

Sentence Enhancers

| | Doubling Minimum Mandatories (Min Mand) | Career Offenders | Armed Career Criminal | Three Strikes | | | | | | | | | | | | | | | | | | |
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| Legal Sources | 21 U.S.C. §841(b)(1)(A),(B), 851 | USSG 4B1.1; 28 U.S.C. §944(h) | USSG §4B1.4; 18 U.S.C. §924(e) | 18 U.S.C. §3559(c) | | | | | | | | | | | | | | | | | | |
| Requirements | <p>1. Defendant manufacture, distribute or possess with intent:</p> <table border="0"> <tr> <td>Drug</td> <td>10 yr</td> <td>5 yr</td> </tr> <tr> <td>Heroin</td> <td>1 kilo</td> <td>100 g</td> </tr> <tr> <td>Cocaine</td> <td>5 kilos</td> <td>500 g</td> </tr> <tr> <td>Crack</td> <td>50 g (280 g)</td> <td>5 g (28 g)</td> </tr> <tr> <td>Marijuana</td> <td>1000 k/plants</td> <td>100 k/plants</td> </tr> <tr> <td>Meth</td> <td>50 g pure/500gmix</td> <td>5 g pure/50gmix</td> </tr> </table> <p>2. Deft. has one or more prior convictions for "felony drug offense." 3. Govt. must file timely §851 notice</p> | Drug | 10 yr | 5 yr | Heroin | 1 kilo | 100 g | Cocaine | 5 kilos | 500 g | Crack | 50 g (280 g) | 5 g (28 g) | Marijuana | 1000 k/plants | 100 k/plants | Meth | 50 g pure/500gmix | 5 g pure/50gmix | <p>1. Defendant is at least 18. 2. Instant offense is felony conviction for "crime of violence" or "controlled substance" offense. 3. Two prior convictions for "crimes of violence" or "controlled substance offenses."</p> | <p>1. Violation of 18 U.S.C. §922(g) (felon in possession of a firearm). 2. Three prior convictions for "violent felonies" or serious drug offenses committed on different occasions. Note: there is a guideline enhancement & a statutory min mand enhancement</p> | <p>1. Instant offense must be "serious violent felony" ("SVF") 2. Two prior convictions for SVF or one prior SVF + one prior "serious drug offense."</p> |
| Drug | 10 yr | 5 yr | | | | | | | | | | | | | | | | | | | | |
| Heroin | 1 kilo | 100 g | | | | | | | | | | | | | | | | | | | | |
| Cocaine | 5 kilos | 500 g | | | | | | | | | | | | | | | | | | | | |
| Crack | 50 g (280 g) | 5 g (28 g) | | | | | | | | | | | | | | | | | | | | |
| Marijuana | 1000 k/plants | 100 k/plants | | | | | | | | | | | | | | | | | | | | |
| Meth | 50 g pure/500gmix | 5 g pure/50gmix | | | | | | | | | | | | | | | | | | | | |
| Predicate Offense Definitions | Prior "felony drug offense" = any state or federal offense classified as a felony involving manufacture, distribution, possession with intent or SIMPLE POSSESSION | "Crime of violence" = any felony for burglary of a dwelling, arson, extortion, other conduct involving serious risk of physical injury or with an element of the use or threatened use of force. §924(c) counts as crime of violence." Controlled substance offense" = any state or federal offense involving manufacture, distribution, or intent to distribute. (NOT SIMPLE POSSESSION; NOT PURCHASE) §924(c) convictions = predicate & instant offenses with base offense level 37 and Cr. Hist. Cat. VI. | "Violent felony" = any felony that i. has an element the use, threat of use, or attempted use of force against another person or ii. is burglary, arson, extortion, explosives use, or otherwise involves conduct that presents a serious potential for risk of physical injury to another. "Serious drug offense" = fed drug offenses with 10 year + max, or state drug offenses involving manufacture/ distribution and at least 10 year max. | SVF= murder, sex crimes, kidnapping, extortion, arson, firearms use, attempts/conspiracies thereof, or any other offense punishable over 10 years with a force element or which by its nature involves substantial risk of physical force being used. "Serious drug offense" = anything punishable under 21 USC §841 (b) (1) (A); 1K heroin, 5K cocaine, 50g crack, etc. | | | | | | | | | | | | | | | | | | |
| Results | Min mand. trumps guideline sentencing range. Doubles min mand. from 5 to 10 years or 10 to 20 years if deft. has 1 prior drug felony. If has 2 or more, mand. life if drugs amounts 1 kilo heroin, etc. If no min mand. but deft. has prior and govt files §851 notice, raises stat. max from 20 to 30 yrs | Criminal history category becomes VI. Offense level determined by statutory max, which is determined depending on whether government files §851 enhancement, except for §924(c) convictions. | Criminal history becomes at least IV. Offense level is at least raised to 33 or 34. Under §924(e), 15 year mandatory minimum. | Mandatory life imprisonment. Note that 18 USC §3582 may provide relief to defendants over 70 who have done at least 30 years. | | | | | | | | | | | | | | | | | | |
| Notes | NOT AUTOMATIC. Notice before trial/plea under §851(a) must be given by the govt. If 851 notice filed, doubles supervised release term. Only § 5K1.1 motions with 18 USC §3553(e) or Rule 35 motions or safety valve will waive min mand. NO TIME LIMIT ON PRIORS | AUTOMATIC ENHANCEMENT: No notice need be filed before trial/plea. 15 YR TIME LIMIT ON PRIORS: Sentenced or served time on prior within 15 yrs of commission of instant offense. Prior convictions "sustained" before commission of instant offense. Both priors counted separately, cannot be "related cases." | AUTOMATIC ENHANCEMENT: No notice need be filed before trial/plea, Only §5K1.1 motions with 18 USC §3553(e) or Rule 35 motions will waive 15-yr min mand. NO TIME LIMIT ON PRIORS: Priors can be charged at the same time, but have to be discrete crim episodes to count. | NOT AUTOMATIC: Govt must give written notice before trial/plea under 21 USC §851 (a). NO TIME LIMIT ON PRIORS: Priors must occur after previous prior conviction (conduct-conv.-conduct.) Robberies don't count as SVF's if deft proves that no dangerous weapon was used/threatened. Similar exception for arson exists. | | | | | | | | | | | | | | | | | | |

Practice Tip: When attacking prior convictions, it is important to challenge all facts describing prior convictions. See *United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006)).

Also, counsel should attack any prior not supported by court documents approved by *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 1263 (2005), e.g., indictment, judgment, plea transcript.

by Jaime Hawk, Assistant Federal Defender, Federal Defenders of Eastern Washington & Idaho

Sentence Reducers

| Source Of Law | Safety Valve USSG §5C1.2; 18USC §3553(f) §2D1.1(b)(11) | USSG § 5K1.1 18 U.S.C. § 3553(e) | Rule 35 - FRCRP 18 U.S.C. §3553(e) | USSG Ch. 5 Downward Departures | Downward Variances based on 18 U.S.C. § 3553 (a) Factors |
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| Require- Ments | <p>There are 2 types of Safety valve provisions.</p> <p>USSG §5C1.2 & 18USC §3553(f) will waive the statutory minimum mandatories found in 21 U.S.C. §§841, 844, 846, 960, 963.</p> <p>USSG §2D1.1(b)(11), will get deft an additional 2 levels off.</p> <p>The requirements for both types of safety valve provisions are:</p> <ol style="list-style-type: none"> 1. 0-1 criminal history points. 2. No violence or guns. 3. Offense didn't result in death or serious injury. 4. Not leader or organizer under USSG §B1.1 or CCE. 5. By sentencing, have provided government with information about offense and relevant conduct. | <ol style="list-style-type: none"> 1. Motion of government at or prior to sentencing. 2. For "substantial assistance to authorities," but court can evaluate significance, nature, extent and timeliness of assistance and truthfulness, completeness, and reliability of any testimony plus injury or danger to defendant and family. | <ol style="list-style-type: none"> 1. Motion of govt after sentencing, but within <ol style="list-style-type: none"> a. 1 yr of sentencing, though in practice does include cooperation before defendant sentenced (a "place holder" motion can be filed within 1yr to permit govt to evaluate cooperation);or b. > 1 yr after sentencing if deft's substantial assistance involved: <ul style="list-style-type: none"> * info not known to deft till 1 yr or more after sentencing; * info provided by deft to govt w/in 1 yr, but which didn't become useful to govt till > 1 yr; or * info the usefulness of which could not reasonably have been anticipated by the deft till > 1 yr after sentencing & which was promptly provided to govt after its usefulness was reasonably apparent to deft. 2. substantial assistance based on same criteria as §5K1.1 departures. | <p>Motion no later than time of sentencing (check local rules or specific judge's rules on timeliness)</p> <p>See USSG Ch. 5 for various departures. USSG Ch 5 sets out different bases for departures, including §5K2.0 (outside the heartland), each having different criteria.</p> | <p>Must consider 18 U.S.C. § 3553 (a) Factors:</p> <ol style="list-style-type: none"> 1. nature & circumstances of offense & history & characteristics of deft; 2. need to reflect seriousness of offense, promote respect for the law, & provide just punishment for offense; 3. need for deterrence; 4. need to protect the public; 5. need to provide deft with needed educational or vocational training or medical care; 6. kinds of sentences available; 7. sentencing guidelines range; 8. pertinent policy statements of the Sentencing Commission; 9. need to avoid unwanted sentencing disparities; and 10. need to provide restitution to victims. |
| Results | <p>Can reduce any drug sentence, with 2 additional levels off, including any mandatory minimum statutory term to guideline sentencing range.</p> | <p>Court may depart below guideline range without limit, even below amount requested by govt.</p> | <p>No limit on departure downward from guideline sentence or statutory minimum once government "opens door" by making motion.</p> | <p>Departure in guideline levels, but not below mand. min.</p> | <p>Must impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing; May not sentence below mand. min.</p> |
| Notes | <p>No motion required; Waives min mand.; Court must grant if deft meets criteria; Sentencing court decides if truthful. Also, §2D1.1(b)(11) doesn't require a minimum offense level 17 like other safety valve provision does; doesn't require motion by govt.</p> | <p>Govt. motion required, but govt discretion to file; Can waive min mand, but only if govt mot references 18 U.S.C. §3553(e); Sentencing court's discretion to grant.</p> | <p>Govt. motion required, but govt discretion to file; Waives min mand automatically, without having to reference §3553(e) See Rule 35(b)(4); Sentencing court's discretion to grant.</p> | <p>No motion by govt required, depends on particular judge as to whether deft must file motion or whether argument only is ok. Does not waive min mand The court has discretion to grant a reasonable dept. if deft proves the grounds exist.</p> | <p>No motion required; sentencing memo is good idea; know your judge; Does not waive min mand; Sentencing court's discretion; guideline sentence cannot be presumed reasonable. <i>See, e.g., Gall v. United States</i>, 128 S. Ct. 586 (2007); <i>Rita v. United States</i>, 127 S. Ct. 2456 (2007); <i>United States v. Talley</i>, 431 F.3d 784 (11th Cir.2005); <i>United States v. Hunt</i>, 459 F.3d 1180 (11th Cir.2006).</p> |