MEMORANDUM

July 9, 2020

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FROM: Tami Martin

Supreme Court Judges' Chambers

RE: *R v Sutherland,* 2019 NWTSC 55

File No.: S-1-CR 2018-000-055

ERRATUM

Page 1 the citation reads: *R v Sutherland,* 2019 NWTSC 55

It should read: *R v Sutherland,* 2019 NWTSC **48**

Please replace original first page with the attached.

Tami Martin

Judicial Executive Assistant

R v Sutherland, 2019 NWTSC 48

Date: 2019 11 21
Docket: S-1-CR-2018-000 055

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

RICKY LEE SUTHERLAND

RULING ON CHALLENGE TO MANDATORY MINIMUM PUNISHMENT

I) INTRODUCTION

[1] Earlier this year, Ricky Sutherland pleaded guilty to a charge of child luring, contrary to section 172.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] As the Crown proceeded by Indictment on the charge, Mr. Sutherland faced, pursuant to section 172.1(2)(a), a mandatory minimum sentence of imprisonment for 1 year. He challenged that mandatory minimum sentence as being contrary to Section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). I dismissed Mr. Sutherland's constitutional challenge and said that written Reasons would follow. These are those Reasons.

II) THE LEGAL FRAMEWORK

[3] Section 12 of the *Charter* provides that everyone has the right not to be subjected to any cruel and unusual punishment. The legal framework that governs challenges based on this provision was developed in a succession of Supreme Court of Canada cases and is now well established.

[4] A mandatory minimum sentence infringes Section 12 if it results in a grossly disproportionate sentence, namely, a sentence that is "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society. It is not sufficient to establish that the mandatory minimum sentence is excessive or even demonstrably unfit. The bar to establishing gross disproportionality is very high. *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13; *R v Morrison*, 2019 SCC 15.

[5] A mandatory minimum sentence is contrary to Section 12 if it results in a grossly disproportionate sentence for the offender who is before the court or if there are reasonably foreseeable situations where it would have that effect on other offenders. *Nur*, para 77.

[6] The Supreme Court of Canada had the opportunity to rule on the constitutionality of section 172.1(2)(a) in *Morrison*. Two of the Justices concluded that the provision contravenes Section 12 and would have struck it down. A majority of the Court, however, declined to rule on the issue.

III) ANALYSIS

[7] Mr. Sutherland argues that the mandatory minimum sentence would result in a grossly disproportionate sentence for him. Alternatively, he put forward a number of hypothetical circumstances where he argues that a 1 year sentence would be grossly disproportionate.

1. Child Luring

[8] The offence of child luring was introduced in the *Criminal Code* in 2002. Its essential features are the use of a means of telecommunications to communicate with a person the offender believes to be a child, for the purpose of facilitating the commission of one of several specified offenses, namely, sexual exploitation, incest, child pornography offenses, procuring sexual activity, permitting prohibited sexual activity, obtaining sexual services for consideration, obtaining a material benefit from sexual services, and procuring a person to offer sexual services.

[9] The offence of child luring is made out irrespective of the actual age of the person the accused is communicating with. What matters is the accused's belief. The offence is also committed irrespective of whether the secondary offence intended to be facilitated is ever actually committed.

[10] The Supreme Court of Canada has described child luring as a preparatory crime that criminalizes conduct that precedes the commission of sexual offenses to

which it refers, its objective being to "close the cyberspace door before the predator gets in to prey". *R v Legare*, 2009 SCC 56, para 25.

[11] Picking up on this theme, the Court of Appeal of Alberta noted in a subsequent case that the purpose of this offence is to protect children, who by definition are particularly vulnerable to exploitation by potential predators through the use of internet communications. The Court underscored the importance of deterring this type of crime, which involves premeditation and persistence:

> Luring is dangerous and, as the Crown points out, serious. It involves pre-meditated conduct specifically designed to engage an underage person in a relationship with the offender, with the goal of reducing the inhibitions of the young person so that he or she will be prepared to engage in further conduct that is not only criminal but extremely harmful. Parliament has recognized that the internet has infinitely expanded the opportunity for predators to attract and ensnare children. The anonymity of the internet allows the predator to hide his or her true identity, to mask predatory behaviours through seemingly innocuous but persistent communication, and to count on victims letting their guard down because the communication occurs in the privacy and supposed safety of their own homes. A proportionate sentence for internet luring must recognize the serious nature of this offence.
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> *R v Paradee*, 2013 ABCA 41, para 12.

[12] A few years later, the same court reiterated this analysis, underscoring again the ease with which this offence can be committed and the fact that it involves planning and deliberation. It characterized child luring as a "virtual home invasion". *R v Hajar*, 2016 ABCA 222, paras 155 and 159.

[13] It is important to note that *Morrison* provided important clarifications as to the mental element that must be established to make out the offence of child luring. Subsection 172.(3) created a presumption: proof that the recipient of the communication was represented to the accused as being under 16, absent evidence to the contrary, stood as proof of the accused's belief. That presumption was challenged, and ultimately struck down by the Supreme Court of Canada. *Morrison*, paras 51-73.

[14] Moreover, the Supreme Court also clarified that failure by an accused to take reasonable steps to ascertain the age of the person he or she is communicating with is not sufficient to support a conviction. Negligence is not sufficient to make out the offence. Neither is recklessness. To secure a conviction for child luring, the Crown must prove that the offender believed that the person he or she was

communicating with was a child, or was wilfully blind to that fact. *Morrison*, paras 96-102.

[15] Against this backdrop, I turn to the consideration of whether the mandatory minimum sentence prescribed by section 172.1(2)(a) would lead to a grossly disproportionate sentence, either for Mr. Sutherland himself, or in other reasonably foreseeable situations.

2. Whether the mandatory minimum sentence is grossly disproportionate in Mr. Sutherland's case

[16] In considering a Section 12 challenge to a mandatory minimum sentence, the court must determine, on a rough scale, what would constitute a proportionate sentence for the offence in question. In doing so it must examine all the relevant contextual factors including the gravity of the offence, the characteristics of the offender, the actual effect the punishment would have on the offender, the penological goals and sentencing principles upon which the mandatory minimum is fashioned, the existence of valid alternatives to the mandatory punishment, and a comparison with punishments imposed for other crimes in the jurisdiction. No one factor is determinative. *R v Goltz*, [1991] 3 S.C.R. 485; *R v Morrisey*, 2000, SCC 39.

[17] In the written submissions filed by Mr. Sutherland before the constitutional challenge was heard, he took the position that a fit sentence in his case would be a conditional sentence in the range of 6 to 9 months, followed by probation. At the hearing, he acknowledged that even absent a mandatory minimum, a conditional sentence would not be available to him. The maximum sentence he faces is 14 years imprisonment and this excludes the possibility of a conditional sentence being imposed. *Criminal Code*, section 741.1(c). Mr. Sutherland's revised position was that a fit sentence would be in the range between 3 and 9 months.

[18] The position advocated by Defence at the hearing, it seems to me, amounts to a concession that a sentence of 1 year would not be grossly disproportionate for Mr. Sutherland. The upper end of the range put forward by Defence is 9 months. If that is correct, the suggestion that 1 year would be grossly disproportionate is untenable.

[19] In any event, and even leaving aside the Defence's position, in light of the factors outlined in *Goltz* and *Morrisey*, I conclude that a 1 year sentence is not grossly disproportionate in Mr. Sutherland's case.

[20] There is no question that a term of imprisonment of 1 year would have a significant impact on M. Sutherland. He has no criminal record, a good work history, support from family and friends, and is the sole financial provider for his family. By all accounts his conduct was entirely out of character, and he is remorseful for his actions.

[21] But there is much more to consider. As noted above, generally speaking, child luring is a very serious offence that entails deliberate conduct with the specific purpose of facilitating the commission of a sexual offence against a child. The sentencing regime is aimed at protecting children, who are particularly vulnerable to those preying on them using the internet.

[22] The changes that Parliament has made to the sentencing regime over the years are revealing. When child luring was first introduced in the *Criminal Code*, it did not carry a mandatory minimum penalty. The maximum penalties were 6 months imprisonment on a summary election and 5 years imprisonment on an indictable election. Since then, Parliament has made the sentencing regime associated with this offence progressively more severe.

[23] In 2007, the maximum penalties were increased to 18 months on a summary election and to 10 years on an indictable election. In 2012, Parliament introduced mandatory minimum sentences of 90 days on a summary election and of 1 year on an indictable election. In 2015, the mandatory minimum on a summary election was increased to 6 months imprisonment and the maximum sentence increased to two years less a day. The mandatory minimum on an indictable election remained the same but the maximum sentence was increased to 14 years imprisonment.

[24] These changes in the sentencing regime confirm that Parliament decided, over time, that this crime should be treated more and more seriously. This is entirely aligned with judicial pronouncements about how seriously courts viewed this offence since its introduction in the *Criminal Code*, as noted above at Paragraphs 10 to 12.

[25] The circumstances of the offence are another factor to consider. I described Mr. Sutherland's offence in some detail in my sentencing decision, now reported at *R v Sutherland*, 2019 NWTSC 45, at pages 1 to 5. Admittedly, those circumstances are not as aggravating as in some of the cases that I was referred to at the hearing. However, they are nonetheless serious.

[26] Mr. Sutherland was the victim's gymnastics coach. She considered him a trusted friend. He communicated with her for the purpose of facilitating the offence of being in possession of child pornography. In one of the photographs he sent her through the Snapchat application, his penis was exposed. In another communication he asked her to remove her clothes. Fortunately, she did not do as he asked. As a result the offence he was attempting to facilitate was not in fact committed. Still, his conduct constituted a serious breach of the relationship of trust between them and had a devastating impact on her.

[27] Finally, the range of sentences imposed in child luring cases must be considered. In reviewing the sentencing jurisprudence, the changes that were made to the sentencing regime over the years must be kept in mind. Sentences imposed when the sentencing regime was different carry less weight than those imposed more recently.

[28] I was not referred to any sentencing decisions from the Northwest Territories for child luring. As I noted when I sentenced Mr. Sutherland, to my knowledge, his was the first such case to come before this Court. This means that guidance must come from case law from other jurisdictions. In this regard, the jurisprudence from Alberta is particularly persuasive in this jurisdiction because most of the judges who sit on the Court of Appeal for the Northwest Territories are also judges of the Court of Appeal of Alberta.

[29] In *R v Hepburn*, 2010 ABCA 157, the Court of Appeal of Alberta identified the appropriate range of sentence for child luring as being between 1 and 3 years, depending on the circumstances of the offence. This was reiterated in *Paradee*. *Paradee*, para 25. In *Hajar*, the same court acknowledged this range but also indicated that it may need to be reviewed upwards in future cases:

> We caution that [the sentence imposed] should not be taken to be a sentence appropriate to future cases, where one year is now the minimum sentence specified by Parliament, especially given the aggravating features here. The Court is well aware of the dangers posed by Internet luring in Canada and the pervasiveness of this problem. Therefore, sterner sentences in the range of two to four years might well be justified in order to deter and denounce adult sexual offenders who view children as easy prey.
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> *Hajar*, para 167.

[30] In the same vein, the Ontario Court of Appeal has observed that whatever sentencing ranges emerged for child luring offenses when it was first introduced in

the *Criminal Code*, those ranges should be revised in light of Parliament's increase of the applicable penalties. *R v Woodward*, 2011 ONCA 81, para 58.

[31] Mr. Sutherland referred to a number of cases in support of the argument that a 1 year sentence would be grossly disproportionate in his case. I find those cases unpersuasive.

[32] One of the cases he referred to is not a child luring case and, as such, is not particularly helpful. Others are cases where conditional sentences were imposed. Those are of no assistance because, as I already noted, a conditional sentence is no longer available for this offence when the matter proceeded by indictment.

[33] Other cases are at odds with more recent jurisprudence. For example, the sentence in *R v Lithgow*, 2007 ONCJ 534, was expressly repudiated in *Woodward*, where the Ontario Court of Appeal called it "manifestly inadequate". *Woodward*, para 72.

[34] Similarly, the sentence imposed in *R v Read*, 2008 ONCJ 732 arose before the increase in penalties for child luring and appears of limited value in light of the comments made in *Woodward*.

[35] I conclude that in light of the current jurisprudence, and in particular the persuasive jurisprudence from the Alberta Court of Appeal, a fit sentence in all the circumstances would be at the very minimum in the range of 1 year imprisonment, even taking into account Mr. Sutherland's circumstances, his guilty plea, and other mitigating factors. Given this, the mandatory minimum sentence would not result in a grossly disproportionate sentence for him.

[36] That leaves the question of whether there are reasonably foreseeable circumstances where a 1 year sentence would be grossly disproportionate.

3. Whether the mandatory minimum would lead to a grossly disproportionate sentence for other offenders

[37] The examples put forward by Mr. Sutherland to argue that such circumstances exist were, for the most part, inspired by the facts in decided cases, namely *R v Scofield*, 2019 BCCA 3, *R v Morrison*, 2017 ONCA 582, *R v Hood*, 2018 NSCA 18, *R v BS*, 2018 BCSC 2044, and *R v Koenig*, 2019 BCPC 83.

[38] Some of these cases are of no assistance. *Scofield* was a case involving an offence of sexual interference, not child luring. It is not helpful to the present

analysis. As for the Ontario Court of Appeal's decision in *Morrison*, it was predicated on errors as to the level of criminal intent that could form the basis of a conviction, more specifically, on the finding that child luring could be committed unintentionally or though negligence. This had a significant impact on the range of conduct captured by the offence and on the range of moral blameworthiness that it could entail. Inevitably, this has an impact on the Section 12 analysis.

[39] The sentences imposed in *BS*, *Koenig* and *Hood* are, in my respectful view, impossible to reconcile with the range articulated, and comments made, in *Hajar* and *Woodward*. I find the reasoning in the latter cases far more persuasive and much more in line with the legislative intent reflected by the increases in penalties for this offence.

[40] Mr. Sutherland has also put forward a scenario based on a somewhat modified version of his own case. In his written submissions, he articulated that scenario as follows:

> A middle aged man with a heart condition befriends a 17-year old through work. He sends the youth messages that contain questionable suggestive content however, there are no pornographic images exchanged and he stops communicating with the youth once the youth ceases to reciprocate any further communication. He apologizes for the nature of the messages sent. He does not surf the internet for the purpose of preying on other youth. The situation does not involve any exchange of child pornography or sexual activity. He does not possess a criminal record and is otherwise, a productive member of society with a family to support.

[41] For the offence of child luring to be made out in this scenario, it would have to also be part of the scenario that the man sent his communications with the specific intent to facilitate the commission of one of the secondary offenses. In that sense the hypothetical is of limited assistance because it lacks some essential details: what offence was the man attempting to facilitate? What were the specifics of the communications sent with that purpose and intent? In my view, even leaving aside the specifics of the communications, once the element of intent to facilitate a secondary offence is added, this scenario does not assist Mr. Sutherland in demonstrating that a 1 year sentence would be grossly disproportionate.

[42] I do not find any of the hypotheticals put forward by Mr. Sutherland persuasive or capable of forming a basis to conclude that there are reasonably foreseeable situations where a 1 year term of imprisonment would be grossly disproportionate for an offence of child luring.

4. The Supreme Court of Canada's decision in *Morrison*

[43] I have, of course, carefully considered the opinions expressed in the majority and minority decisions of the Supreme Court of Canada in *Morrison*.

[44] In concluding that section 172.1(2)(a) is contrary to Section 12, Karakastanis J. underscored two features of the legislation which had been identified, in earlier cases, as rendering mandatory minimum sentences constitutionally vulnerable.

[45] The first is the broad array of circumstances in which child luring can be committed. It makes sense that the wider the range of conduct and offenders is caught by an offence, the greater the risk of there being situations where the mandatory minimum will be grossly disproportionate.

[46] Several examples of this can be drawn from the case law. In *R v Smith*, [1987] 1 S.C.R. 1045, the mandatory minimum sentence of 7 years was struck down because it applied to an offender who imported even an extremely small quantity of drugs. In *Nur*, the mandatory minimum sentences of 3 and 5 years were struck down because they applied to an offender who committed a simple licensing offence. In *R v Lloyd*, [2016] 1 S.C.R. 130, the mandatory minimum sentence of 1 year for recidivism in drug trafficking was struck down because it applied to an offender who merely shared drugs with a friend or spouse.

[47] Admittedly, child luring can be committed in a number of different ways. It can involve a single communication or multiple ones. It can be committed with a view of facilitating different offenses, not all of which have the same degree of seriousness. It can be committed even if the recipient of the communication is not in fact a child, and is, for example, an undercover police officer posing as a child. And it may or may not lead to the actual commission of the secondary offence intended to be facilitated.

[48] However, some features present in every case necessarily imply a high degree of moral blameworthiness. In every case, the offender believes he or she is communicating with a child. In every case the specific purpose of the communication is to facilitate the commission of a sexual offence against that child.

[49] Child luring is like no other offence. It was created in an effort to prevent the harm that can result from the misuse of modern technology to access children and abuse them. The Ontario Court of Appeal aptly summarized the nature of that harm in this way:

> (…) the Internet has made it possible for abusers to get into the victim's head and abuse remotely. The abuser can tell the victim what to do and how to do it, and record it – in text, video, or photograph – all for the abuser's gratification. Thus, through manipulation and control over time by an adult abuser, the child victim becomes a participant in her own sexual abuse
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> *R v Rafiq*, 2015 ONCA 768, para 44.

[50] The essence of child luring is the deliberate use of the internet to target a particularly vulnerable group in circumstances where there is very little that can be done to protect the targets. That is what makes each and every instance of it very serious and very dangerous:

> The offence of internet luring is regarded as a serious gateway offence. Virtually all young people have access to the internet, and it is increasingly the communication mode of choice. The universality and anonymity of the internet permits criminals and others with improper motives to inappropriately access vulnerable segments of the community in ways that are difficult to intercept or detect. *R v K.R.J.*, 2016 SCC 31 at para. 113
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> *Hajar*, para 279 (per Slatter JA)

[51] In every child luring case, irrespective of the circumstances of its commission or the circumstances of the offender, the intent of the offender is to use the internet to commit what amounts to, as the majority put it in *Hajar*, a virtual home invasion. Parents, other caregivers and society in general have very few tools to protect children against this.

[52] There are cases where the offender does not succeed. And there are circumstances where, unbeknownst to the offender, the offender is not actually communicating with a child. I agree, obviously, that if the person receiving the communication is an undercover police officer no actual harm is caused. But that does not significantly reduce the blameworthiness of a crime for which intent is key. Similarly, if the secondary offence is not committed, that does not reduce the blameworthiness that attaches to the luring offence. After all, if the offender ultimately commits the secondary offence that he or she was attempting to facilitate, then he or she commits a separate crime that gives rise to a separate punishment.

[53] For similar reasons, I am not persuaded that it makes any difference that the secondary offences listed in section 172.1 vary in seriousness and may well give

rise to less severe penalties than the preparatory offence. As I have been trying to explain, the seriousness of child luring comes from the offender's intent, purpose, and deliberateness at the time it is committed, the ease with which it is committed and the vulnerability of the targets.

[54] I acknowledge that certain offenders' personal characteristics may reduce their blameworthiness. Still, in light of the specific intent and purpose that have to be proven to make out this charge, those personal characteristics cannot reduce an offender's blameworthiness to the point of rendering a 1 year sentence grossly disproportionate for this offence.

[55] In short, in my view, while child luring can capture a broad range of conduct, any such offence necessarily carries a significant level of moral blameworthiness and constitutes a very serious and morally repugnant act that calls for a significant deterrent and denunciatory sentence. That is an important difference between child luring and the situations examined in *Smith*, *Nur*, *Lloyd*, and other cases where a mandatory minimum sentence was found to contravene Section 12 because the net cast by the offence that triggered it was too wide.

[56] The second element underscored by Karakastanis J. in *Morrison* was that child luring is a hybrid offence. This too is a factor that may render a mandatory minimum sentence constitutionally vulnerable. *Morrison*, paras 185-186.

[57] When dealing with a hybrid offence, and when considering whether the mandatory minimum sentence on an indictable election is grossly disproportionate, a court cannot assume that the Crown will exercise its discretion to elect by indictment only in cases where proceeding summarily would be inappropriate because of the seriousness of the conduct alleged. *Nur*, paras 85-86 and 92; *Morrison*, para 149-150.

[58] As Moldaver J. noted in *Morrison*, when this arises, the gap between the sentencing range that applies to a summary charge and the one that applies to an indictable charge must be carefully considered:

> In the context of a hybrid offence, then, when a two-tier mandatory minimum is challenged on the basis that the higher tier is grossly disproportionate, an important question to be answered is whether the difference between the summary conviction sentencing floor (i.e.: the lower mandatory minimum) and the mandatory minimum for a conviction on indictment (i.e., the higher mandatory minimum) is so great as to render the higher mandatory minimum "grossly" disproportionate in cases where the summary conviction sentencing floor would be fit.

Morrison, para 152.

[59] Under the sentencing regime examined in *Morrison*, a conviction for child luring gave rise to a mandatory minimum sentence of 90 days imprisonment if the matter proceeded summarily. Karakastanis J. noted that this was one quarter of the mandatory minimum sentence if the charge proceeds by indictment and that this disparity suggested that section 172.1(2)(a) was contrary to Section 12. *Morrison*, para 186.

[60] As noted above at Paragraph 23, the mandatory minimum sentence for child luring, when proceeded summarily, has since been increased to 6 months. The mandatory minimum on an indictable election remains 1 year. The gap between the two mandatory minimum sentences has been considerably reduced.

[61] Moreover, as noted by Moldaver J. in *Morrison*, the fact that an offence is hybrid is not determinative of the constitutionality of a mandatory minimum punishment that attaches to the offence if proceeded by indictment. *Morrison*, para 154.

[62] In fact, the mandatory minimum sentence that attaches to the offence of sexual exploitation has recently been upheld, despite the fact that that it is a hybrid offence. *R v E.J.B.*, 2018 ABCA 239, (leave to appeal refused [2018] S.C.C.A. No.441). On that charge, the mandatory minimum sentence on a summary election is 90 days. The gap between the two mandatory minimum sentences is greater than is now the case for child luring and yet, the mandatory minimum sentence on an indictable election survived *Charter* scrutiny.

[63] In *Morrison*, Moldaver J. noted that the availability of a summary election could be viewed as giving the Crown an opportunity to extend a form of leniency to an offender, as opposed to an indication that 1 year imprisonment is grossly disproportionate in some cases of child luring. He concluded, without deciding the issue:

> Child luring is a serious offence that targets one of the most vulnerable groups within Canadian society – our children. It requires a high level of mens rea and involves a high degree of moral blameworthiness. And while the offence may be committed in various ways and in a broad array of circumstances - which is generally the case for most criminal offenses – the simple fact remains that in order to secure a conviction, the Crown must prove beyond a reasonable doubt that the accused intentionally communicated with a person who is, or who the accused believes to be, underage, with specific intent to facilitate the commission

> of a sexual offence or the offence of abduction against that person. Thus, it is at least arguable that a mandatory minimum sentence of one year's imprisonment is not grossly disproportionate in its reasonably foreseeable applications.
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> *Morrison*, para 153.

[64] I conclude, with great respect for those who disagree, that the 1 year mandatory minimum sentence prescribed by section 172.1(2)(a) is not grossly disproportionate in its reasonably foreseeable applications.

[65] Those were my Reasons for dismissing Mr. Sutherland's constitutional challenge to section 172.1(2)(a) of the *Criminal Code*.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
21st day of November, 2019

Counsel for the Crown:	Morgan Fane
Counsel for the Accused:	Stephanie Whitecloud-Brass

S-1-CR-2018-000 055

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BETWEEN:

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RULING ON CHALLENGE TO MANDATORY MINIMUM PUNISHMENT
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