparently at least a division among the circuits over whether the government’s failure to comply with the procedure for establishing a prior conviction,⁵⁵ and therefore to alert the defendant to the prospect of an enhanced mandatory minimum, precludes a sentencing court from taking prior conviction into account.⁵⁶

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.⁵⁷ The most severe penalties are reserved for high-volume trafficking of eight substances assigned to Controlled Substance Schedules I and II.⁵⁸

The eight substances are heroin, powder cocaine, cocaine base (crack), PCP, LSD, fentanyl, methamphetamine, and marijuana. Criminal penalties related to each substance provide 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;⁵⁹
- powder cocaine - 5 kilograms;⁶⁰
- crack - 280 grams;⁶¹
- PCP - 100 grams;⁶²
- LSD - 10 grams;⁶³
- fentanyl - 400 grams;⁶⁴

⁵³ *Burgess, v. United States*, 553 U.S. 124, 126 (2008).

⁵⁴ *United States v. Dyke*, 718 F.3d 1282, 1292 (10th Cir. 2013).

⁵⁵ 21 U.S.C. § 851.

⁵⁶ *United States v. Isaac*, 655 F.3d 148, 155-57 (3d Cir. 2011) (citing cases on either side of the divide).

⁵⁷ As noted later and in the chart above, the sentencing provisions for violations of the Controlled Substances Export and Import Act, 21 U.S.C. § 960(b), mirror those for violations of the Controlled Substances Act in Section 841(b).

⁵⁸ 21 U.S.C. § 812.

⁵⁹ *Id.* §§ 841(b)(1)(A)(i), 960(b)(1)(A) (“1 kilogram grams or more of a mixture or substance containing a detectable amount of heroin”) (10 grams = .35 ounces; 1 kilogram (1,000 grams) = 2.2 lbs.).

⁶⁰ *Id.* §§ 841(b)(1)(A)(ii), 960(b)(1)(B) (“5 kilograms or more of a mixture or substance containing a detectable amount of- (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III)”).

⁶¹ *Id.* §§ 841(b)(1)(A)(iii), 960(b)(1)(C) (“280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base”).

⁶² *Id.* §§ 841(b)(1)(A)(iv), 960(b)(1)(D) (“100 grams or more of phencyclidine (PCP) or 1 kilogram grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)”).

⁶³ *Id.* §§ 841(b)(1)(A)(v), 960(b)(1)(E) (“10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)”).

- methamphetamine - 50 grams;⁶⁵
- marijuana - 1,000 kilograms.⁶⁶

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

- heroin - 100 grams;⁶⁷
- powder cocaine - 500 grams;⁶⁸
- crack - 28 grams;⁶⁹
- PCP - 100 grams;⁷⁰
- LSD - 1 gram;⁷¹
- fentanyl - 40 grams;⁷²
- methamphetamine - 5 grams;⁷³
- marijuana - 100 kilograms.⁷⁴

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;

(...continued)

⁶⁴ *Id.* §§ 841(b)(1)(A)(vi), 960(b)(1)(F) (“400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide”).

⁶⁵ *Id.* §§ 841(b)(1)(A)(viii), 960(b)(1)(H) (“50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers”).

⁶⁶ *Id.* §§ 841(b)(1)(A)(vii), 960(b)(1)(G) (“1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1000 or more marihuana plants regardless of weight”).

⁶⁷ *Id.* §§ 841(b)(1)(B)(i), 960(b)(2)(A) (“100 grams or more of a mixture or substance containing a detectable amount of heroin”) (10 grams = .35 ounces; 1 kilogram (1,000 grams) = 2.2 lbs.). *Id.* § 841(b) and 960(b) use the same thresholds.

⁶⁸ *Id.* §§ 841(b)(1)(B)(ii), 960(b)(2)(B) (“500 grams or more of a mixture or substance containing a detectable amount of- (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III)”).

⁶⁹ *Id.* §§ 841(b)(1)(B)(iii), 960(b)(2)(C) (“28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base”).

⁷⁰ *Id.* §§ 841(b)(1)(B)(iv), 960(b)(2)(D) (“10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)”).

⁷¹ *Id.* §§ 841(b)(1)(B)(v), 960(b)(2)(E) (“1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)”).

⁷² *Id.* §§ 841(b)(1)(B)(vi), 960(b)(2)(F) (“40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide”).

⁷³ *Id.* §§ 841(b)(1)(B)(viii), 960(b)(2)(H) (“5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers”).

⁷⁴ *Id.* §§ 841(b)(1)(B)(vii), 960(b)(2)(G) (“100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight.”).

- 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.⁷⁵

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.⁷⁶

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.⁷⁷

The felony drug convictions that trigger the sentencing enhancement include federal, state, and foreign convictions.⁷⁸ 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.”⁷⁹ 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.⁸⁰ The same “but for” standard presumably applies with equal force to the “serious bodily injury” enhancement.

⁷⁵ *Id.* § 841(b)(1)(A).

⁷⁶ *Id.* § 841(b)(1)(B).

⁷⁷ *Id.* § 841(b)(1)(C) (“In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), [or] (B) . . .”). The penalty is imprisonment for not more than 20 years and there is no mandatory minimum where neither death nor serious bodily injury result.

⁷⁸ *Id.* § 802(44) (“The term ‘felony drug offense’ means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”).

⁷⁹ *Id.* § 802(25).

⁸⁰ *Burrage v. United States*, 134 S. Ct. 881, 892 (2014); *see also Santillana v. Upton*, 846 F.3d 779, 781 (5th Cir. 2017); *Krieger v. United States*, 842 F.3d 490, 497 (7th Cir. 2016).

Attempt, Conspiracy, and Aiding and Abetting (21 U.S.C. § 846; 18 U.S.C. § 2)

The mandatory minimums of Section 841 apply with equal force to those who attempt to possess with intent to distribute;⁸¹ who conspire to do so;⁸² or who aid and abet a violation of Section 841 by others.⁸³

Attempt

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.”⁸⁴

Conspiracy

Conspiracy is an agreement to commit a crime.⁸⁵ “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.”⁸⁶ 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.⁸⁷ Moreover, each of the conspirators need not be fully aware of the roles or activities of all of their cohorts.⁸⁸ Each conspirator, however, is punishable for the foreseeable offenses committed in furtherance of the common scheme.⁸⁹

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

⁸¹ 21 U.S.C. §§ 856, 963.

⁸² *Id.*

⁸³ 18 U.S.C. § 2.

⁸⁴ *United States v. Anderson*, 747 F.3d 51, 73-4 (2d Cir. 2014) (internal citations omitted). *See also* *United States v. Stallworth*, 656 F.3d 721, 728 (7th Cir. 2011); *United States v. Hunt*, 656 F.3d 906, 912 (9th Cir. 2011).

⁸⁵ *United States v. Lyle*, 856 F.2d 191, 207 (2d Cir. 2017).

⁸⁶ *United States v. Jackson*, 856 F.3d 1187, 1192 (8th Cir. 2017); *see also* *United States v. Chapman*, 851 F.3d 363,375 (5th Cir. 2017); *United States v. Cardena*, 842 F.3d 959, 994-95 (7th Cir. 2016); *United States v. Williams*, 827 F.3d 1134, 1162 (D.C. Cir. 2016).

⁸⁷ *United States v. Garcia-Lagunas*, 835 F.3d 479, 490 (4th Cir. 2016) (“[G]iven the clandestine and covert nature of conspiracies, the government can prove the existence of a conspiracy by circumstantial evidence alone.”); *Jackson*, 856 F.3d at 1192; *Chapman*, 851 F.3d at 375; *United States v. Trotter*, 837 F.3d 864, 867-68 (8th Cir. 2016); *Williams*, 827 F.3d at 1162.

⁸⁸ *United States v. Bailey*, 840 F.3d 99, 108 (3d Cir. 2016); *United States v. Morales*, 813 F.3d 1058, 1065 (8th Cir. 2016); *United States v. Santos-Soto*, 799 F.3d 49, 58 (1st Cir. 2015).

⁸⁹ *Pinkerton v. United States*, 328 U.S. 640, 64748 (1946); *United States v. Hare*, 820 F.3d 93, 105 (4th Cir. 2016); *United States v. Gadson*, 763 F.3d 1189, 1214 (9th Cir. 2014).

demonstrated level of mutual trust; (5) whether the transactions involved large amounts of drugs; and (6) whether the defendant purchased his drugs on credit.”⁹⁰

Aiding and Abetting

Accomplices who aid and abet the crime of another receive the same punishment as the offender they assist.⁹¹ To prove, aiding and abetting, the government must show that the defendant knowingly embraced and assisted in the commission of the crime.⁹²

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,⁹³ children,⁹⁴ or in proximity of a school, playground, or other prohibited location,⁹⁵ 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.⁹⁶

Import/Export Offenses

Sections 960 and 963 of the Controlled Substances Import and Export Act,⁹⁷ and by cross-reference Section 70506 of the Maritime Drug Law Enforcement Act (MDLEA),⁹⁸ largely track the penalties found in Section 841(b) of the Controlled Substances Act, including the mandatory minimum sentences of imprisonment.

⁹⁰ *Bailey*, 840 F.3d at 108. *See also Trotter*, 837 F.3d at 867-68 (“While proof of a conspiracy requires evidence of more than simply a buyer-seller relationship, we have limited the buyer-seller relationship cases to those involving only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use.”); *United States v. Lyle*, 856 F.3d 191, 207-208 (2d Cir. 2017).

⁹¹ 18 U.S.C. § 2.

⁹² *United States v. Negron-Sostre*, 790 F.3d 295, 311 (1st Cir. 2015) (internal citations omitted) (“[A] defendant may be held indirectly responsible as an aider and abettor if he associated himself with the venture ... participated in it as something that he wished to bring about, and ... sought by his actions to make the venture succeed.”); *United States v. Sanchez*, 789 F.3d 827, 838 (8th Cir. 2015); *United States v. Boykin*, 785 F.3d 1352, 1359 (9th Cir. 2015).

⁹³ 21 U.S.C. § 861(f), (b), (c).

⁹⁴ *Id.* § 859.

⁹⁵ *Id.* § 860 (“(a) Any person who violates section 841(a)(1) of this title ... by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to.... Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marijuana. (b) Any person who violates section 841(a)(1) of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, ... or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, after a prior conviction under subsection (a) of this section has become final is punishable.... Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than three years.... ”).

⁹⁶ *Id.* § 861(a), (b), (c).

⁹⁷ *Id.* §§ 960, 963.

⁹⁸ 46 U.S.C. § 70506.

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.”⁹⁹ The government, however, need not prove that the defendant knew which controlled substance was being imported or its quantity.¹⁰⁰

Section 959 proscribes two offenses: manufacturing or distributing a controlled substance for import purposes¹⁰¹ and possession aboard an aircraft by a U.S. citizen or aboard a U.S. aircraft.¹⁰² The section specifically states that it governs offenses committed outside the territory of the United States.¹⁰³

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.¹⁰⁴ Here too, violations carry the same penalties, including mandatory minimums, as the underlying substantive offenses.¹⁰⁵

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 consented to application of U.S. law, as well as vessels for which no claim of registration or false claim of registration is presented.¹⁰⁶ 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.¹⁰⁷ The type and volume of controlled substances

⁹⁹ *United States v. Lopez-Monzon*, 850 F.3d 202, 206 (5th Cir. 2017).

¹⁰⁰ *United States v. Gil-Cruz*, 808 F.3d 274, 278-79 (5th Cir. 2015); *United States v. Jefferson*, 791 F.3d 1013, 1016-18 (9th Cir. 2015).

¹⁰¹ 21 U.S.C. § 959(a); *e.g.*, *United States v. Rojas*, 812 F.3d 382, 399-400 (5th Cir. 2016); *United States v. Romero-Padilla*, 583 F.3d 126, 129-30 (2d Cir. 2009).

¹⁰² 21 U.S.C. § 959(b), *e.g.*, *United States v. Lawrence*, 727 F.3d 386, 390-95 (5th Cir. 2013).

¹⁰³ 21 U.S.C. § 959(c).

¹⁰⁴ 46 U.S.C. §§ 70503, 70506(b).

¹⁰⁵ *Id.* § 70506(a).

¹⁰⁶ *Id.* § 70502(c).

¹⁰⁷ *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (citing *United States v. Suerte*, 291 F.3d 366, 369-72 (5th Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez*- (continued...)

ordinarily involved in MDLEA cases usually trigger the more severe mandatory minimum sentences.¹⁰⁸

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.¹⁰⁹ The merge of drug trafficking and terrorism offenses in Section 960a does not preclude conviction of the defendant for drug trafficking and terrorism offenses as well.¹¹⁰ Here, too, the controlled substances involved ordinarily carry their own mandatory minimum term of imprisonment.¹¹¹

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.¹¹² Drug kingpins of enormous enterprises, however, face a mandatory sentence of life imprisonment.¹¹³

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.”¹¹⁴

(...continued)

Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); contra, *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)).

¹⁰⁸ *E.g.*, *United States v. Trinidad*, 839 F.3d 112, 114 (1st Cir. 2016) (114 kilograms of cocaine); *Wilchcombe*, 838 F.3d at 1183 (more than five kilograms of cocaine and more than 100 kilograms of marijuana); *United States v. Cruickshank*, 837 F.3d 1182, 1187 (11th Cir. 2016) (more than five kilograms of cocaine); *United States v. Cruz-Mendez*, 811 F.3d 1172, 1173 (9th Cir. 2016) (568 kilograms of marijuana); *United States v. Pena-Santo*, 809 F.3d 686, 691-92 (1st Cir. 2015) (more than 150 kilograms of cocaine).

¹⁰⁹ 21 U.S.C. §§ 960a, 963.

¹¹⁰ *United States v. Garavito-Garcia*, 827 F.3d 242, 244, 249-50 (2d Cir. 2016) (conviction under 21 U.S.C. § 960a, as well as, 21 U.S.C. § 963 (conspiracy to import cocaine), 18 U.S.C. § 2339B (conspiracy to provide material support to a terrorist organization), and 18 U.S.C. § 2332g (conspiracy to traffic in anti-aircraft missiles); *cf.* *United States v. Mohammed*, 693 F.3d 192, 197 (D.C. Cir. 2012) (conviction under 21 U.S.C. § 960a and 21 U.S.C. § 959 (distribution of controlled substances with the intent to import into the United States)).

¹¹¹ *E.g.*, *Garavito-Garcia*, 827 F.3d at 244 (“ton-quantities” of cocaine); *Mohammed*, 693 F.3d at 195 (two kilograms of heroin).

¹¹² 21 U.S.C. § 848(a).

¹¹³ *Id.* § 848(b) (“Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if - (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation referred to in subsection (c)(1) involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B).”).

¹¹⁴ *United States v. Lee*, 687 F.3d 935, 940 (8th Cir. 2012); *see also*, *United States v. Bostick*, 791 F.3d 127, 1490 (D.C. Cir. 2015); *United States v. Isaac*, 655 F.3d 148, 154 (3d Cir. 2011).

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.¹¹⁵ Neither prohibition requires the defendant to have been manufacturing or distributing controlled substances at the time of the killing.¹¹⁶

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.¹¹⁷ 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.¹¹⁸

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:

- imprisonment for not less than five years, unless one of the higher mandatory minimums below applies;
- imprisonment for not less than seven years if a firearm is brandished;
- imprisonment for not less than 10 years if a firearm is discharged;

¹¹⁵ 21 U.S.C. § 848(e); *United States v. Hager*, 721 F.3d 167, 179-80 (4th Cir. 2013) (citing *United States v. Aguilar*, 585 F.3d 652, 657 (2d Cir. 2009) (internal citations and quotation marks omitted)) (“There are three prongs to this statute. The first prong covers those who intentionally kill someone while engaged in a CCE. The second prong concerns the one who intentionally kills another while working in furtherance of a CCE. And, the third prong envelops that person who intentionally kills another while engaged in an offense punishable under section 841(b)(1)(A) ... or section 960(b)(1).”). *Hager* and *Aguilar* describe 21 U.S.C. § 848(e)(1)(A). Section 848(e)(1)(B) establishes the same 20-year mandatory minimum for a killing of a police officer in the line of duty when committed in furtherance or to avoid punishment for any violation of the Controlled Substances or Controlled Substances Import and Export Acts.

¹¹⁶ *United States v. Barrett*, 797 F.3d 1207, 1219 (10th Cir. 2015); *United States v. Pierce*, 785 F.3d 832, 839 (2d Cir. 2015) (“The government need only prove beyond a reasonable doubt that one motive for the killing ... was related to the drug conspiracy.”).

¹¹⁷ 18 U.S.C. § 924(e).

¹¹⁸ *Id.* § 924(c). Section 924(c) has been the subject of repeated Supreme Court litigation and regular congressional amendment since its inception in 1968. However, the crime of violence prong of the section, rather than the drug trafficking prong, has been the scene of most of the activity. *See United States v. O’Brien*, 560 U.S. 218, 221 (2010) (“The Court must interpret, once again, §924(c) of Title 18 of the United States Code”); *Dean v. United States*, 137 S. Ct. 1170 (2017); *Rosemond v. United States*, 134 S. Ct. 1240 (2014); *Alleyne v. United States*, 133 S. Ct. 2151 (2013); *United States v. Abbott*, 562 U.S.18 (2010); *Dean v. United States*, 556 U.S. 568 (2009); *Watson v. United States*, 552 U.S. 74 (2007); *Harris v. United States*, 536 U.S. 545 (2002); *Castillo v. United States*, 530 U.S. 120 (2000); *Mascarello v. United States*, 524 U.S. 125 (1998); *United States v. Gonzales*, 520 U.S. 1 (1997); *Bailey v. United States*, 516 U.S. 137 (1995); *Smith v. United States*, 508 U.S. 223 (1993); *Deal v. United States*, 508 U.S. 129 (1993); P.L. 90-618, 82 Stat. 1223 (1968), 18 U.S.C. § 924(c)(1970 ed.); P.L. 91-644, §13, 84 Stat. 1889 (1971), 18 U.S.C. § 924(c) (1976 ed.); P.L. §1005, 98 Stat. 2138 (1984), 18 U.S.C. § 924(c) (1982 ed.) (Supp. II); P.L. 99-308, 100 Stat. 457 (1986), 18 U.S.C. § 924(c) (1982 ed.) (Supp. IV); P.L. 100-690, §6460, 102 Stat. 4373 (1988), 18 U.S.C. § 924(c) (1988 ed.); P.L. 101-647, §1101, 104 Stat. 4829 (1990), 18 U.S.C. § 924(c) (1988 ed.) (Supp. II); P.L. 105-386, §1, 112 Stat. 3469 (1998), 18 U.S.C. § 924(c) (2000 ed.); P.L. 109-92, §6(b), 119 Stat. 2102 (2005), 18 U.S.C. § 924(c)(2000 ed.) (Supp. V).

- imprisonment for not less than 10 years if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon;
- imprisonment for not less than 15 years if the offense involves the armor piercing ammunition;
- imprisonment for not less than 25 years if the offender has a prior conviction for violation of Section 924(c);
- imprisonment for not less than 30 years if the firearm is a machine gun or destructive device or is equipped with a silencer; and
- 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.¹¹⁹

Features

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.¹²⁰ It includes firearms that are not loaded or that are broken.¹²¹ It does not include toys or imitations.¹²² Nevertheless, the government need not produce the gun itself at trial. 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).”¹²³ Yet conviction must rest on some evidence of the presence of a firearm.¹²⁴

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

¹¹⁹ 18 U.S.C. § 924(c)(1), (5).

¹²⁰ *Id.* § 921(a)(3), (4) (“(3) The term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; ... (C) any firearm muffler or firearm silencer; or (D) any destructive device.... (4) The term ‘destructive device’ means - (A) any explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses ...”). *E.g.*, *United States v. York*, 600 F.3d 347, 354 (5th Cir. 2010) (Molotov cocktail constitutes a firearm for purposes of § 924(c)); *United States v. Tomkins*, 782 F.3d 338, 345 (7th Cir. 2015) (pipe bombs constitute firearms for purposes of § 924(c)).

¹²¹ *United States v. Cooper*, 714 F.3d 873, 881 (5th Cir. 2013).

¹²² *United States v. Garrido*, 596 F.3d 613, 617 (9th Cir. 2010) (“Possession of a toy or replica gun cannot sustain a conviction under § 924(c)”); *see also* *United States v. Martinez-Armestica*, 846 F.3d 436, 440 (1st Cir. 2017); *United States v. Lawson*, 810 F.3d 1032, 1039 (7th Cir. 2016).

¹²³ *United States v. King*, 751 F.3d 1268, 1274 (11th Cir. 2014); *see also* *Lawson*, 810 F.3d at 1039-40; *United States v. Sherer*, 770 F.3d 407, 412 (6th Cir. 2014); *United States v. Kamahele*, 748 F.3d 984, 1010 (10th Cir. 2014).

¹²⁴ *United States v. Feliciano*, 761 F.3d 1202, 1212 (11th Cir. 2014).

Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.¹²⁵ A defendant may be convicted under Section 924(c), however, even though not convicted or even prosecuted for the predicate offense.¹²⁶

Possession in Furtherance

Section 924(c) has two alternative firearm-nexus elements: (a) possession in furtherance and (b) carrying or use.¹²⁷ 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].”¹²⁸ 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.”¹²⁹

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.¹³⁰ This requires more than proof of the presence of a firearm in the same location as the predicate offense.¹³¹ 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.”¹³²

¹²⁵ 18 U.S.C. § 924(c)(2), referring to 21 U.S.C. §§ 801-904, 21 U.S.C. §§ 951-971, and 46 U.S.C. §§ 70501-70507, respectively. *See, e.g.*, *United States v. Chapman*, 851 F.3d 363, 372-73 (5th Cir. 2017); *United States v. Rivera-Ruperto*, 846 F.3d 417, 423 (1st Cir. 2017).

¹²⁶ *United States v. Galati*, 844 F.3d 152, 155 (3d Cir. 2016); *Davila v. United States*, 843 F.3d 729, 730-31 (7th Cir. 2016).

¹²⁷ *United States v. Burnett*, 773 F.3d 122, 134 (3d Cir. 2014) (“Section 924(c) has two separate prongs, the violation of either standing alone is sufficient to support a conviction under the statute: (1) ‘us[ing] or carry[ing]’ a firearm ‘during and in relation to’ the underlying offense; or (2) ‘possess[ing] a firearm ‘in furtherance’ of the underlying offense.... By making this distinction, Congress may well have intended ‘in furtherance’ to impose a more stringent standard than ‘in relation to.’”).

¹²⁸ *United States v. Bobadilla-Pagan*, 747 F.3d 26, 35 (1st Cir. 2014); *see also* *United States v. Ramos*, 852 F.3d 747, 753 (8th Cir. 2017); *United States v. Bailey*, 840 F.3d 99, 112 (3d Cir. 2016); *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011).

¹²⁹ *United States v. Taylor*, 800 F.3d 701, 709(6th Cir. 2015); *see also* *United States v. Fernandez-Santos*, 856 F.3d 10, 20 (1st Cir. 2017); *United States v. Webster*, 775 F.3d 897, 905-906 (7th Cir. 2015); *United States v. Booker*, 774 F.3d 928, 929-31 (8th Cir. 2014).

¹³⁰ *United States v. Green*, 835 F.3d 844, 854 (8th Cir. 2016); *United States v. Ray*, 803 F.3d 244, 263 (6th Cir. 2015); *United States v. Pineda*, 770 F.3d 313, 317 (4th Cir. 2014); *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); *United States v. Eller*, 670 F.3d 762, 765 (7th Cir. 2012); *United States v. Pena*, 586 F.3d 105, 113 (1st Cir. 2009); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1322 (11th Cir. 2009).

¹³¹ *United States v. Russian*, 848 F.3d 1239, 1250 (10th Cir. 2017); *Eller*, 670 F.3d at 765; *United States v. Pena*, 586 F.3d at 113; *United States v. Penney*, 576 F.3d 297, 315 (1st Cir. 2009).

¹³² *Russian*, 848 F.3d at 1250; *see also* *United States v. Amaya*, 828 F.3d 518 (7th Cir. 2016); *United States v. Holley*, 831 F.3d 322, 329 (5th Cir. 2016); *Renteria*, 720 F.3d at 1255; *United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Johnson*, 677 F.3d 138, 143 (3d Cir. 2012); *Lopez-Garcia*, 565 F.3d at 1322; *United States v.* (continued...)

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),¹³³ several of the circuits have found that such acquisition may constitute “possession in furtherance.”¹³⁴

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.¹³⁵ 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,¹³⁶ when he uses it as collateral in a drug deal;¹³⁷ or when he sells both drugs and firearms;¹³⁸ but not when he accepts a firearm in exchange for drugs in a drug deal.¹³⁹ 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.¹⁴⁰

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.”¹⁴¹ The government must show that the availability of the

(...continued)

Perry, 560 F.3d 246, 254 (4th Cir. 2009); *see also* United States v. Chavez, 549 F.3d 119, 130 (2d Cir. 2008) (noting after quoting the factors that, “while no conviction would lie for a drug dealer’s innocent possession of a firearm, ... a drug dealer may be punished under § 924(c)(1)(A) where the charged weapon is readily accessible to protect drugs, drug proceeds, or the drug dealer himself”); *but see* United States v. Hector, 474 F.3d 1150, 1157 (9th Cir. 2007) (internal citations omitted) (“Although the Fifth Circuit has developed a non-exclusive list of factors ... we have concluded that this approach is not particularly helpful in close cases.... In our most recent case addressing the ‘in furtherance question,’ we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury’s common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction.”).

¹³³ *Watson v. United States*, 552 U.S. 74 (2007).

¹³⁴ *United States v. Gurka*, 605 F.3d 40, 44 (1st Cir. 2010) (“We join the ... circuits holding that *Watson* does not affect the prong of 18 U.S.C. § 924(c)(1)(A) concerned with ‘possession in furtherance.’”) (citing *United States v. Gardner*, 602 F.3d 97, 103 (2d Cir. 2010) and *United States v. Mahan*, 586 F.3d 1185, 1189 (9th Cir. 2009)); *see also* *United States v. Miranda*, 666 F.3d 1280, 1282-284 (11th Cir. 2012); *United States v. Dickerson*, 705 F.3d 683, 688-90 (7th Cir. 2013).

¹³⁵ *Bailey v. United States*, 516 U.S. 137, 143 (1995); *United States v. Isnadin*, 742 F.3d 1278, 1307 (11th Cir. 2014); *United States v. Haynes*, 582 F.3d 686, 704 (7th Cir. 2009); *United States v. Combs*, 369 F.3d 925, 932 (6th Cir. 2004).

¹³⁶ *Smith v. United States*, 508 U.S. 223, 228 (1993); *Bailey*, 516 U.S. at 148.

¹³⁷ *United States v. Cox*, 324 F.3d 77, 82 (2d Cir. 2003).

¹³⁸ *United States v. Benitez*, 809 F.3d 243, 248 (5th Cir. 2015).

¹³⁹ *Watson*, 552 U.S. at 78.

¹⁴⁰ *Muscarello v. United States*, 524 U.S. 125, 126 (1998) (“The question before us is whether the phrase ‘carries a firearm’ is limited to the carrying of firearms on the person. We hold that it is not so limited. Rather, it also applies to a person who knowingly possesses and carries a firearm in a vehicle, including locked in a glove compartment or trunk of a car, which the person accompanies”); *United States v. Franklin*, 561 F.3d 398, 403 (5th Cir. 2009); *United States v. Winder*, 557 F.3d 1129, 1138-139 (10th Cir. 2009); *United States v. Robinson*, 390 F.3d 853, 878 (6th Cir. 2005); *United States v. Williams*, 344 F.3d 365, 370 (3d Cir. 2003).

¹⁴¹ *United States v. Henry*, 819 F.3d 856, 865 (6th Cir. 2016); *United States v. Mashek*, 606 F.3d 922, 930 (8th Cir. 2010) (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993)); *United States v. Roberson*, 459 F.3d 39, 48 (1st Cir. 2006); *Williams*, 344 F.3d at 371.

firearm played an integral role in the predicate offense.¹⁴² It need not show that the firearm was used “in furtherance” of the predicate offense.¹⁴³

Discharge and Brandish

The basic five-year mandatory minimum penalty for using, carrying, or possessing a firearm in the course of a predicate offense becomes a seven-year mandatory minimum if a firearm was brandished during the course of the offense and becomes a 10-year mandatory minimum if a firearm was discharged during the course of the offense.¹⁴⁴ The discharge provision applies even if the firearm was discharged inadvertently.¹⁴⁵ 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.¹⁴⁶ A firearm is brandished for these purposes when (1) it is displayed or its presence made known (2) in order to intimidate another.¹⁴⁷ 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.¹⁴⁸

Short Barrels, Semiautomatics, Machine Guns, and Bombs

For some time, Section 924(c) consisted of a single long paragraph with brandishing, discharging, short barrels, semiautomatics, machine guns, and bombs all in the same 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.¹⁴⁹ The provisions for

¹⁴² *United States v. Burkley*, 513 F.3d 1183, 1189-90 (10th Cir., 2008) (“A firearm is carried during and in relation to the underlying crime when the defendant avails himself of the weapon and ... the weapon plays an integral role in the underlying offense.... Thus, the government must prove that the defendant intended the firearm to be available for use in the offense.”).

¹⁴³ *United States v. Burnett*, 773 F.3d 122, 134 (3d Cir. 2014); *cf.* *United States v. Barnes*, 822 F.3d 914, 918 (6th Cir. 2016) (noting that “possession in furtherance” or “using or carrying during and in relation to” are two distinct crimes).

¹⁴⁴ 18 U.S.C. § 924(c)(1)(A)(ii), (iii).

¹⁴⁵ *Dean v. United States*, 556 U.S. 568, 574 (2009); *United States v. Mann*, 786 F.3d 1244, 1251 (10th Cir. 2015).

¹⁴⁶ *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013) (“Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt”). *Alleyne* overruled *Harris*, which had held that brandishing was a sentencing factor that might be entrusted to the judge to find by a preponderance of the evidence (*Harris v. United States*, 535 U.S. 545, 556 (2002)); *United States v. Cardena*, 842 F.3d 959, 1000-1001 (7th Cir. 2016); *United States v. Lewis*, 802 F.3d 449, 454 (3d Cir. 2015); *United States v. Hackett*, 762 F.3d 493, 502 (6th Cir. 2014); *United States v. King*, 751 F.3d 1268, 1278-280 (11th Cir. 2014). The fact of a second or subsequent conviction, however, remains a sentencing factor, because the Supreme Court’s holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), to that effect has not been withdrawn, *King*, 751 F.3d at 1280 (citing *Alleyne v. United States*, 133 S. Ct. at 2160 n.1); *Cardena*, 842 F.3d at 1000.

¹⁴⁷ 18 U.S.C. § 924(c)(4) (“For purposes of this subsection, the term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person”); *Cardena*, 842 F.3d at 1001; *United States v. Gonzales*, 841 F.3d 339, 353 (5th Cir. 2016); *United States v. Carter*, 560 F.3d 1107, 1114 (9th Cir. 2009); *United States v. Payne*, 763 F.3d 1301, 1304-1305 (11th Cir. 2014).

¹⁴⁸ *United States v. Bowen*, 527 F.3d at 1075 (10th Cir. 2008).

¹⁴⁹ 18 U.S.C. § 924(c)(1) (emphasis added) (“(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of (continued...)”).

offenses involving a short-barreled rifle or shotgun, a semiautomatic assault weapon, a silencer, a machine gun, or explosives appear in a second part.¹⁵⁰ The provisions for second and consequent convictions appear in a third part.¹⁵¹

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).¹⁵²

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 machine gun was the firearm used during and in relation to a predicate offense.¹⁵³ 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.¹⁵⁴ The question of whether a second or subsequent conviction has occurred, however, remains a sentencing factor.¹⁵⁵

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.¹⁵⁶ “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 seek by his action to make it succeed.”¹⁵⁷

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.¹⁵⁸ However, the defendant must be shown to have intended his efforts contribute to the success of the Section 924(c) violation – that is, commission of a predicate offense while

(...continued)

imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years ...”).

¹⁵⁰ 18 U.S.C. § 924(c)(1)(B) (“If the firearm possessed by a person convicted of a violation of this subsection - (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years....”).

¹⁵¹ *Id.* § 924(c)(1)(C) (“In the case of a second or subsequent conviction under this subsection, the person shall - (i) be sentenced to a term of imprisonment of not less than 25 years; and (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.”).

¹⁵² *United States v. Burwell*, 690 F.3d 500, 510-11 (D.C. Cir. 2012) (citing cases evidencing a split).

¹⁵³ *Castillo v. United States*, 530 U.S. 120, 121 (2000).

¹⁵⁴ *United States v. O’Brien*, 560 U.S. 218, 235 (2010).

¹⁵⁵ *United States v. Rivera-Rivera*, 555 F.3d 277, 291 (1st Cir. 2009); *United States v. Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008). This is true even after *Alleyne*, because the Court continues to recognize a recidivist exception to the *Apprendi* rule, *see, e.g.*, *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (“In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision’s vitality, we do not revisit it for purposes of our decision today.”).

¹⁵⁶ 18 U.S.C. § 2.

¹⁵⁷ *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *see also* *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015); *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015) (“Thus, to convict under a theory of aiding and abetting, the government must prove that (1) someone committed the substantive offense; (2) the defendant contributed to and furthered the offense; and (3) the defendant intended to aid in its commission.”).

¹⁵⁸ *Rosemond v. United States*, 134 S. Ct. 1240, 1247 (2014) (“*Rosemond* therefore could assist in § 924(c)’s violation by facilitating either the drug transaction or the firearms use (or of course both).”).

armed.¹⁵⁹ Thus, the defendant must be shown to have known before the commission of the predicate offense that his confederate was armed.¹⁶⁰

In similar manner, conspirators are liable for any foreseeable crimes committed by any of their co-conspirators in furtherance of the conspiracy.¹⁶¹ The rule applies when a defendant's co-conspirator has committed a violation of Section 924(c).¹⁶²

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.¹⁶³ Now, they are simply mandatory minimums, each carrying an unspecified maximum term of life imprisonment.¹⁶⁴

A court may not avoid the mandatory minimums called for in Section 924(c)(1) by imposing a probationary sentence,¹⁶⁵ or by ordering that a Section 924(c)(1) minimum mandatory sentence be served concurrently with some other sentence.¹⁶⁶ A court may, however, take Section 924(c)'s mandatory minimum into account when calculating the appropriate sentence for the underlying predicate offense.¹⁶⁷

If a criminal episode involves more than one predicate offense, more than one violation of Section 924(c) may be punished.¹⁶⁸ 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.¹⁶⁹

¹⁵⁹ *Id.* at 1248 (“[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense’s commission.... [T]he intend must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c).”).

¹⁶⁰ *Id.* at 1249; *United States v. Diaz-Rodriguez*, 853 F.3d 540, 544-45 (1st Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 287 (6th Cir. 2017).

¹⁶¹ *Pinkerton v. United States*, 328 U.S. 640, 646 (1946); *Smith v. United States*, 133 S. Ct. 718, 719 (2013).

¹⁶² *United States v. Bailey*, 784 F.3d 99, 112 (3d Cir. 2016); *United States v. Hare*, 8120 F.3d 93, 105 (4th Cir. 2016); *United States v. Soto*, 794 F.3d 635, (6th Cir. 2015); *United States v. Adams*, 789 F.3d 713, 715 (7th Cir. 2015); *United States v. Reed*, 780 F.3d 272, 272 (4th Cir. 2015) (“A defendant may be convicted on a § 924(c) charge on the basis of a coconspirator’s use of a gun if the use was in furtherance of the conspiracy and was reasonable foreseeable to the defendant.”).

¹⁶³ 18 U.S.C. § 924(c) (1976 ed.).

¹⁶⁴ *United States v. Lara-Ruiz*, 781 F.3d 919, 924 (8th Cir. 2015); *United States v. Diaz-Bermudez*, 778 F.3d 309, 313-14 (1st Cir. 2015); *United States v. Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009) (citing *United States v. Johnson*, 507 F.3d 793, 798 (2d Cir. 2007); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Avery*, 295 F.3d 1158, 1170 (10th Cir. 2002); *United States v. Cristobal*, 293 F.3d 134, 147 (4th Cir. 2002); *United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000); *United States v. Silas*, 227 F.3d 244, 246 (5th Cir. 2000).

¹⁶⁵ 18 U.S.C. § 924(c)(1)(D)(i).

¹⁶⁶ *Id.* § 924(c)(1)(D)(ii). *Dean v. United States*, 137 S. Ct. 1170, 1174 (2017).

¹⁶⁷ *Id.* at 1178.

¹⁶⁸ *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010) (“... [M]ultiple underlying offenses support multiple §924(c) convictions”); *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009); *United States v. Penny*, 576 F.3d 297, 316 (6th Cir. 2009) (“[W]hen two separate predicate offenses for triggering §924(c)(1) are charged and proved, a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event”); *United States v. Looney*, 532 F.3d 392, 396 (5th Cir. 2008).

¹⁶⁹ *Deal v. United States*, 508 U.S. 129, 132 (1993); *United States v. Gooch*, 850 F.3d 285, 290 (6th Cir. 2017); *United* (continued...)

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.¹⁷⁰ The Supreme Court rejected the argument in *Abbott v. United States*.¹⁷¹ Thus, 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.¹⁷²

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.¹⁷³ 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.¹⁷⁴ As the cases below suggest, 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.¹⁷⁵

(...continued)

States v. Buck, 847 F.3d 267, 278 (5th Cir. 2017); *United States v. Davis*, 841 F.3d 1253, 1260 n. 9 (11th Cir. 2016); *United States v. Cardena*, 842 F.3d 959, 999 (7th Cir. 2016); *United States v. Arline*, 835 F.3d 277, 281-82 (2d Cir. 2016); *United States v. Washington*, 714 F.3d 962, 969-70 (6th Cir. 2013) (noting, however, that the stacking should be governed by the rule of lenity, so that, for example, the 25-year mandatory minimums for second offenses should be stacked starting with a seven-year brandishing sentence rather than a 10-year discharge sentence).

¹⁷⁰ *United States v. Almany*, 598 F.3d 238, 241-42 (6th Cir. 2010); *United States v. Whitley*, 529 F.3d 150, 153-56 (2d Cir. 2008).

¹⁷¹ 562 U.S. 8, 13 (2010).

¹⁷² *Id.*; *United States v. Robles*, 709 F.3d 98, 100-101 (2d Cir. 2013).

¹⁷³ The disqualified categories cover felons, fugitives, drug addicts, mental defectives, unlawful aliens, dishonorably discharged members of the Armed Forces, individuals who have renounced their U.S. citizenship, those under a domestic violence restraining order, and those convicted of misdemeanor domestic violence, 18 U.S.C. § 922(g)(1)-(9).

¹⁷⁴ The ACCA is not to be confused with the federal three-strikes statute, 18 U.S.C. § 3559(c), which establishes a mandatory term of life imprisonment upon a third serious violent felony conviction, or with its two-strike counterpart in 18 U.S.C. § 3559(e), relating to mandatory life imprisonment for repeated child sex offenders.

¹⁷⁵ The vast majority of the Supreme Court's Section 924(e) cases involved at last one prior state conviction, *see, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Welch v. United States*, 136 S. Ct. 1257 (2016); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011), overruled by *Johnson*, 135 S. Ct. 2551 (2015); *McNeill v. United States*, 563 U.S. 816 (2011); *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009), overruled by *Johnson*, 135 S. Ct. 2551 (2015); *United States v. Rodriguez*, 553 U.S. 377 (2008); *Begay v. United States*, 553 U.S. 137 (2008), overruled by *Johnson*, 135 S. Ct. 2551 (2015); *Logan v. United States*, 552 U.S. 23 (2007); *James v. United States*, 550 U.S. 192 (2007), overruled by *Johnson*, 135 S. Ct. 2551 (2015); *Shepard v. United States*, 544 U.S. 13 (2005); *Custis v. United States*, 511 U.S. 485 (1994); *Taylor v. United States*, 495 U.S. 575 (1990).

Features

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.¹⁷⁶

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”).¹⁷⁷ 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.¹⁷⁸

Moreover, qualifying violent felonies or serious drug offenses must have been committed on different occasions.¹⁷⁹ “[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,” one court has observed.¹⁸⁰ And “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.”¹⁸¹ Thus, separate drug deals on separate days will constitute offenses committed on different occasions though they involve the same parties and location.¹⁸² The fact that two crimes

¹⁷⁶ *United States v. Raymond*, 778 F.3d 716, 717 (8th Cir. 2015).

¹⁷⁷ The statutory mandatory minimum takes precedence over a plea agreement calling for a sentence beneath the mandatory minimum. *United States v. Symington*, 781 F.3d 1308, 1313 (11th Cir. 2015) (citing *United States v. Davis*, 689 F.3d 349, 354 (4th Cir. 2012), and *United States v. Moyer*, 282 F.3d 1311, 1314 (10th Cir. 2002)).

¹⁷⁸ 18 U.S.C. § 921(20) (“The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”). See *United States v. Sellers*, 784 F.3d 876, 881-87 (2d Cir. 2015) (A New York youthful offender conviction set aside as a matter of New York law does not qualify as a predicate offense) (citing *United States v. Collins*, 61 F.3d 1379, 1382 (9th Cir. 1995), and *United States v. Clark*, 993 F.2d 402, 403 (4th Cir. 1993); and distinguishing, *United States v. Ellis*, 619 F.3d 72,75 (1st Cir. 2010) (“‘It was not blatant error for the sentencing court to take [a defendant’s] juvenile adjudication into consideration for the purpose of applying the ACCA’ because ‘juvenile adjudications [under Massachusetts law] are not “set aside” for the purpose of imposing sentence in later criminal proceedings.’”)).

¹⁷⁹ 18 U.S.C. § 924(e)(1).

¹⁸⁰ *United States v. Martin*, 526 F.3d 926, 938-39 (6th Cir. 2008) (internal citations omitted).

¹⁸¹ *Id.* See also *United States v. Morris*, 821 F.3d 877, 880 (7th Cir. 2016); *United States v. Limney*, 819 F.3d 747, 751 (4th Cir. 2016) (internal citations omitted) (“We have come to rely on five factors to determine whether predicate ACCA offenses were committed on different occasions: (1) whether the offenses arose in different geographic locations; (2) whether the nature of each offense was substantively different; (3) whether each offense involved different victims; (4) whether such offense involved different criminal objectives; and (5) whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense. Importantly, these five factors may be considered together or independently and the strong presence of any one factor can dispositionally segregate an extended criminal episode into a serious of separate and distinct episodes.”); *United States v. Weeks*, 711 F.3d 1255, 1261 (11th Cir. 2013) (internal citations omitted) (“To satisfy the ACCA’s different-occasions requirement, a defendant must have at least three prior convictions for crimes that are temporally distinct. So long as the predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA.”).

¹⁸² *United States v. Abbott*, 794 F.3d 896, 898 (8th Cir. 2015) (“We have repeatedly held that convictions for separate drug transactions on separate days are multiple AWCCA predicate offenses, even if the transactions were sales to the same victim or informant.”).

occurred on different occasions, however, must be clear on the judicial record; recourse to police records will not do.¹⁸³

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.”¹⁸⁴ Moreover, application of Section 924(e) provides no opportunity to challenge the validity of the underlying predicate offenses.¹⁸⁵

The section defines serious drug offenses as those violations of state or federal drug law punishable by imprisonment for 10 years or more.¹⁸⁶ Conviction under a statute which carries a 10-year maximum for repeat offenders qualifies, even though the maximum term for first-time offenders is five years.¹⁸⁷ It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines call for a term of less than 10 years,¹⁸⁸ or when the defendant was in fact sentenced to a lesser term of imprisonment.¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ 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.¹⁹²

¹⁸³ *United States v. King*, 853 F.3d 267, 279 (6th Cir. 2017); *Limney*, 819 F.3d at 751-52 (4th Cir. 2016); *United States v. McCloud*, 818 F.3d 591, 595-96 (11th Cir. 2016) (each citing *Shepard v. United States*, 544 U.S. 13 (2005)).

¹⁸⁴ *United States v. Moody*, 770 F.3d 577, 580 (7th Cir. 2014).

¹⁸⁵ *Custis v. United States*, 511 U.S. 485, 487 (1994) (“[A] defendant has no such right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions.”); *Daniels v. United States*, 532 U.S. 374, 378-82 (2001); *United States v. Coleman*, 655 F.3d 480, 485 (6th Cir. 2011); *United States v. Greer*, 607 F.3d 559, 565 (8th Cir. 2010); *United States v. Dean*, 604 F.3d 169, 174-75 (4th Cir. 2010); *United States v. Covington*, 565 F.3d 1336, 1345 (11th Cir. 2009); *United States v. Buie*, 547 F.3d 401, 403-404 (2d Cir. 2008); *United States v. Krejcarek*, 453 F.3d 1290, 1297 (10th Cir. 2006).

¹⁸⁶ 18 U.S.C. § 924(e)(2)(A) (“[T]he term ‘serious drug offense’ means - (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.”).

¹⁸⁷ *United States v. Rodriguez*, 533 U.S. 377, 380 (2008). The record must make it clear, however, that the defendant was subject to any recidivist provision needed to reach the 10-year threshold, *United States v. Lockett*, 782 F.3d 349, 352-53 (7th Cir. 2015) (“Rodriguez requires the government to provide evidence from the record that the defendant was in fact subject to the enhanced recidivist penalties that could elevate his sentence past the ten-year mark.”).

¹⁸⁸ *United States v. Rodriguez*, 533 U.S. at 390; *United States v. Mayer*, 560 F.3d 948, 963(9th Cir. 2009).

¹⁸⁹ *United States v. Buie*, 547 F.3d 401, 404 (2d Cir. 2008); *United States v. Williams*, 508 F.3d 724, 728 (4th Cir. 2007); *United States v. Henton*, 473 F.3d 467, 470 (7th Cir. 2004).

¹⁹⁰ *McNeill v. United States*, 563 U.S. 816, 817-18 (2011); *United States v. Faust*, 853 F.3d 39, 57 (1st Cir. 2017); *United States v. Seabrooks*, 839 F.3d 1326, 1347 (11th Cir. 2016); *Rivera v. United States*, 716 F.3d 685, 688-89 (2d Cir. 2013).

¹⁹¹ *United States v. Trent*, 767 F.3d 1046, 1057 (10th Cir. 2014) (citing *United States v. Bynum*, 669 F.3d 880, 887 (8th Cir. 2012); *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007); and *United States v. McKinney*, 450 F.3d 39, 44 (1st Cir. 2006)).

¹⁹² *United States v. Smith*, 775 F.3d 1262, 1266-67 (11th Cir. 2014).

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."¹⁹³ 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).¹⁹⁴

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.¹⁹⁵ The safety valve 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.¹⁹⁶

The safety valve is not available to avoid the mandatory minimum sentences that attend other offenses, even those closely related to the covered offenses. Section 860 (21 U.S.C. § 860), which outlaws violations of Section 841 near schools, playgrounds, or public housing facilities and sets the penalties for violation at twice what they would be under Section 841, is not covered. Those charged with a violation of Section 860 are not eligible for relief under the safety valve provisions.¹⁹⁷ In addition, safety valve relief is not available to those convicted under the Maritime Drug Law Enforcement Act, even though the act proscribes conduct closely related to the smuggling and trafficking activities punished under Sections 960 and 963 (21 U.S.C. §§ 960, 963).¹⁹⁸

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.¹⁹⁹ He may not have more than one criminal history point.²⁰⁰ He may not have

¹⁹³ *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (construing 18 U.S.C. § 924(e)(2)(B)(ii)).

¹⁹⁴ *Cf. In re Davis*, 929 F.3d 1297, 1298 (11th Cir. 2016).

¹⁹⁵ H. R. REP. NO. 103-460, at 4 (1994); *United States v. Carillo-Ayala*, 713 F.3d 82, 88 (11th Cir. 2013).

¹⁹⁶ 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 ...").

¹⁹⁷ *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).

¹⁹⁸ *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496-503 (9th Cir. 2007).

¹⁹⁹ *United States v. Syms*, 846 F.3d 230, 235 (7th Cir. 2017); *United States v. Claxton*, 766 F.3d 280, 305 (3d Cir. 2014); *United States v. Schmitt*, 765 F.3d 841, 842 (8th Cir. 2014); *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. Larios*, 593 F.3d 82, 89 (1st 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).

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

used violence or a dangerous weapon in connection with the offense.²⁰¹ He may not have been an organizer or leader of the drug enterprise.²⁰² He must have provided the government with all the information and evidence at his disposal.²⁰³ Finally, the offense may not have resulted in serious injury or death.²⁰⁴

One Criminal History Point

More than one “criminal history point” is safety valve disqualifying.²⁰⁵ 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.²⁰⁶ A single point is assigned for every other federal or state prior sentence of conviction, subject to certain exceptions.²⁰⁷

Foreign sentences of imprisonment are not counted;²⁰⁸ nor are sentences imposed by tribal courts;²⁰⁹ nor summary court martial sentences;²¹⁰ nor sentences imposed for expunged, reversed, vacated, or invalidated convictions;²¹¹ nor sentences for certain petty offenses or minor misdemeanors.²¹² 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.²¹³ The other class consists of arguably more serious offenses, such as gambling or prostitution, that are excused only if the offender was sentenced no more severely than to imprisonment for 30 days or less or

²⁰¹ *Id.* § 3553(f)(2) (“[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.”).

²⁰² *Id.* § 3553(f)(4) (“[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”).

²⁰³ *Id.* § 3553(f)(5) (“[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.”).

²⁰⁴ *Id.* § 3553(f)(3) (“[T]he offense did not result in death or serious bodily injury to any person.”).

²⁰⁵ *Id.* § 3553(f)(2); *United States v. Monzo*, 852 F.3d 1343, 1351 (11th Cir. 2017).

²⁰⁶ U.S.S.G. §§ 4A1.1(a), (b), (d); 4A1.2(d). *United States v. Yopez*, 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)).

²⁰⁷ U.S.C.G. §§ 4A1.1(c); 4A1.2.

²⁰⁸ *Id.* § 4A1.2(h).

²⁰⁹ *Id.* § 4A1.2(i).

²¹⁰ *Id.* § 4A1.2(g). Sentences imposed by general and special courts martial are counted, *id.*

²¹¹ *Id.* §§ 4A1.2(j); 4A1.2, cmt. n.6.

²¹² *Id.* § 4A1.2(c).

²¹³ 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.” *Id.* § 4A1.2(c)(2).

to probation for less than a year.²¹⁴ Both classes also include similar offenses to those listed “by whatever name they are known.”²¹⁵

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.”²¹⁶ 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.²¹⁷ Disqualifying firearm possession may be either actual or constructive.²¹⁸ Constructive possession is the dominion or control over a firearm or the place where one is located.²¹⁹ Disqualification requires that the threat of violence or possession of a firearm be “in connection with the offense,”²²⁰ and may include threats against witnesses.²²¹ In

²¹⁴ 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.” *Id.* § 4A1.2(c)(1).

²¹⁵ *Id.* §§ 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 considered “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.” *Id.* § 4A1.2, cmt. n.12(A). *See, e.g.,* *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 state wildlife code is sufficient 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).

²¹⁶ U.S.S.G. § 5C1.2, cmt., n.4.

²¹⁷ *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).

²¹⁸ *United States v. Leanos*, 827 F.3d 1167, 1170 (8th Cir. 2016); *United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (citing *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)).

²¹⁹ *United States v. Stewart*, 306 F.3d 295, 326 (6th Cir. 2002).

²²⁰ 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 (continued...)”).

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.²²²

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.”²²³ On its face, the definition would include serious bodily injuries, such as one that requires hospitalization, suffered by the defendant as a result of the offense.²²⁴ 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.²²⁵

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.²²⁶ 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.²²⁷

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.²²⁸

(...continued)

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.”).

²²¹ United States v. Ortiz, 775 F.3d 964, 968-69 (7th Cir. 2015).

²²² 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).

²²³ U.S.S.G. § 5C1.2, cmt. n.2; § 1B1.1, cmt. n.1(L).

²²⁴ The Eleventh Circuit in a nonbinding opinion seems to have come to same conclusion. United States v. Valencia-Vergara, 264 F.App’x. 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.”).

²²⁵ Cf. United States v. Grimmett, 150 F.3d 958, 960-61 (8th Cir. 1998).

²²⁶ U.S.S.G. §§ 5C1.2(a)(4), cmt. n.5; United States v. Syms, 846 F.3d 230, 235-36 (7th Cir. 2017); (“‘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).

²²⁷ The Sentencing Guidelines recommend a sentencing increase for offenders who acted as organizers, leaders, managers, or supervisors of a criminal enterprise with multiple participants and a sentencing reduction for offenders who acted as minimal or minor participants in such an enterprise. U.S.S.G. §§ 3B1.1, 3B1.2.

²²⁸ 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); and United States (continued...)

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.²²⁹ The stipulation of facts in a plea bargain without more ordinarily will not qualify.²³⁰ Most often, the defendant provides the information during an interview with prosecutors or by a proffer.²³¹ The defendant must disclose the information to the prosecutor, however. Disclosure to the probation officer during preparation of the presentence report is not sufficient.²³² 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.”²³³ A defendant’s proffer must be “truthful.”²³⁴ 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.²³⁵

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v. Sabir, 117 F.3d 750, 753 (3d Cir. 1997)).

²²⁹ *United States v. DeLaTorre*, 599 F.3d 1198, 1206 (10th Cir. 2010); *United States v. Delgrosso*, 852 F.3d 821, 829 (8th Cir. 2017) (citing and contrasting *United States v. Hinojosa*, 728 F.3d 787, 790 (8th Cir. 2013) where the trial court granted safety valve relief for a defendant who argued ignorance of co-defendant’s misconduct but admitted he unreasonably failed to take the steps to investigate).

²³⁰ *E.g.*, *United States v. Cruz-Romero*, 848 F.3d 399, 402 (5th Cir. 2017).

²³¹ *E.g.*, *United States v. Rebolledo-Delgado*, 820 F.3d 870, 879 (7th Cir. 2016).

²³² *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)).

²³³ *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)); *United States v. Cruz-Romero*, 848 F.3d 399, 402 (5th Cir. 2017) (plea bargain fact stipulation standing alone is insufficient); *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.”).

²³⁴ 18 U.S.C. § 3553(f)(5); *Rebolledo-Delgado*, 820 F.3d at 879-80.

²³⁵ *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 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).”).

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.²³⁶

The substantial assistance provision was enacted with little fanfare in the twilight of the 99th Congress as part of the wide-ranging Anti-Drug Abuse Act of 1986, legislation that established or increased a number of mandatory minimum sentencing provisions.²³⁷ The section passed between the date authorizing the Sentencing Guidelines and the date the Guidelines became effective. Rather than replicate the language of Section 3553(e), the Guidelines contain an overlapping section which authorizes a sentencing court to depart from the minimum sentence called for by the Guidelines.²³⁸ A motion asking the court to sentence a defendant beneath the statutory mandatory minimum must be filed under Section 3553(e); a motion under Section 5K1.1 of the Guidelines alone is insufficient.²³⁹ The government has at least a year to file its motion for substantial assistance.²⁴⁰

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 § 3553(e) only if the government agrees.²⁴¹ The courts have

²³⁶ 18 U.S.C. § 3553(e).

²³⁷ Section 1007(a) of P.L. 99-570, 100 Stat. 32-07-7 (1986).

²³⁸ U.S.S.G. § 5K1.1 (“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.”); *see also* FED. R. CRIM. P. 35(b) (quoted below).

²³⁹ *Melendez v. United States*, 518 U.S. 120, 123-24 (1996) (“[T]he Courts of Appeals disagree as to whether a Government motion attesting to the defendant’s substantial assistance and requesting that the district court depart below the minimum of the applicable sentencing range under the Guidelines also permits the district court to depart below any statutory minimum ... We now hold that such a motion does not authorize a departure below a lower statutory minimum.”).

²⁴⁰ FED. R. CRIM. 35(b) (captions omitted) (“(1) Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. (2) 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. (3) In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance. (4) When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.”).

²⁴¹ *Melendez*, 518 U.S. at 125-26 (“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[a] minimum sentence before the court (continued...)”).

acknowledged that due process, equal protection, or other constitutional guarantees may provide a narrow exception.²⁴² For instance, a defendant is entitled to relief if the government’s refusal constitutes a breach of its plea agreement.²⁴³ A defendant is also “entitled to relief if the prosecutor’s refusal to move was not rationally related to any legitimate Government end.”²⁴⁴ 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.²⁴⁵

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.²⁴⁶

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.²⁴⁷ It has been suggested that a court may use the factors found in Section 5K1.1 of the Sentencing Guidelines for that determination.²⁴⁸ District courts appear to have some latitude as

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may impose such a sentence.”); *United States v. Massey*, 663 F.3d 852, 860 (6th Cir. 2011).

²⁴² *Wade v. United States*, 504 U.S. 181, 185-86 (1992); *United States v. Patton*, 847 F.3d 883, 885 (7th Cir. 2017); *United States v. Gomez*, 705 F.3d 68, 79 (2d Cir. 2013).

²⁴³ *United States v. Doe*, 741 F.3d 359, 362-63 (2d Cir. 2013); *United States v. Barnes*, 730 F.3d 456, 457 (4th Cir. 2013); *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).

²⁴⁴ *Wade*, 504 U.S. at 186; *Patton*, 847 F.3d at 885.

²⁴⁵ *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.”); *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 basis to compel a government motion); *United States v. Doe*, 865 F.3d 1295 (10th Cir. 2017) (noting a split between the circuits and within the circuit on the question).

²⁴⁶ *United States v. McMahan*, 872 F.3d 717, 719-21 (5th Cir. 2017) (declining to be guided by a contrary conclusion in *United States v. Gangi*, 45 F.3d 28 (2d Cir. 1995), announced before Rule 35(b) was amended).

²⁴⁷ *United States v. Spinks*, 770 F.3d 285, 287 (4th Cir. 2014); *United States v. Lee*, 725 F.3d 1159, 1168 (9th Cir. 2013); *United States v. Williams*, 687 F.3d 283, 286 (6th Cir. 2012); *United States v. Span*, 682 F.3d 565, 566 (7th Cir. 2012); *United States v. Winebarger*, 664 F.3d 388, 392-93 (3d Cir. 2011) (“Congress’s chosen language explicitly indicates that the reduction below the statutory minimum is to ‘reflect’ a defendant’s assistance to the government in investigating and prosecuting other offenders. This language does not give a court carte blanche to sentence a defendant below a statutory minimum sentence based on non-assistance-related factors once it is established that the defendant provided assistance to the government”); *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”); *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 *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008) and *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006)).

²⁴⁸ *United States v. Gabbard*, 586 F.3d 1046, 1051 (6th Cir. 2009) (citing *United States v. Richardson*, 521 F.3d at 159). U.S.S.G. § 5K1.1(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 (continued...)”).

to the method used to calculate the reduction for substantial assistance *e.g.*, “offense-level-based reductions, month-based reductions, and percentage-based reductions.”²⁴⁹

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.²⁵⁰

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.

Legislative Authority

The federal government is a creature of the Constitution; it enjoys only such powers as can be traced to the Constitution.²⁵¹ Among the powers which the Constitution bestows upon Congress are the powers to define and punish felonies committed upon the high seas, to exercise exclusive legislative authority over certain federal territories and facilities, to make rules governing the Armed Forces, to regulate interstate and foreign commerce, and to enact legislation necessary and proper for the execution of those and Congress’s other constitutionally granted powers.²⁵² It also grants Congress authority to enact legislation necessary and proper to the execution of those powers which it vests in any officer or department of the federal government.²⁵³

Many of the federal laws with mandatory minimum sentencing requirements were enacted pursuant to Congress’s legislative authority over crimes occurring on the high seas or within federal enclaves,²⁵⁴ or to its power to regulate commerce.²⁵⁵ When a statute falls for want of

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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.”).

²⁴⁹ *United States v. Marroquin-Medina*, 817 F. 3d 1285, 1289 (11th Cir. 2016).

²⁵⁰ *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992) (“Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious the defendant’s crimes, the lower the sentence – because the greater is wrongs, the more information and assistance he has to offer to the prosecutor. Discounts for the top dogs have the virtue of necessity, because rewards for assistance are essential to the business of detecting and punishing crime. But what makes the post-discount sentencing structure topsy-turvy is the mandatory minimum, binding only for the hangers one.”).

²⁵¹ U.S. CONST. amend. X.

²⁵² *Id.* art. I, § 8, cls.10, 17, 14, 3, and 18, respectively.

²⁵³ *Id.* art. I, § 8, cl.18; *see generally* *United States v. Comstock*, 560 U.S. 126 (2010).

²⁵⁴ *E.g.*, 18 U.S.C. § 2241(a) (“Whoever, in the special maritime and territorial jurisdiction of the United States ... knowing causes another person to engage in a sexual act – (1) by using force against that other person ... shall be ... imprisoned for any term of years or life ...”).

²⁵⁵ *E.g.*, *Id.* § 2251(a), (e) (“(a) Any person ... who transports any minor in or affecting interstate or foreign commerce ... with the intent that such minor engage in any sexually explicit conduct for the purpose of producing any visual (continued...)”).

legislative authority, the penalties it would impose fall with it. This has yet to occur in the area of mandatory minimum sentences relating to controlled substances.

Commerce Clause

“The Congress shall have Power ... To regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes.”²⁵⁶ This clause vests Congress with authority to regulate three broad categories of interstate commerce. In the words of *United States v. Lopez*, “[f]irst, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.”²⁵⁷

Applying these standards, the *Lopez* Court concluded that the Commerce Clause did not authorize Congress to enact a particular statute which purported to outlaw possession of a firearm on school property. Because the statute addressed neither the channels nor instrumentalities of interstate commerce, its survival turned upon whether it came within Congress’s power to regulate activities that have a substantial impact on interstate commerce.²⁵⁸ Here, the statute was found wanting. “[B]y its terms” it had “nothing to do with commerce or any sort of economic enterprise.”²⁵⁹ It “contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce.”²⁶⁰ Its impact on commerce was so remote that to credit it would envision a virtually boundless power and one reserved to the states, the Court explained.²⁶¹

A few years later, the Court in *United States v. Morrison*²⁶² reiterated “that Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”²⁶³ Yet purely intrastate activities may have a sufficient impact on interstate

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depiction of such conduct.... (e) Any individual who violates ... this section shall be ... imprisoned not less than 15 years.... ”).

²⁵⁶ U.S. CONST. art. I, § 8, cl. 3.

²⁵⁷ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

²⁵⁸ *Id.* at 559.

²⁵⁹ *Id.* at 561.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 563-64 (“The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being.... Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”); *id.* at 567 (“To uphold the Government’s contentions here, we would have to pile inference on inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).

²⁶² 529 U.S. 598 (2000).

²⁶³ *Id.* 617-18.

commerce to bring them within the reach of Congress’s Commerce Clause power. So it is in the case of the Controlled Substances Act. The Court concluded in *Gonzales v. Raich* that:

Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA [Controlled Substances Act]. Thus ... when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States.’ That the regulation ensnares some purely intrastate activity is of no moment.”²⁶⁴

Treaty Power

The Constitution grants the President authority to negotiate treaties and the Senate the authority to approve them in the exercise of its advice and consent prerogatives.²⁶⁵ Almost a century ago, the Court observed that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”²⁶⁶ The Controlled Substances Act might be considered implementation of various treaties of the United States relating to controlled substances.²⁶⁷ In fact, the Controlled Substances Act begins with the congressional finding and declaration that “[t]he United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.”²⁶⁸ Congress was even more explicit in the Psychotropic Substances Act of 1978 when it declared, “[i]n implementing the Convention on Psychotropic Substances, the Congress intends that, consistent with the obligations of the United States under the Convention, control of psychotropic substances in the United States should be accomplished within the framework of the procedures and criteria for classification of substances provided in the Comprehensive Drug Abuse Prevention and Control Act of 1970.”²⁶⁹

Territorial and Maritime Jurisdiction

The Constitution empowers Congress “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”²⁷⁰ The courts have held that the Maritime Drug Law Enforcement Act (MDLEA), which includes mandatory minimum sentencing requirements, constitutes a valid exercise of Congress’s authority under the High Seas Felonies Clause.²⁷¹

²⁶⁴ 545 U.S. 1, 22 (2005) (internal citations omitted).

²⁶⁵ U.S. CONST. art. II, § 2, cl. 2.

²⁶⁶ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

²⁶⁷ *E.g.*, SINGLE CONVENTION ON NARCOTIC DRUGS, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204; CONVENTION ON PSYCHOTROPIC SUBSTANCES, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

²⁶⁸ 21 U.S.C. § 801(7).

²⁶⁹ *Id.* § 801a(3). At least one court has held that extraterritorial application of the Controlled Substances Export and Import Act’s prohibitions, and by implication its mandatory minimum penalties, constitute a permissible exercise of “Congress’ treaty-making power under the Necessary and Proper Clause.” *United States v. Lawrence*, 727 F.3d 386, 397 (5th Cir. 2013).

²⁷⁰ U.S. CONST. art. I, § 8, cl. 10.

²⁷¹ *United States v. Hernandez*, 864 F.3d 1292, 1303 (11th Cir. 2017) (citing *United States v. Campbell*, 743 F.3d 802, (continued...))

Necessary and Proper

“The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁷² It has never been thought that the Necessary and Proper Clause empowers only those laws that are absolutely necessary. Instead, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.”²⁷³ Thus, the Necessary and Proper Clause makes possible those statutes that are rationally related to the implementation of another constitutional power.²⁷⁴

The Court in *United States v. Comstock* provided a hint of the scope of Necessary and Proper Clause.²⁷⁵ The statute there authorized the Attorney General to continue to hold a federal inmate, pending a civil commitment determination, after his scheduled date of release.²⁷⁶ The Court analyzed the breadth of the power without any explicit reference to any other constitutional power, deciding that:

[T]he statute is a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the imprisonment of others.²⁷⁷

Justice Scalia, in his *Raich* concurrence, saw the Necessary and Proper Clause as a necessary Commerce Clause supplement for legislation like the Controlled Substances Act that purports to regulate purely in-state activity.²⁷⁸ Moreover, as noted above, at least one lower federal appellate court considers the Necessary and Proper Clause the implementing vehicle for enactment of the Maritime Drug Law Enforcement Act under Congress’s treaty-making powers.²⁷⁹

Limits on Legislative Authority

The Constitution both grants and limits Congress’s legislative authority. In the area of mandatory minimum sentences for controlled substance violations, the constitutional challenges have arisen largely under the Eighth Amendment’s Cruel and Unusual Punishment Clause; the equal protection element of the Fifth Amendment; the Fifth and Sixth Amendment components awakened by *Apprendi v. New Jersey* and its progeny; and the separation-of-powers doctrine.

(...continued)

809-12 (11th Cir. 2014)); *United States v. Ballestas*, 795 F.3d 138, 146-47 (D.C. Cir. 2015). The Eleventh Circuit had previously held, however, that the MDLEA rests beyond the reach of the *Law of Nations Clause*. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1253-58 (11th Cir. 2012).

²⁷² U.S. CONST. art. I, § 8, cl. 18.

²⁷³ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819).

²⁷⁴ *Sabri v. United States*, 541 U.S. 600, 605 (2004) (“*McCulloch v. Maryland* ... establish[es] review for means-ends rationality under the Necessary and Proper Clause.”).

²⁷⁵ *United States v. Comstock*, 560 U.S. 126 (2010).

²⁷⁶ 18 U.S.C. § 4248.

²⁷⁷ *Comstock*, 560 U.S. at 149.

²⁷⁸ *Gonzales v. Raich*, 545 U.S. 1, 34 (Scalia, J., concurring in the judgment) (“Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.”).

²⁷⁹ *United States v. Lawrence*, 727 F.3d 386, 397 (5th Cir. 2013).

Cruel and Unusual Punishment

Mandatory minimums implicate considerations under the Eighth Amendment’s Cruel and Unusual Punishment Clause.²⁸⁰ The clause bars mandatory capital punishment statutes²⁸¹ and mandatory imposition on a juvenile of life imprisonment without the possibility of parole.²⁸² Although the case law is somewhat uncertain, it seems to condemn punishment that is “grossly disproportionate” to the misconduct for which it is imposed,²⁸³ a standard which a sentence imposed under a mandatory minimum statute might breach only under extreme circumstances.

The Supreme Court decision in *Harmelin v. Michigan*²⁸⁴ seems to make a defendant’s Eighth Amendment arguments in a controlled substances case more difficult. The defendant in *Harmelin* was a first-time offender convicted of possession of 672 grams of cocaine, enough for possibly as many as 65,000 individual doses. Under the laws of the State of Michigan, the conviction carried with it a mandatory sentence of life imprisonment without the possibility of parole. The Court splintered over the question of whether Harmelin’s mandatory sentence offended the Eighth Amendment because it was grossly disproportionate to his offense.

Five members of the Court concluded that it did not. Two members, Justice Scalia and Chief Justice Rehnquist, simply refused to recognize an Eighth Amendment proportionality requirement, at least in noncapital cases.²⁸⁵ Justices Kennedy, O’Connor, and Souter concluded the Eighth Amendment does in fact forbid “extreme sentences that are grossly disproportionate to the crime.”²⁸⁶ They explained, however, that Harmelin’s sentence was not grossly disproportionate to the severity of his crime – that is, a crime whose “pernicious effects ... demonstrate that the ... legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”²⁸⁷

Decisions of the lower federal courts seem to confirm that the Eighth Amendment precludes a mandatory term of imprisonment in drug trafficking cases only in those exceptionally rare cases when the punishment is grossly disproportionate to the offense.²⁸⁸

²⁸⁰ The Eighth Amendment to the United States Constitution states in its entirety, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

²⁸¹ *Woodson v. North Carolina*, 428 U.S. 280, 305-306 (1976).

²⁸² *Miller v. Alabama*, 567 U.S. 460, 489 (2012). Virtual all contemporary convictions for federal offenses are convictions without the possibility of parole, because Congress abolished parole in the case of federal crimes over three decades ago. Section 212(a), P.L. 98-473, 98 Stat. 1987 (1984).

²⁸³ *Ewing v. California*, 538 U.S. 11, 31-32 (2003).

²⁸⁴ 501 U.S. 957 (1991).

²⁸⁵ *Id.* at 994 (Scalia, J., with Rehnquist, Ch.J.) (citations omitted) (“Proportionality review is one of several respects in which we have held that ‘death is different’, and have imposed protections that the Constitution nowhere else provides. We would leave it there, but will not extend it further.”).

²⁸⁶ *Id.* at 1001 (Kennedy, J., with O’Connor & Souter, JJ., concurring in part and concurring the judgment).

²⁸⁷ *Id.* at 1003.

²⁸⁸ See, e.g., *United States v. Syms*, 846 F.3d 230, 236 (7th Cir. 2017) (151-month sentence for conspiracy to distribute cocaine) (citations omitted) (“Only extreme sentences that are ‘grossly disproportionate’ to the crime will be deemed cruel and unusual. Additionally, ‘eighth amendment challenges to sentences that are both prescribed by the [sentencing] guidelines, and within the statutory maximums established by Congress, are not looked on with disfavor.”); *United States v. Camberos-Villapuda*, 832 F.3d 948, 953 (8th Cir. 2016) (“This court has ruled on numerous occasions that the imposition of a mandatory life sentence under that statute [21 U.S.C. § 841(b)(1)(A)] does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment.”); *United States v. Law*, 806 F.3d (continued...)

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment condemns statutory classifications invidiously based on race, or constitutionally suspect factors. Moreover, “[d]iscrimination on the basis of race odious in all aspects is especially pernicious in the administration of justice.”²⁸⁹

These prohibitions apply with equal force under the equal protection component of the Fifth Amendment’s Due Process Clause.²⁹⁰ An explicit racial classification scheme can survive only under the most exceptional circumstances.²⁹¹ A statute, racially neutral on its face but discriminatory in its impact, cannot survive if racially motivated.²⁹² The circumstances surrounding the passage of a legislative measure with discriminatory impact may provide evidence of improper racial motivation.²⁹³

At one time, possession with intent to distribute crack cocaine (cocaine base) was punished 100 times more severely than possession with intent to distribute cocaine in powdered form.²⁹⁴ Defendants claimed the distinction had a racially disparate impact. The claim was almost universally rejected.²⁹⁵

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1103, 1107 (D.C. Cir. 2015) (quoting *Miller v. Alabama*, 567 U.S. 460, 481 (2012)) (“Law also contends ... that the life sentence the court imposed ... violates the Eighth Amendment because it constitutes cruel and unusual punishment. This contention is foreclosed by precedent. The Supreme Court rejected it in *Harmelin v. Michigan* ... In its recent opinion in *Miller v. Alabama*, the Supreme Court left *Harmelin* undisturbed ... “[L]ife without parole is permissible for nonhomicide offenses – except ... for children ... Our reading thus neither overrules nor undermines nor conflicts with *Harmelin*.”); *United States v. Flores-Alvarado*, 779 F.3d 250, 257 n.3 (4th Cir. 2015) (life sentence for recidivist trafficker); *United States v. Gay*, 771 F.3d 681, 686-87 (10th Cir. 2014) (262-month sentence for crack trafficker) (citing *Harmelin*); *United States v. Adams*, 768 F.3d 219, 224-25 (2d Cir. 2014) (210-month sentence for marijuana trafficker) (“Lengthy prison sentences, moreover, even those that exceed any conceivable life expectancy of a convicted defendant, do not violate the Eighth Amendment’s prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutory mandated consecutive terms. We have also recognized that in a noncapital case it is exceedingly rare to uphold a claim that a sentence within the statutory limits is disproportionately severe.”).

²⁸⁹ *Pena-Rodriguez*, 137 S. Ct. 855, 868 (2017).

²⁹⁰ *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

²⁹¹ *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979).

²⁹² *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-66 (1977).

²⁹³ *Id.* at 267-68.

²⁹⁴ At one time, for example, the same mandatory minimum sentence applied to 5000 grams of powder cocaine as applied to 50 grams of crack cocaine. 21 U.S.C. § 841(b)(1)(A) (2006 ed.).

²⁹⁵ *E.g.*, *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995) (citing *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992)) (“We have previously considered and rejected ‘as enacted’ equal protection challenges to 21 U.S.C. § 841(b) and USSG § 2D1.1... [W]e refused to apply a strict level of scrutiny to the sentencing distinction between crack and powder cocaine. We noted that, on its fact, section 841(b) implicates neither a suspect class nor a fundamental right. Therefore, we reviewed the distinction only under the rational basis test, the lowest level of scrutiny applicable to equal protection challenges. We held that the crack/powder cocaine distinction survived rationality review because, although crack and powder cocaine are different forms of the same drug, Congress reasonably could have considered that crack’s differing physiological and psychological effects, and its greater marketability, made crack a greater societal problem meriting more severe punishment.”); *United States v. Fenner*, 600 F.3d 1014, 1024-25 (8th Cir. 2010); *United States v. Wimbley*, 553 F.3d 455, 463 (6th Cir. 2009); *United States v. Eirby*, 262 F.3d 31, 41 (1st Cir. 2001); *United States v. Matthews*, 168 F.3d 1234, 1250-51 (11th Cir. 1999); *United States v. Holton*, 116 F.3d 1536, 1548 (D.C. Cir. 1997); *United States v. Perkins*, 108 F.3d 512, 518 (4th Cir. 1997); *United States v. Teague*, 93 F.3d 81, 84-5 (2d Cir. 1996); *United States v. Reddick*, 90 F.3d 1276, 1282 (7th Cir. 1996); *United States v. McKinney*, 53 F.3d 664, 678 (5th Cir. 1995); *United States v. Williamson*, 1500, 1503 (10th Cir. 1995); *United States v. Frazier*, 981 F.3d 92, 95 (3d Cir. 1992); *contra United States v. Clary*, 846 F. Supp. 768, 796-97 (E.D. Mo. 1994) (holding that the 100 to 1 sentencing ratio found in the 21 U.S.C. § 841(b) and the implementing U.S. Sentencing Commission Sentencing (continued...))

Juries, Grand Juries, and Due Process

The Constitution demands that no person “be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury” and that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”²⁹⁶ Moreover the Supreme Court’s *In re Winship* decision explained that due process requires that the prosecution prove beyond a reasonable doubt “every fact necessary to constitute the crime” with which an accused is charged.²⁹⁷ After *Winship*, the question arose whether a statute might authorize or require a more severe penalty for a particular crime based on a fact—not included in the indictment, not found by the jury, and not proven beyond a reasonable doubt. Pennsylvania passed a law under which various serious crimes (rape, robbery, kidnapping, and the like) were subject to a mandatory minimum penalty of imprisonment for five years, if the judge after conviction found by a preponderance of the evidence that the defendant had been in visible possession of a firearm during the commission of the offense.²⁹⁸ Had the Pennsylvania statute created a new series of crimes? For example, had it supplemented its crime of rape with a new crime of rape while in visible possession of a firearm? And if so, did the fact of visible possession have to be proven to the jury beyond a reasonable doubt?²⁹⁹

The Supreme Court concluded that visible possession of a firearm under the statute was not an element of a new series of crimes, but was instead a sentencing consideration that had been given a legislatively prescribed weight.³⁰⁰ As such, the Pennsylvania statutory scheme neither offended due process nor triggered any right to a separate jury finding.³⁰¹

There followed a number of state and federal statutes under which facts that might earlier have been treated as elements of a new crime were simply classified as sentencing factors. In some instances, the new sentencing factor permitted imposition of a penalty far in excess of that otherwise available for the underlying offense. For instance, the Supreme Court found no constitutional defect in a statute which punished a deported alien for returning to the United States by imprisonment for not more than 2 years, but which permitted the alien to be sentenced to imprisonment for not more than 20 years upon a post-trial, judicial determination that the alien had been convicted of a serious crime following deportation.³⁰²

Perhaps uneasy with the implications, the Court soon made it clear in *Apprendi* that, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable

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Guidelines constitute a violation of the Constitution’s equal protection guarantees), rev’d, 34 F.3d 710 (8th Cir. 1994).

²⁹⁶ U.S. CONST. amends. V, VI.

²⁹⁷ *In re Winship*, 397 U.S. 358, 364 (1970).

²⁹⁸ 42 Pa.Cons.Stat. 9712 (1982), reprinted in *McMillan v. Pennsylvania*, 477 U.S. 79, 81-2 n.1 (1986).

²⁹⁹ The right to grand jury indictment was not implicated since the Sixth Amendment right to grand jury indictment applies only to federal prosecutions, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

³⁰⁰ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

³⁰¹ *Id.* at 84, 93.

³⁰² *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

doubt.”³⁰³ Side opinions questioned the continued vitality of *McMillan*’s mandatory minimum determination in light of the *Apprendi*.³⁰⁴

Initially unwilling to extend *Apprendi* to mandatory minimums in *Harris v. United States*,³⁰⁵ the Court did so in *Alleyne v. United States*.³⁰⁶ *Alleyne* was convicted under the statute that imposes a series of mandatory minimum penalties upon defendants who carry a firearm during and in furtherance of a crime of violence (5 years for carrying; 7 years for brandishing; 10 years for discharging).³⁰⁷ The jury found him guilty of carrying; the trial court judge concluded the gun had been brandished.³⁰⁸ The Sixth Amendment requires that the question of brandishing had to be found by the jury, the Court declared:

Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi* and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an element that must be submitted to the jury.³⁰⁹

Neither *Apprendi* nor *Alleyne* limits Congress’s authority to establish mandatory minimum sentences or limits the authority of the courts to impose them. They simply dictate the procedural safeguards that must accompany the exercise of that authority. Thus, the lower federal appellate courts have held that the neither the Fifth nor Sixth Amendment requires that “facts that determine whether a defendant is eligible under the safety valve for a sentence below the statutory minimum” need be found by the jury beyond a reasonable doubt.³¹⁰

Separation of Powers

While “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another,”³¹¹ the Supreme Court has observed that “Congress has the power to define criminal punishments without giving the courts

³⁰³ *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (emphasis added).

³⁰⁴ “Thus, the Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed – which, by definition, must include increases or alterations to either the minimum or maximum penalties – must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.” *Id.* at 533 (O’Connor, with Kennedy, Breyer, JJ., and Rehnquist, Ch.J., dissenting) (referring to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). See also *id.* at 518, 521-22 (Thomas, J., concurring); *Rethinking Mandatory Minimums After Apprendi*, 96 NW. U. L. REV. 811 (2002); Levine, *The Confounding Boundaries of “Apprendi-land”: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AMER. J. CRIM. L. 377 (2002).

³⁰⁵ *Harris v. United States*, 536 U.S. 545, 568 (2002).

³⁰⁶ 133 S. Ct. 2151 (2013).

³⁰⁷ 18 U.S.C. § 924(c).

³⁰⁸ *Alleyne*, 133 S. Ct. at 2156.

³⁰⁹ *Id.* at 2155.

³¹⁰ *United States v. Leanos*, 827 F.3d 1167, 1169-70 (8th Cir. 2016) (citing *United States v. King*, 773 F.3d 48, 55 (5th Cir. 2014); *United States v. Lizarraga-Carrizales*, 757 F.3d 955, 997-99 (9th Cir. 2014); and *United States v. Harakaly*, 734 F.3d 88, 97 (1st Cir. 2013)).

³¹¹ *Loving v. United States*, 517 U.S. 748, 757 (1996).

any sentencing discretion.”³¹² Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation-of-powers grounds,³¹³ and the Supreme Court has denied any separation-of-powers infirmity in the federal sentencing guideline system, which at the time might have been thought to produce its own form of mandatory minimums.³¹⁴

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³¹² *United States v. Chapman*, 500 U.S. 453, 467 (1991).

³¹³ *United States v. Carpenter*, 819 F.3d 880, 892 (6th Cir. 2016); *United States v. Major*, 676 F.3d 803, 811 (9th Cir. 2012); *United States v. Nigg*, 667 F.3d 929, 934-35 (7th Cir. 2012); *United States v. Page*, 604 F.3d 1268, 1274 (11th Cir. 2010); *United States v. Walker*, 473 F.3d 71,76 (3d Cir. 2007); *United States v. Rasco*, 123 F.3d 222, 226-27 (5th Cir. 1997); *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997).

³¹⁴ *Mistretta v. United States*, 488 U.S. 361 (1989). *Mistretta*, sentenced under the guidelines to 18 months’ imprisonment for conspiracy to distribute cocaine, argued that the guidelines constituted an unconstitutional delegation of Congress’s legislative authority and that the service of judges upon the Commission constituted extrajudicial service at odds with the separation of powers doctrine. The Court rejected both arguments concluding “that in creating the Sentencing Commission ... Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches,” *Id.* at 412.