

Turning Off the Spigot



How Sentencing Safety Valves Can Help States Protect Public Safety and Save Money

With a foreword by Pennsylvania State Senator Stewart Greenleaf

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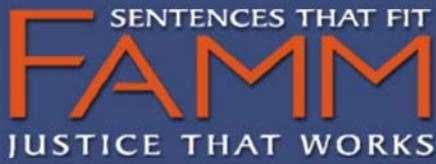
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FAMM (Families Against Mandatory Minimums) is a nonprofit, nonpartisan organization fighting for fair and proportionate sentencing laws that allow judicial discretion while maintaining public safety.

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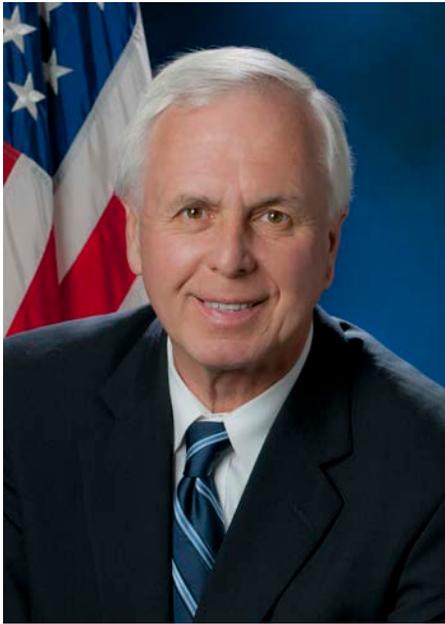
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Foreword

By Pennsylvania State Senator Stewart Greenleaf



During the 1980s and 1990s, lawmakers with good intentions, I being one of them, voted to enact many mandatory minimum sentences in an effort to reduce crime. Lawmakers across the country were led to believe that mandatory minimum prison sentences were necessary to remove drug dealers from the streets and stop the flow of illegal drugs into our communities. This national movement toward harsh punishment has had the opposite effect of its intentions, as my home state of Pennsylvania and many other states have seen an unprecedented increase in their inmate populations without a proportionate benefit to public safety.

Mandatory minimums are a one-size-fits-all approach to sentencing that have taken away judges' discretion and force the sentencing of offenders without consideration of the individual circumstances of a case. Mandatory sentences have been extended from applying to "big-time dealers" to many smaller fish who deal drugs to support their own addiction. At least two-thirds of our inmates have drug addiction issues. Mandatory minimums have been a driving force behind Pennsylvania's inmate population increase from 8,000 in 1980 to 51,000 in 2011.

FAMM's work on fair sentencing issues is changing attitudes here in Pennsylvania and across the country as many states are now moving toward fairer sentencing practices. FAMM has provided valuable advice and insight to the Pennsylvania Senate Judiciary Committee and to me personally as we work toward prison reform.

This report examines several states' "safety valve" statutes — legislation that allows judges to bypass a mandatory sentence under certain circumstances. I support legislation that would provide a safety valve for cases where the mandatory minimum sentence would be unjust. A federal law providing for a safety valve was enacted in 1994. Since that time nearly 80,000 federal drug offenders facing mandatory minimum

sentences have received the benefit of the safety valve, saving the federal government an estimated \$25,000 per prisoner, per year for each year shaved off of the sentence. About one-third of states have enacted some type of safety valve statute, with considerable cost savings and without a reduction in public safety.

Just as I was once an advocate for harsher, longer sentences, I am now at the forefront of the movement to balance our criminal justice system in favor of more rehabilitation and judicial discretion. In Pennsylvania, we have recently made great progress with landmark alternative sentencing statutes, and I hope that soon mandatory minimums will be more widely accepted as an area in need of reform.

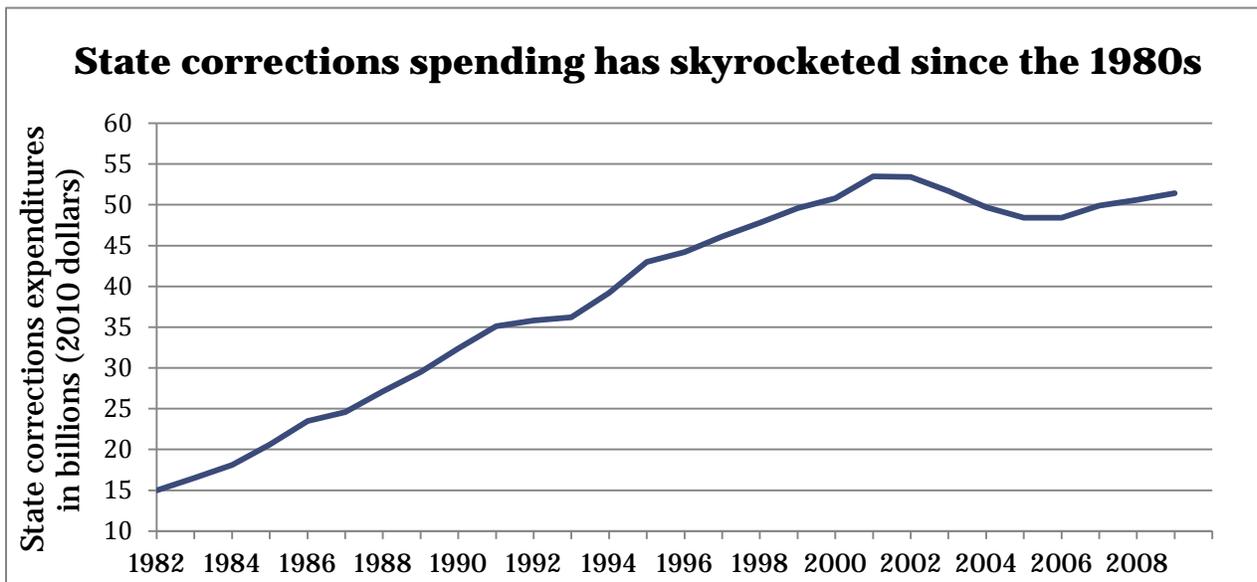
The following report should serve as a guide to lawmakers and policy advisors across the country who are seeking to reduce their states' inmate populations and save precious resources currently spent on incarceration. FAMM has demonstrated that we can be tough on crime as well as smart on crime.

Pennsylvania State Senator Stewart J. Greenleaf (R-Montgomery/Bucks) is chairman of the Senate Judiciary Committee. He has represented the 12th Senatorial District in the Pennsylvania Senate since 1978. He was a member of the Pennsylvania House of Representatives from 1977 to 1978, serving on the House Labor Relations and Judiciary Committees as well as the Subcommittee on Crime and Corrections. He served as an Assistant District Attorney and Chief of the Appeals Division for the Montgomery County District Attorney's Office and as an Assistant Public Defender in Bucks County.

The rising costs and shrinking benefits of mass incarceration

After watching the crime rate steadily rise during the 1970s, state and federal policymakers decided that it was time to “get tough” on crime. Legislators began passing new anti-crime laws that sent more people to prison and sent them for longer terms. As crime rates declined, policymakers continued to pass new mandatory minimum sentencing laws – laws that require judges to impose automatic, fixed-length prison sentences for specified offenses. Mandatory minimum laws had been around since the beginning of the country, but legislators began to rely on them as solutions to a growing number of offenses, especially drug crimes.

Although locking up more offenders was a logical response to combating crime — and, indeed, is believed to have played a role in reducing the crime rate¹ — lawmakers did not consider the cost or, more importantly, cost-ineffectiveness of longer prison terms.² The results, however, should have surprised no one. The huge rise in prison populations led to skyrocketing state corrections budgets. Overall, state spending on corrections has risen more than 300 percent over the past two decades. Taxpayers are now footing a bill of more than \$51 billion annually, which represents 7.3 percent of all state general fund spending.³



If the new lengthy, mandatory sentences were necessary to keep their families and communities safe, taxpayers would have little cause to question their cost-effectiveness.

In recent years, however, serious doubts have been raised about the efficacy of using mandatory sentences for nonviolent offenders. Indeed, according to the Pew Center on the States, “most criminologists now consider the increased use of prison for nonviolent offenders a questionable public expenditure, producing little additional crime control benefit for each dollar spent.”⁴

Even the most ardent and influential past supporters of incarceration believe the “lock ‘em up and throw away the key” strategy has gone too far. University of Chicago economist and author Steven D. Levitt wrote several influential papers in which he concluded that pro-prison policies were a major factor in reducing crime during the 1990s. He later found, however, that as the crime rate continued to drop and the prison population continued to grow, the return on public safety diminished. “We know that harsher punishments lead to less crime, but we also know that the millionth prisoner we lock up is a lot less dangerous to society than the first guy we lock up,” Dr. Levitt said. “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration.” And today? Dr. Levitt says, “I think we should be shrinking the prison population by at least one-third.”⁵

States take lead in rethinking sentencing policies

As overcrowded prisons began to squeeze their budgets, some states started to rethink the value of mandatory prison terms. For example, the Pennsylvania Sentencing Commission was ordered by Keystone State legislators to study its mandatory minimum laws and concluded that “neither length of sentence nor the imposition of a mandatory minimum sentence alone was related to recidivism.”⁶ A legislative analysis in Washington State found that while incarcerating violent offenders provides a net public benefit by saving the state more than incarceration costs, imprisonment of property and drug offenders leads to negative returns.⁷

Many states did more than study the issue. They acted to reduce their prison population by

“I am unalterably opposed to the system of mandatory minimums. I think we need to give this authority back to the judges.”

- Barry McCaffrey, former U.S. drug czar in the Clinton administration

adopting cost-effective sentencing and prison reforms. For example, New York, Rhode Island, and Delaware repealed most of their drug-related mandatory minimum laws. Other states have limited the reach of their mandatory sentencing laws or increased the thresholds for felony offenses so that lower-level offenders would not take up scarce prison space. Prison reform leaders in Texas spared taxpayers the expense of building new prisons by investing more in diversion and community corrections programs. As a result, Texas avoided nearly \$2 billion in anticipated prison costs. More importantly, the crime rate in Texas has fallen faster than the national crime rate in every category of crime, from violent to property crime.⁸

*All 17 states that cut their imprisonment rates over the past decade also experienced a **decline in crime rates.***

These state reforms did not jeopardize public safety. To the contrary, the Pew Center on the States found that all 17 states that cut their imprisonment rates over the past decade also experienced a decline in crime rates.⁹

Turning off the spigot: Sentencing reform is smartest reform

Though states have used different strategies for combating inefficient prison spending, the wisest chose front-end reforms, such as repealing or limiting the reach of mandatory minimums. Why is this approach preferable? Imagine your bathtub is overflowing and you notice that the water spigot was left wide open. What would you do first: turn off the spigot or open the tub's drain a little? Though you might eventually do both, the obvious first step is to stop the flow of new water. You need to turn off the spigot.

To prevent prisons from being overfilled with low-level offenders who do not pose a real risk to public safety, states should turn off the spigot by reforming the laws that impose lengthy, mandatory sentences. The best course is to repeal mandatory minimum laws so that judges can craft sentences to fit the unique circumstances of each crime and offender. Where that option is not possible – either because of political or legislative realities – states should adopt sentencing “safety valve” laws, which prevent mandatory minimum sentences from being imposed in cases where they are not appropriate.

How a safety valve works

A safety valve is a law that authorizes the sentencing court to give an offender who would otherwise receive a mandatory minimum sentence less time in prison than the required minimum. Some safety valve laws give judges wide discretion to avoid an ill-fitting mandatory minimum. Other safety valves authorize judges to depart from the minimum if the offender or his offense meets certain special requirements. For example, Congress enacted a drug offense safety valve in 1994 after it realized that many first-time, low-level, and nonviolent drug offenders were receiving mandatory minimums that did not fit them or their crimes. The federal safety valve is a strict, five-part test. If – and only if – all five requirements in the law are met, the court may sentence a person below the mandatory minimum, generally by using the federal advisory sentencing guidelines to create a sentence that fits the offender and his crime.¹⁰

Each year, about 25 percent of federal drug offenders who would otherwise be sentenced to mandatory minimums receive the benefit of the safety valve.¹¹ Since 1995, courts have waived mandatory minimums for almost 80,000 federal drug offenders, saving taxpayers hundreds of millions of dollars in unnecessary prison costs. During this same period, the nation's crime rate has dropped to its lowest level in a generation.

State safety valves

Several states also have safety valve provisions in their codes. Some, like the federal safety valve, apply only to drug offenses, but others apply to other types of crimes.

Minnesota's safety valve, for example, is used in firearm offenses. The state has one-, three-, and five-year consecutive mandatory minimum sentences for using or displaying a gun or dangerous weapon while committing certain

*In 2010, Minnesota saved nearly 1,200 prison beds and **\$37.5 million** thanks to the safety valve, without jeopardizing public safety.*

offenses, including many violent offenses (murder, assault, robbery, sex offenses) and drug crimes.¹² As a result of Minnesota's safety valve provision, courts may sentence some of these offenders below the mandatory minimums whenever the court finds

“substantial and compelling reasons to do so.”¹³ This relatively broad safety valve has saved Minnesotans lots of money without jeopardizing public safety. In 2010, 48 percent of Minnesota offenders subject to these mandatory minimums received the safety valve. On average, their sentences were 38 months shorter than those of people who received the mandatory minimum, saving Minnesota almost 1,200 prison beds and \$37.5 million in prison costs. At the same time, violent crime in Minnesota has steadily declined since 2006, falling another 2.9 percent in 2010.¹⁴

New York also has a safety valve that applies to certain gun offenses: namely, criminal use of a firearm in the first degree.¹⁵ Normally, an offender who possesses a gun while committing certain violent felonies will be subject to an additional mandatory minimum sentence of five years. But the New York law gives the court discretion to ignore the mandatory sentence “if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such additional consecutive sentence would be unduly harsh and that not imposing such sentence would be consistent with the public safety and would not deprecate the seriousness of the crime.”¹⁶

Connecticut law includes a safety valve for drug-related offenses. To avoid the mandatory minimum, a defendant must not have used or threatened to use physical force in the commission of his crime and must show “good cause” why a sentence lower than the statutory minimum is appropriate.¹⁷

Meanwhile, courts in Maine are authorized to impose sentences below the mandatory minimums for drug trafficking offenses if, among other things, they find that imposing the minimum would “result in a substantial injustice to the defendant.” The law also requires the court to find that failure to impose a minimum sentence “would not have an adverse effect on public safety.”¹⁸ Oregon and Montana have broader safety valve provisions. Oregon’s safety valve authorizes judges to sentence below the

“[M]y opposition to mandatory minimums ... is rooted in conservative principles; namely, reverence for the Constitution and contempt for government action that ignores the differences among individuals.”

- David A. Keene,
President of the National
Rifle Association

statutory minimum for a variety of crimes, including kidnapping, second-degree manslaughter, certain second-degree sex offenses, and repeat property offenders. To sentence a person below the mandatory minimum term, the court must make certain findings on the record at sentencing, depending on the offense in question (e.g., age and relationship of victim and/or offender; defendant's criminal history; lack of significant injury to the victim, etc.). The court must also determine that "a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission justifies the lesser sentence."¹⁹ Examples of substantial and compelling reasons include: the defendant played a minor or passive role in the crime; the harm caused was significantly less than what is typically caused during similar offenses; and the court finds that a treatment program is likely to be more effective in reducing recidivism.²⁰ Montana's safety valve, which also applies to a wide list of violent and nonviolent offenses, allows courts to give sentences below the mandatory minimum if the offender was a minor, had a significantly impaired mental capacity, committed the crime under unusual or substantial duress, was an accomplice who played a minor role, or when the crime did not involve a weapon or serious injury to the victim.²¹

"The benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers ... [M]andatory minimums have become a sort of poor man's Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself."

- Grover Norquist
President, Americans for
Tax Reform

The State of Virginia adopted a safety valve for drug cases that mirrors the federal safety valve. To impose a sentence below the statutory mandatory minimum, a Virginia court must find that (1) the defendant does not have a prior conviction for certain felony offenses; (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; and (5) the defendant tells prosecutors all he knows about the offense.²²

New safety valve proposals have been introduced in other states. In Georgia, Governor

Nathan Deal and the legislature created a special council to develop recommendations to reduce corrections spending. In November 2011, the council, comprising judges, prosecutors, and state lawmakers, issued its report and recommendations.²³ Included among its recommendations was the adoption of a broad safety valve for drug trafficking offenses that would permit judges to impose shorter prison sentences in situations where “the interests of justice are served by a reduced minimum sentence” and “public safety is likely to be improved with expedited access to risk-reduction programs.”²⁴ In February 2013, Governor Deal and key lawmakers introduced legislation to implement a safety valve in drug-related cases.²⁵ Their proposal borrows from the federal safety valve and authorizes courts to impose a shorter prison term if: (1) the defendant was not a leader/organizer of the offense; (2) the defendant did not use a weapon; (3) the defendant’s conduct did not result in death or substantial bodily injury; (4) the defendant does not have a prior felony conviction; and (5) the interests of justice would not be served by forcing the defendant to serve the mandatory minimum prison sentence.

In Pennsylvania, Senate Judiciary Committee Chairman Stewart Greenleaf introduced a safety valve provision that would allow a judge to depart below a mandatory minimum if he or she believes “a substantial injustice would occur” from imposing the minimum.²⁶ Offenders with significant prior criminal records and those who use a firearm or other dangerous weapon are not eligible for safety valve relief.

The benefits of a safety valve

For policymakers concerned with improving the criminal justice system in ways that keep their communities and neighborhoods safe while not asking more from taxpayers than is necessary, a sentencing safety valve has many benefits:

- ✓ **Protect public safety.** Safety valves do not mean that people will avoid prison time, just that they don’t get any *more* prison time than is necessary. Safety valves reserve scarce prison space and resources for people who pose a real threat to the community, and they help prevent prison overcrowding.

- ✓ **Give courts flexibility to punish enough – but not too much.** Safety valves allow courts – in some circumstances – to sentence a person below the mandatory minimum if that sentence is too lengthy, unjust or unreasonable, or doesn't fit the offender or the crime. For example, a safety valve allows the court to avoid nonsensical outcomes, such as a first-time drug courier getting the same sentence as a major drug kingpin.
- ✓ **Save taxpayers money.** When courts sentence people below the mandatory minimum, people spend less time in prison than they otherwise would be required to, which costs taxpayers less in corrections costs. These savings can be returned to taxpayers, invested in more effective anti-crime strategies (e.g., more police on the street), or dedicated to other state needs, such as more teachers and better infrastructure.

Some worry that adoption of a safety valve will harm law enforcement by eliminating the threat of a severe, mandatory sentence. This threat, they believe, helps prosecutors convince defendants to plead guilty and cooperate against other offenders.²⁷ In response, it must be noted that passage of a safety valve will not eliminate prosecutors' leverage. A safety valve does not require a judge to give a lower sentence; it simply allows him or her to do so in special circumstances where the mandatory minimum is not reasonable or necessary. Many defendants will still choose to plead guilty to avoid the mandatory minimum, rather than "rolling the dice" and hoping a jury will acquit them or that a judge will find them eligible for a lower sentence.

A model state sentencing safety valve

FAMM believes that more states should follow the lead of those that have repealed their mandatory minimum sentencing laws. Where that is not possible, state policymakers should adopt sentencing safety valves to ensure that expensive prison space is reserved for the most serious and dangerous offenders. As discussed above, different states have adopted different types of safety valves, i.e., some apply to all crimes while others apply only to drug offenses. One of the benefits of the safety valve approach is that it allows lawmakers to tailor the law to the needs and desires of their state.

Consider the following model safety valve language:

Notwithstanding any other provision of law, when sentencing a person convicted of a violation for which there is a mandatory minimum sentence, the court may depart from the prescribed mandatory minimum sentence if the court finds that a substantial injustice would occur by applying the mandatory minimum sentence.

This model language would authorize state courts to impose a shorter sentence if it finds that the length of the mandatory minimum sentence would cause “a substantial injustice” to occur. This broad safety valve reflects the fact that mandatory minimum sentences sometimes produce ill-fitting, unreasonable sentences and that courts should have the ability to modify sentences in those rare and unusual cases.

For a variety of reasons, state policymakers might want to tailor a proposed safety valve, at least initially, to certain types of cases or to limit a judge’s discretion to utilize the safety valve. A safety valve can be tailored in two key ways:

- (1) **Eligible offenders.** Policymakers can choose the offense and/or offenders that will be eligible for safety valve relief. For example, they might want to let judges depart in drug trafficking cases, but not those involving injury to a victim. Alternatively, states might choose to limit safety valve eligibility to offenders with little or no criminal background.
- (2) **Standard for invocation.** Some states might want to authorize judges to impose a sentence below the statutory minimum to avoid a “substantial injustice,” while others might choose to allow departures in cases where a judge finds that the minimum is “not necessary to ensure public safety” or a similar such standard.

The text of safety valve provisions from various states can found in Appendix A, and the language of the federal sentencing safety valve can be found in Appendix B.

Regardless of the approach state policymakers choose to take, they will find that a sentencing safety valve can help protect public safety while reducing unnecessary spending.

Appendix A: State safety valve statutes

CONNECTICUT

The safety valve in Connecticut applies to drug offenses.

CGS § 21a-283a

Sec. 21a-283a. Court authorized to depart from imposing mandatory minimum sentence. Notwithstanding any provision of the general statutes, when sentencing a person convicted of a violation of any provision of this chapter, except a violation of subsection (a) or (c) of section 21a-278a, for which there is a mandatory minimum sentence, which did not involve the use, attempted use or threatened use of physical force against another person or result in the physical injury or serious physical injury of another person, and in the commission of which such person neither was armed with nor threatened the use of or displayed or represented by word or conduct that such person possessed any firearm, deadly weapon or dangerous instrument, as those terms are defined in section 53a-3, the court may, upon a showing of good cause by the defendant, depart from the prescribed mandatory minimum sentence, provided the provisions of this section have not previously been invoked on the defendant's behalf and the court, at the time of sentencing, states in open court the reasons for imposing the particular sentence and the specific reason for imposing a sentence that departs from the prescribed mandatory minimum sentence.

FLORIDA

A Florida safety valve applies to habitual offenders.

F.S. § 775.084(3)(a)(6)

6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a

habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing. Each month, the court shall submit to the Office of Economic and Demographic Research of the Legislature the written reasons or transcripts in each case in which the court determines not to sentence a defendant as a habitual felony offender or a habitual violent felony offender as provided in this subparagraph.

MAINE

The Maine safety valve applies to all drug trafficking offenses.

17-A MRS § 1252(5)(A-C)

5-A. Notwithstanding any other provision of this Code, for a person convicted of violating section 1105-A, 1105-B, 1105-C or 1105-D:
A. Except as otherwise provided in paragraphs B and C, the minimum sentence of imprisonment, which may not be suspended, is as follows: When the sentencing class is Class A, the minimum term of imprisonment is 4 years; when the sentencing class is Class B, the minimum term of imprisonment is 2 years; and, with the exception of a conviction under section 1105-A, 1105-B, 1105-C or 1105-D when the drug that is the basis for the charge is marijuana, when the sentencing class is Class C, the minimum term of imprisonment is one year; [2001, c. 383, §151 (AMD); 2001, c. 383, §156 (AFF).]

B. The court may impose a sentence other than a minimum unsuspended term of imprisonment set forth in paragraph A, if:

(1) The court finds by substantial evidence that:

(a) Imposition of a minimum unsuspended term of imprisonment under paragraph A will result in substantial injustice to the defendant. In making this determination, the court shall consider, among other considerations,

whether the defendant did not know and reasonably should not have known that the victim was less than 18 years of age;

(b) Failure to impose a minimum unsuspended term of imprisonment under paragraph A will not have an adverse effect on public safety; and

(c) Failure to impose a minimum unsuspended term of imprisonment under paragraph A will not appreciably impair the effect of paragraph A in deterring others from violating section 1105-A, 1105-B, 1105-C or 1105-D; and
(2) The court finds that:

(b) ²⁸ The defendant is an appropriate candidate for an intensive supervision program, but would be ineligible to participate under a sentence imposed under paragraph A; or

(c) The defendant's background, attitude and prospects for rehabilitation and the nature of the victim and the offense indicate that imposition of a sentence under paragraph A would frustrate the general purposes of sentencing set forth in section 1151.

If the court imposes a sentence under this paragraph, the court shall state in writing its reasons for its findings and for imposing a sentence under this paragraph rather than under paragraph A; and [2003, c. 232, §1 (AMD).]

C. If the court imposes a sentence under paragraph B, the minimum sentence of imprisonment, which may not be suspended, is as follows: When the sentencing class is Class A, the minimum term of imprisonment is 9 months; when the sentencing is Class B, the minimum term of imprisonment is 6 months; and, with the exception of trafficking or furnishing marijuana under section 1105-A or 1105-C, when the sentencing class is Class C, the minimum term of imprisonment is 3 months. [2001, c. 383, §151 (AMD); 2001, c. 383, §156 (AFF).]

MINNESOTA

The Minnesota safety valve applies to gun offenses.

Minn. Stat. § 609.11, subd. 8

Subd. 8. Motion by prosecutor. (a) Except as otherwise provided in paragraph (b), prior to the time of sentencing, the prosecutor may file a motion to have the defendant sentenced without regard to the mandatory minimum sentences established by this section. The motion shall be

accompanied by a statement on the record of the reasons for it. When presented with the motion, or on its own motion, the court may sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so. A sentence imposed under this subdivision is a departure from the Sentencing Guidelines.

(b) The court may not, on its own motion or the prosecutor's motion, sentence a defendant without regard to the mandatory minimum sentences established by this section if the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon.

MONTANA

The Montana safety valve applies to all crimes.

MCA § 46-18-222

46-18-222. Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility. Mandatory minimum sentences prescribed by the laws of this state, mandatory life sentences prescribed by 46-18-219, the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(1)(b), 46-18-205, 46-18-221(3), 46-18-224, and 46-18-502(3), and restrictions on parole eligibility do not apply if:

(1) the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced;

(2) the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution.

However, a voluntarily induced intoxicated or drugged condition may not be considered an impairment for the purposes of this subsection.

(3) the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution;

(4) the offender was an accomplice, the conduct constituting the offense was principally

the conduct of another, and the offender's participation was relatively minor;

(5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense; or

(6) the offense was committed under 45-5-502(3), 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4) and the judge determines, based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination.

NEW YORK

The New York safety valve applies to criminal use of a firearm in the first degree.

N.Y. PEN. LAW § 265.09

(1) A person is guilty of criminal use of a firearm in the first degree when he commits any class B violent felony offense as defined in paragraph (a) of subdivision one of section 70.02 and he either:

(a) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or

(b) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Criminal use of a firearm in the first degree is a class B felony.

(2) Sentencing. Notwithstanding any other provision of law to the contrary, when a person is convicted of criminal use of a firearm in the first degree as defined in subdivision one of this section, the court shall impose an additional consecutive sentence of five years to the sentence imposed on the underlying class B violent felony offense where the person convicted of such crime displays a loaded

weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of such crime, provided, however, that such additional sentence shall not be imposed if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such additional consecutive sentence would be unduly harsh and that not imposing such sentence would be consistent with the public safety and would not deprecate the seriousness of the crime. Notwithstanding any other provision of law to the contrary, the aggregate of the five year consecutive term imposed pursuant to this subdivision and the minimum term of the indeterminate sentence imposed on the underlying class B violent felony shall constitute the new aggregate minimum term of imprisonment, and a person subject to such term shall be required to serve the entire aggregate minimum term and shall not be eligible for release on parole or conditional release during such term. This subdivision shall not apply where the defendant's criminal liability for displaying a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of crime is based on the conduct of another pursuant to section 20.00 of this chapter.

OREGON

Oregon has a safety valve for numerous crimes, and the required court findings vary depending on the offense of conviction.

137.712 Exceptions to ORS 137.700 and 137.707.

(1)

(a) Notwithstanding ORS 137.700 and 137.707, when a person is convicted of manslaughter in the second degree as defined in ORS 163.125, assault in the second degree as defined in ORS 163.175 (1)(b), kidnapping in the second degree as defined in ORS 163.225, rape in the second degree as defined in ORS 163.365, sodomy in the second degree as defined in ORS 163.395, unlawful sexual penetration in the second degree as defined in ORS 163.408, sexual abuse in the first degree as defined in ORS 163.427 (1)(a)(A) or robbery in the second degree as defined in ORS 164.405, the court may

impose a sentence according to the rules of the Oregon Criminal Justice Commission that is less than the minimum sentence that otherwise may be required by ORS 137.700 or 137.707 if the court, on the record at sentencing, makes the findings set forth in subsection (2) of this section and finds that a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission justifies the lesser sentence. When the court imposes a sentence under this subsection, the person is eligible for a reduction in the sentence as provided in ORS 421.121 and any other statute.

(b) In order to make a dispositional departure under this section, the court must make the following additional findings on the record:

(A) There exists a substantial and compelling reason not relied upon in paragraph (a) of this subsection;

(B) A sentence of probation will be more effective than a prison term in reducing the risk of offender recidivism; and

(C) A sentence of probation will better serve to protect society.

(2) A conviction is subject to subsection (1) of this section only if the sentencing court finds on the record by a preponderance of the evidence:

(a) If the conviction is for manslaughter in the second degree:

(A) That the victim was a dependent person as defined in ORS 163.205 who was at least 18 years of age;

(B) That the defendant is the mother or father of the victim;

(C) That the death of the victim was the result of an injury or illness that was not caused by the defendant;

(D) That the defendant treated the injury or illness solely by spiritual treatment in accordance with the religious beliefs or practices of the defendant and based on a good faith belief that spiritual treatment would bring about the victim's recovery from the injury or illness;

(E) That no other person previously under the defendant's care has died or sustained significant physical injury as a result of or despite the use of spiritual treatment, regardless of whether the spiritual treatment was used alone or in conjunction with medical care; and

(F) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section or for criminal mistreatment in the second degree.

(b) If the conviction is for assault in the second degree:

(A) That the victim was not physically injured by means of a deadly weapon;

(B) That the victim did not suffer a significant physical injury; and

(C) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(c) If the conviction is for kidnapping in the second degree:

(A) That the victim was at least 12 years of age at the time the crime was committed; and

(B) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(d) If the conviction is for robbery in the second degree:

(A) That the victim did not suffer a significant physical injury;

(B) That, if the defendant represented by words or conduct that the defendant was armed with a dangerous weapon, the representation did not reasonably put the victim in fear of imminent significant physical injury;

(C) That, if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, the representation did not reasonably put the victim in fear of imminent physical injury; and

(D) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(e) If the conviction is for rape in the second degree, sodomy in the second degree or sexual abuse in the first degree:

(A) That the victim was at least 12 years of age, but under 14 years of age, at the time of the offense;

(B) That the defendant does not have a prior conviction for a crime listed in subsection (4) of this section;

(C) That the defendant has not been previously found to be within the jurisdiction of a juvenile court for an act that would have been a felony sexual offense if the act had been committed by an adult;

(D) That the defendant was no more than five years older than the victim at the time of the offense;

(E) That the offense did not involve sexual contact with any minor other than the victim; and

(F) That the victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age at the time of the offense.

(f) If the conviction is for unlawful sexual penetration in the second degree:

(A) That the victim was 12 years of age or older at the time of the offense;

(B) That the defendant does not have a prior conviction for a crime listed in subsection (4) of this section;

(C) That the defendant has not been previously found to be within the jurisdiction of a juvenile court for an act that would have been a felony sexual offense if the act had been committed by an adult;

(D) That the defendant was no more than five years older than the victim at the time of the offense;

(E) That the offense did not involve sexual contact with any minor other than the victim;

(F) That the victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age at the time of the offense; and

(G) That the object used to commit the unlawful sexual penetration was the hand or any part thereof of the defendant.

(3) In making the findings required by subsections (1) and (2) of this section, the court may consider any evidence presented at trial and may receive and consider any additional relevant information offered by either party at sentencing.

(4) The crimes to which subsection (2)(a)(F), (b)(C), (c)(B), (d)(D), (e)(B) and (f)(B) of this section refer are:

(a) A crime listed in ORS 137.700 (2) or 137.707 (4);

(b) Escape in the first degree, as defined in ORS 162.165;

(c) Aggravated murder, as defined in ORS 163.095;

(d) Criminally negligent homicide, as defined in ORS 163.145;

(e) Assault in the third degree, as defined in ORS 163.165;

(f) Criminal mistreatment in the first degree, as defined in ORS 163.205 (1)(b)(A);

(g) Rape in the third degree, as defined in ORS 163.355;

(h) Sodomy in the third degree, as defined in ORS 163.385;

(i) Sexual abuse in the second degree, as defined in ORS 163.425;

(j) Stalking, as defined in ORS 163.732;

(k) Burglary in the first degree, as defined in ORS 164.225, when it is classified as a person felony under the rules of the Oregon Criminal Justice Commission;

(l) Arson in the first degree, as defined in ORS 164.325;

(m) Robbery in the third degree, as defined in ORS 164.395;

(n) Intimidation in the first degree, as defined in ORS 166.165;

(o) Promoting prostitution, as defined in ORS 167.012; and

(p) An attempt or solicitation to commit any Class A or B felony listed in paragraphs (a) to (L) of this subsection.

VIRGINIA

The Virginia safety valve, like the federal safety valve, establishes a five-part test for eligibility for a sentence below the mandatory minimum term for a drug offense.

VA. CODE ANN. § 18.2-248

The mandatory minimum term of imprisonment to be imposed for a violation of this subsection shall not be applicable if the court finds that:

a. The person does not have a prior conviction for an offense listed in subsection C of § 17.1-805;

b. The person did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense or induce another participant in the offense to do so;

c. The offense did not result in death or serious bodily injury to any person;

d. The person was not an organizer, leader, manager, or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined in subsection I; and

e. Not later than the time of the sentencing hearing, the person has truthfully provided to the Commonwealth all information and evidence the person 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 person has no relevant or useful other information to provide or that the Commonwealth already is aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Appendix B: Federal safety valve statute

The federal safety valve applies to drug offenses only.

18 U.S.C. § 3553(f)

(f) Limitation on Applicability of Statutory Minimums in Certain Cases. - 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, after the Government has been afforded the opportunity to make a recommendation, that -

(1) the defendant does not have more than 1 criminal history point, as determined

under the sentencing guidelines;

(2) the 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;

(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 section 408 of the Controlled Substances Act; 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 requirement.

Endnotes

¹ Anne Morrison Piehl & Bert Useem, *Prisons*, in CRIME AND PUBLIC POLICY 540-43 (James Q. Wilson and Joan Petersilia eds., 2011).

² PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 7 (June 2012), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf.

³ *Id.*

⁴ *Id.* (citing Raymond V. Liedka, Anne Morrison Piehl, & Bert Useem, *The Crime-Control Effect of Incarceration: Does Scale Matter?*, CRIMINOLOGY & PUBLIC POLICY 245-76 (2006); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?* (Working paper, 2010), available at http://socrates.berkeley.edu/~ruckerj/johnson_raphael_crimeincarcJLE.pdf).

⁵ John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, THE N.Y. TIMES (Dec. 12, 2012), available at http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0.

⁶ PENNSYLVANIA COMMISSION ON SENTENCING, A STUDY ON THE USE AND IMPACT OF MANDATORY MINIMUM SENTENCES 1 (Oct. 2009), available at <http://www.scribd.com/doc/35882472/Pennsylvania-Mandatory-Sentences-Report>.

⁷ TIME SERVED, *supra* note 2, at 7.

⁸ Vikrant P. Reddy, *Texas Crime Rate Falling Faster Than the National Crime Rate*, at <http://www.rightoncrime.com/2012/09/post-needs-editing-department-of-justice-focuses-on-victims/> (last visited Mar. 15, 2013).

⁹ TIME SERVED, *supra* note 2, at 7.

¹⁰ To qualify for the federal safety valve, the court must find that (1) no one was harmed during the offense; (2) the offender has little or no history of criminal convictions; (3) the offender did not use violence or a gun; (4) the individual was not a leader or organizer of the offense; and (5) the offender told the prosecutor all that he knows about the offense. 18 U.S.C. § 3553(f) (2012).

¹¹ See U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 44 (2012), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm.

¹² Minn. Stat. § 609.11 (2012)

¹³ Minn. Stat. § 609.11, subd. 8.

¹⁴ STATE OF MINNESOTA DEP'T OF PUBLIC SAFETY, UNIFORM CRIME REPORT 2010 10, 12, Fig. 1 (July 2011), available at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2010%20State%20Crime%20Book.pdf>.

¹⁵ N.Y. PEN. LAW § 265.09(1) (2012).

¹⁶ N.Y. PEN. LAW § 265.09(2).

¹⁷ See CGS § 21a-283a (2012).

¹⁸ See 17-A MRS § 1252(5)(A-C) (2012).

¹⁹ See ORS 137.712 (2012).

²⁰ See OAR 213-008-0002 (2012).

²¹ See MCA § 46-18-222 (2012).

²² See VA. CODE ANN. § 18.2-248 (2012).

²³ SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS (Nov. 2011), *available at* <http://www.legis.ga.gov/Documents/GACouncilReport-FINALDRAFT.pdf>.

²⁴ *Id.* at 22.

²⁵ HB 349, 151st Gen. Assem., Reg. Sess. (Ga. 2013), *available at* <http://www.legis.ga.gov/Legislation/20132014/134497.pdf>. As of publication, HB 349 had been approved unanimously by the Georgia House and was awaiting consideration by the Senate.

²⁶ SB 1205, Gen. Assem., Reg. Sess. (Pa. 2011-2012), *available at* <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&sind=0&body=S&type=B&BN=1205>.

²⁷ See U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 125-27 (Oct. 2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. Recent evidence suggests that mandatory minimum sentences actually produce fewer guilty pleas. In its comprehensive 2011 report on federal mandatory minimum laws, the U.S. Sentencing Commission found that the threat of lengthy mandatory terms might actually motivate people to go to trial. According to the Commission, 94.1 percent of those convicted of an offense carrying a mandatory minimum pled guilty, while 97.5 percent of the offenders *not* facing a mandatory minimum pled guilty. *Id.* at 125. The Commission also found that “the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty.” *Id.* at 126. Notably, offenders who were eligible for the safety valve pled guilty at a higher rate (99.4 percent) than those offenders who were not eligible for safety valve relief (94.6 percent). *Id.* at 127.

²⁸ This is not a typo. The code does not contain a subsection (a) here.

Our Mission

FAMM (Families Against Mandatory Minimums) is a nonprofit, nonpartisan organization fighting for fair and proportionate sentencing laws that allow judicial discretion while maintaining public safety.

FAMM advocates for state and federal sentencing reform, and mobilizes thousands of individuals and families whose lives are adversely affected by unjust sentences to work constructively for change.

Our Vision

FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation and reentry.

FAMM supporters include taxpayers, families, prisoners, attorneys, judges, criminal justice experts and concerned citizens.

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