

Does *Pulsifer* pulverize sentencing reform?

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On March 15, a divided U.S. Supreme Court decided *Pulsifer v. United States*, No. 22-340 (6-3) in a way that thwarts sentencing reform. The case involved the “safety valve,” a statutory provision that allows federal judges to sentence drug trafficking defendants below an otherwise applicable mandatory minimum penalty provided the defendant meets several criteria.

As discussed below, the majority’s decision greatly restricts the availability of the safety valve. This despite Congress’ recent effort to expand its availability as a means to counter the draconian nature of mandatory minimum penalties and thereby reduce their impact on an already overcrowded federal prison population.

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Forty years ago, Congress created the U.S. Sentencing Commission tasking it with promulgating sentencing guidelines to help guide the discretion of federal judges when sentencing defendants. Despite this, Congress also created mandatory minimum penalties, which trump the guidelines and apply primarily in drug trafficking cases. These mandatory minimum penalties have long been criticized not only for their one-size-fits all approach, but also because of their draconian nature, inherent racial bias, and significant contribution to the dramatic increase in the federal prison population.

Recognizing the problems with mandatory minimum penalties, Congress has occasionally taken steps toward blunting their impact. Among these was the creation in the mid-1990s of a “safety valve” at 18 U.S.C. § 3553(f), which allows federal judges to impose a sentence below an otherwise applicable mandatory minimum penalty.

According to the latest U.S. Sentencing Commission statistics, over 60% of the 19,066 defendants sentenced for a federal drug offense

last fiscal year were subject to a mandatory minimum penalty of at least five years, most of whom, however, were subject to at least a 10-year minimum. Of those defendants, nearly 40% received the benefit of the safety valve. Thus, its ameliorative impact is quite substantial.

In order to be eligible for the safety valve, however, a defendant must meet five criteria. Originally, they were:

- (1) the defendant does not have more than 1 criminal history point;
- (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; 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.

Via the First Step Act of 2018, Congress expanded the availability of the safety valve by relaxing the restriction of the first criterion, which precluded most drug defendants facing a mandatory minimum from qualifying for it. So, rather than limiting the safety valve to only those with no more than a single criminal history point, Congress changed the first criterion to the following:

- (1) the defendant does not have —
 - (A) more than 4 criminal history points;
 - (B) a prior 3-point offense; and
 - (C) a prior 2-point violent offense.

The question before the Court in *Pulsifer* was how to interpret this criterion. Does it mean that a defendant could qualify for the safety valve provided he did not have A, B, and C all at the same time? If so, then most drug defendants subject to a mandatory minimum could qualify (assuming they met the other four criteria as well). Or, does it mean that as long as a defendant has one of those, then he does not qualify? If so, then far fewer could qualify.

While the Court found both readings plausible, the majority sided with the Government and the latter reading. Writing for the

majority, Justice Elena Kagan focused on the “context” of 3553(f)(1) and held that even having a single 2-point violent offense in one’s criminal history precludes application of the safety valve. In other words, 3553(f)(1) “creates an eligibility checklist. It specifies three necessary conditions for safety-valve relief.”

Writing at length in dissent, Justice Neil Gorsuch (joined by Justices Sonia Sotomayor and Kentanji Brown Jackson, a former U.S. Sentencing Commissioner) observed that “[o]ur decision today ... promises to affect the lives and liberty of thousands of individuals.” As he notes, “about 33% of drug offenders were eligible for safety-valve relief under the law’s old terms. Under Pulsifer’s understanding of the First Step Act, about 66% would become eligible for individualized sentencing. By contrast, under the government’s reading of the Act, that number would shrink to around 44%.”

Thus, while about 11% more drug defendants have been made eligible for the safety valve due to the First Step Act’s change to the first criterion, the Court today precludes twice as many — another 22% — from its relief. With the analysis resting on the reading by the majority of the Court of “and” to mean “or” in this “context.”

But as Justice Gorsuch asks, “All to what end? To deny some individuals a chance — just a chance — at relief from mandatory minimums and a sentence that fits them and their circumstances. It is a chance Congress promised in the First Step Act, and it is a promise this Court should have honored.”

This is especially noteworthy since the U.S. Bureau of Prisons reports that drug offenders make up the largest proportion of inmates by far at 44.4%. Those convicted of weapons, explosive and arsons offenses sit a distant second at 21.8%. And while the BOP’s inmate population finally fell from being over its capacity for the first time in nearly 40 years in 2020, that was as a result of the pandemic and accordingly did not last. Since then, the BOP’s inmate population has been steadily increasing. Last year it was over 9% of its capacity and is projected to be over 10% this year.

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The Court’s eschewing of a plain reading of the statute in favor of a “context” oriented one will now result in thousands of inmates spending many additional years behind bars in an expensive, overcrowded and greatly mismanaged prison system. The full promise of the First Step Act will have to wait for future legislation.

About the authors



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