



Impact of Prior Minor Offenses on Eligibility for Safety Valve

UNITED STATES SENTENCING COMMISSION



United States Sentencing Commission

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Impact of Prior Minor Offenses on Eligibility for Safety Valve

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This report is the first in a series of reports that discuss the criminal history rules in the United States sentencing guidelines promulgated by the United States Sentencing Commission.² In this report, the impact of prior minor offenses committed by federal drug offenders is reviewed to determine the effect of those crimes on eligibility for application of the statutory and guideline “safety valve” provisions.³

Introduction

As part of its ongoing review and amendment of the guidelines, the Commission, in August 2006, began to examine various aspects of the criminal history rules located in Chapter Four of the guidelines, including the treatment of misdemeanor and petty offenses (minor offenses).⁴ The Commission hosted two roundtable discussions on November 1, 2006, and November 3, 2006, in Washington, D.C., to solicit input from judges, defense attorneys, probation officers, Department of Justice representatives, and members of academia as one component of this review. The Commission also gathered information through its training programs, the public comment process, and comments received during a public hearing held in March 2007.

During the process, some commentators hypothesized that the inclusion of minor offenses in the criminal history calculation has an unwarranted adverse impact on offenders’ criminal history scores and, ultimately, their guideline ranges and sentences. In April 2007, the Commission promulgated an amendment to respond to these concerns and to modify the provisions determining whether and when certain minor offenses are counted in the criminal history score.⁵

The dialogue leading to the promulgation of the amendment focused, in part, on the frequency with which prior minor offenses caused a defendant convicted of drug trafficking to become

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ineligible to receive the benefit of the safety valve relief provided by statute⁶ and guideline.⁷ Data reviewed by the Commission in connection with the amendment showed that relatively few drug trafficking offenders are excluded from receiving the safety valve because of the guideline provision regarding minor offenses.

Background

Federal judges must calculate a sentencing range pursuant to the United States sentencing guidelines as a starting point for determining the appropriate punishment for a person convicted of a federal crime.⁸ The guidelines recommend a sentence within a range of months based on the offense for which the defendant was convicted and the defendant's past criminal history. The guidelines use a two-dimensional grid known as the Sentencing Table to provide the recommended range. The seriousness of the offense⁹ is measured on one axis and the offender's criminal history is measured on the other axis. There are 43 offense levels forming the vertical axis and six criminal history categories that form the horizontal axis of the Sentencing Table. The recommended guideline range for an offender is determined by the cell of the table that lies at the intersection of the scores for his or her offense and criminal history.¹⁰

Under Chapter Four of the guidelines, offenders are assigned to one of the six "criminal history categories" based on their prior criminal history. For each past conviction that is counted under the guidelines, offenders are assigned from one to three points based on the seriousness of that past conviction.¹¹ Additionally, the criminal history score can increase based on the offender's "status" at the time the offender commits a federal offense (e.g., two points are added if the offender was on probation when he or she committed the federal offense).¹² Also, an offender receives points if he or she commits the federal crime within two years of release from imprisonment for a prior offense.

While some minor crimes receive criminal history points,¹³ others are expressly excluded from the calculation of the criminal history score.¹⁴ In fiscal year 2006, minor offenses that could receive points were included in the criminal history score only if one of the following criteria were met: the sentence for that minor crime was a term of probation of at least one year, the sentence for the minor crime was a term of imprisonment of at least 30 days, or the prior minor crime was similar to the instant offense.

Because of these “counting rules,” Criminal History Category I (applicable to offenders with zero or one point) includes both offenders with prior convictions and others who have had no prior contact with the criminal justice system. Finally, because some prior convictions do not receive points,¹⁵ some offenders in Criminal History Category I may have had multiple prior convictions.

In 1994, Congress enacted the statutory safety valve provision at 18 U.S.C. § 3553(f) requiring courts to sentence drug offenders without respect to any otherwise applicable statutory mandatory minimum if five criteria are met. The first criterion is that the defendant be in Criminal History Category I.¹⁶

The guidelines incorporate the statutory safety valve provision at USSG §5C1.2. In addition, the guidelines provide a further benefit at USSG §2D1.1 that grants a two-level decrease for drug offenders who meet the requirements of the statutory safety valve, regardless of whether a statutory mandatory minimum sentence would have applied in that case.

Methodology

As part of its 2006 study, the Commission undertook an intensive data collection effort to analyze in detail the criminal backgrounds of 11,300 offenders. The sample was randomly selected from the Commission’s fiscal year 2006 datafile and consists of cases that were sentenced after June 6, 2006.¹⁷ The 11,300 cases represent 17.6 percent of the total offender population with complete guideline information that was submitted to the Commission in fiscal year 2006. As discussed in more detail below, the compilation of the datafile for this analysis was based on the criminal history information provided in the presentence investigation reports.¹⁸ The criminal history information from the presentence investigation reports was compared to the Statement of Reasons¹⁹ to determine if the court made a finding that changed the criminal history score.²⁰ If an inconsistency was identified, and could not be resolved, the case was excluded from the analysis. In total, 11,207 cases were included in the analysis.²¹ The numbers reported in this paper are weighted based on the 11,207 case sample to reflect the proportion of cases estimated in the annual population (final weighted N=63,528).²² Because the data in this analysis was weighted based on the sample of cases, it should not be used for comparison to other Commission publications using actual fiscal year 2006 annual data.²³

The numbers reported in this paper are weighted based on the 11,207 case sample to reflect the proportion of cases estimated in the annual population (final weighted N=63,528).

[T]he analysis in this report focuses on the first requirement of the safety valve, that the defendant must be in Criminal History Category I (*i.e.*, have been assessed no more than one criminal history point based on the offender's prior criminal conduct). The analysis revealed that while some offenders do become ineligible for safety valve relief for this reason, the overall impact of prior minor offense convictions is minimal.

The information collected from the 11,207 cases included the number of prior convictions, the types of prior convictions, and the sentence imposed on each prior conviction. Additional information collected for minor offenses included whether the conviction resulted in "status" and/or "recency" points pursuant to USSG §4A1.1(d) and (e) and whether any uncounted, non-minor offense (due to the four-point maximum for counting one-point offenses) would have been counted had the minor offenses been excluded from the criminal history score. From this data, the portion of minor offenses that received criminal history points and those offenders whose criminal history categories and guideline ranges were ultimately affected by a minor offense was determined.²⁴

The Effect of Minor Offenses on Safety Valve Eligibility

The benefit from safety valve relief can significantly reduce a sentence. As discussed above, practitioners have raised a concern that offenders are frequently disqualified from receiving the benefit of the safety valve because a prior minor offense moves them from Criminal History Category I to Criminal History Category II or higher. Therefore, the analysis in this report focuses on the first requirement of the safety valve, that the defendant must be in Criminal History Category I (*i.e.*, have been assessed no more than one criminal history point based on the offender's prior criminal conduct). The analysis revealed that while some offenders do become ineligible for safety valve relief for this reason, the overall impact of prior minor offense convictions is minimal.

The total number of drug trafficking offenders in the fiscal year 2006 weighted sample is 24,483 (38.5%). Of these offenders, 9,115 (37.2% of the drug trafficking offenders) received the benefit of the safety valve provision. Of the 9,115 who received the benefit of the safety valve provision, 1,519 had a prior minor offense in their criminal history that did not affect their eligibility for this relief (*i.e.*, the minor offense or offenses received zero or one point and the offender remained in Criminal History Category I). As noted above, a prior conviction for a minor offense can result in criminal history points if the offense was enumerated in USSG §4A1.2(c)(1) and met the specified criteria. Conversely, an offender can have multiple minor offenses enumerated in USSG §4A1.2(c)(1) that did not result in any criminal history points.

Thus, the treatment of minor offenses in the criminal history calculation can vary. The 1,519 offenders include those with convictions for minor offenses that did not receive a criminal history point, those with a prior minor conviction that received one point, and those with a combination of minor offenses that did not receive a point coupled with those that did receive one point.

In fiscal year 2006, an estimated²⁵ 788 of the 15,368 drug trafficking offenders who did not receive the benefit of the safety valve had prior convictions for minor offenses and would have satisfied the first criteria of the safety valve provision had all minor offenses been excluded from the criminal history calculation.²⁶ However, not all of these 788 offenders would have met the other criteria to qualify for safety valve relief. Of the 788 offenders who had no more than one criminal history point after excluding convictions for minor offenses, an estimated 260 (33.0% of the 788 offenders; 1.1% of the total drug trafficking offender population) satisfied the other criteria and, therefore, appear to have been eligible for safety valve relief but for the minor offense conviction. In other words, these 260 offenders, 1.1 percent of the total weighted drug trafficking population, would have been eligible for the safety valve if all minor offense convictions had been excluded in that each of them would have received a two-level reduction in their final offense level under the guidelines.

Of these 260 offenders, an estimated 91 (35.0% of the 260 offenders; 0.4% of the total drug trafficking offender population) were subject to a mandatory minimum penalty.²⁷ Of these 91 offenders, 79 (86.8% of the 91 offenders; 0.3% of the total drug trafficking offender population) would have benefitted from the application of the safety valve in that a guideline range below the statutory minimum would have applied had their minor offense(s) not been counted in determining their criminal history category. As a result, the sentence for these 79 offenders would have been below the statutory minimum.²⁸ The other 11 offenders would have received a two-level reduction in the total offense level but their resulting guideline range would still have been greater than the length of imprisonment required by the statutory minimum penalty. Thus, the two-level guideline range reduction would likely decrease their term of imprisonment but not to the extent of the 79 offenders exposed to a statutory minimum that exceeded the guideline range.

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These data show that disqualification for application of the safety valve based solely on a conviction for a prior minor offense occurs infrequently. However, although infrequent, the resulting sentence for all but 11 of the 91 offenders would have been reduced below the statutory mandatory minimum penalty.

Conclusion

Prior convictions for minor offenses have a minimal impact on safety valve eligibility. Some offenders are subject to an increase in their criminal history score and become ineligible for safety valve relief as a result of their prior minor offenses. However, these offenders comprise a very small percentage of the drug trafficking offender population. Therefore, the notion that including minor offenses in the criminal history calculation causes wide spread inequity in sentencing is an overstatement. Of the 24,483 drug trafficking offenders in the sample, only 260 (1.1%) were disqualified from eligibility for the safety valve provision due to minor offenses in their criminal history. For the vast majority of drug trafficking offenders, past convictions for minor offenses have no effect on the punishment they receive for their later federal crime.

Endnotes

1. Timothy Drisko and Adam Henerey contributed to the data analysis.
2. The United States Sentencing Commission is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues.
3. 18 U.S.C. § 3553(f); United States Sentencing Commission, *Guidelines Manual*, §5C1.2 (2008) (hereinafter USSG).
4. The provisions dealing with misdemeanor and petty offenses are located at USSG §4A1.2(c).
5. Amendment No. 709 to the guidelines modified USSG §4A1.2. Subsections (c)(1) and (2) of that guideline govern whether and when certain misdemeanor and petty offenses are counted. Prior to November 2007, subsection 4A1.2(c)(1) listed offenses that were counted only when the prior sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days. Subsection 4A1.2(c)(2) lists offenses that are never counted toward the defendant's criminal history score. The 2007 amendment moved two classes of offenses from §4A1.2(c)(1) to §4A1.2(c)(2): fish and game violations and local ordinance violations (except those violations that are also violations under state criminal law). The amendment also modified §4A1.2(c)(1) to provide that probation sentences would be counted only when a term of "more than" one year was imposed. The amendment became effective on November 1, 2007. USSG App. C, 709.
6. 18 U.S.C. § 3553(f).
7. USSG §2D1.1(b)(9). This provision provides a two-level decrease in the offense level for an offender who meets the criteria. In the 2007 *Guidelines Manual*, the provision is found at §2D1.1(b)(11).
8. *United States v. Booker*, 543 U.S. 220, 245 (2005).
9. Each offense has a corresponding base offense level (BOL) that is based on the severity of the crime committed. Offenses may also have one or more specific offense characteristics that adjust the offense level upward or downward. Additionally, the final offense level depends on any victim-related adjustment, the offender's role in the offense, whether the offender obstructed or impeded justice, if there were multiple counts in the guideline computation, and whether the offender accepted responsibility for his or her crime.
10. See USSG §1B1.1.
11. Three points are added for prior sentences of imprisonment exceeding 13 months; two points are added for prior sentences of imprisonment of at least 60 days and less than or equal to 13 months; and one additional point is imposed for each prior sentence of less than 60 days, sentences of probation, fines, or alternative sanctions. An offender can receive no more than a total of four points for offenses in this latter group. USSG §4A1.1.

Offenders who received either zero or one criminal history point fall into Criminal History Category I; two or three points fall into Criminal History Category II; four, five, or six points fall into Criminal History Category III; seven, eight, or nine points fall into Criminal History Category IV; ten, eleven, or twelve points fall into Criminal History Category V; and offenders with thirteen points or more fall into Criminal History Category VI.

12. See USSG §4A1.1(d). Two points are added to the defendant's criminal history score if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

13. In fiscal year 2006, the offenses at USSG §4A1.2(c)(1) were 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, fish and game violations, gambling, hindering or failure to obey a police officer, insufficient funds check, leaving the scene of an accident, local ordinance violations, non-support, prostitution, resisting arrest, and trespassing.

14. In fiscal year 2006, the following prior offenses and offenses similar to them by whatever name they are known, were never counted: hitchhiking, juvenile status offenses, loitering, minor traffic infractions (e.g., speeding), public intoxication, and vagrancy. USSG §4A1.2(c)(2).

15. *Id.*

16. The other criteria are (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this request. 18 U.S.C. § 3553(f).

17. All of the cases sentenced after June 6, 2006, were available as electronic files at the United States Sentencing Commission. The sample was drawn after this date for efficiency and logistical reasons. The individual offender characteristics (e.g., offense types, demographics, district of sentencing) from this sample are comparable to the entire population of fiscal year 2006 offenders. Because there is no evidence that the criminal histories of offenders sentenced during one time of the year differs from those sentenced at other times of the year, this sample was deemed to be representative of all fiscal year 2006 offenders.

18. The presentence investigation report was used because it contains detailed information about an offender's prior criminal record.

19. See 28 U.S.C. § 994(w)(1)(b). Following entry of judgment in every case, the sentencing court submits to the Commission a written report of the sentence, including the Statement of Reasons for the sentence imposed.

20. The presentence investigation report was compared to Statement of Reasons because the Statement of Reasons indicates the offender's guideline range, offense level, and criminal history category as determined by the court.

21. Any change in the criminal history calculation should be noted on the Statement of Reasons. A change could include removing a prior event from the calculation, adding an event to the calculation, changing the points assigned to an event, or adding recency/status points. Any change in the calculation has implications for the data collection and analysis and must have been resolved to be included in the final 11,207 cases. For example, if the presentence investigation report provided a Criminal History Category III and the Statement of Reasons provided a Criminal History Category II without an explanation for the change, the case was excluded because the reason for the change could not be identified. In this analysis, 93 cases were excluded due to missing or inconsistent criminal history information.

22. Weighting refers to a technique of adjusting data that is collected from a sample of the population to represent the entire population from which the sample was drawn.

23. Fiscal year 2006 data for the actual offender population is reported in the Commission's 2006 *Sourcebook of Federal Sentencing Statistics*.

24. Any increase in the criminal history category based on the inclusion of minor offenses was considered. This includes adding points based on the scoring rules pursuant to USSG §4A1.2(c) and those regarding "status" or "recency" in §4A1.1(d) and §4A1.1(e).

25. The data is "estimated" because it is weighted to represent the entire fiscal year 2006 population based on a sample of cases.

26. This number represents offenders who had a minor offense in their criminal history that resulted in at least one criminal history point and were placed in Criminal History Category II or higher because of the inclusion of that offense.

27. This number represents offenders who did not receive a USSG §5K1.1 substantial assistance departure (which provides further authority to courts to sentence below an otherwise applicable mandatory minimum sentence).

28. Of the 79 offenders, 40 would have been eligible for the safety valve had the 2007 criminal history amendment been in effect at the time they were sentenced. Each of these offenders would have had a lower criminal history score as a result of that portion of the 2007 amendment that required probation sentences to be "at least" one year in length in order to receive points. None of these 79 offenders would have benefited from that portion of the 2007 amendment that moved Fish and Game Violations and Local Ordinance Violations to the category of offenses that does not receive points.