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SENTENCING GUIDELINES

Expert Analysis

The Future of Mandatory Minimums in Sentencing

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Since the Supreme Court's decisions in *Blakely*[1] and *Booker*,[2] sentencing jurisprudence has undergone a virtual revolution. But at least one stalwart remains—mandatory minimums.

Though the proliferation of mandatory minimum sentences is a relatively new phenomenon, mandatory sentences date back to the federal government's first criminal statute, the Crimes Act of 1790. Many of the punishments in the act have been abolished—for example, mutilation of the corpse of a person who committed treason after he was put to death—but some are still good law, including a mandatory minimum of 10 years for holding out false light to a sailing vessel and a mandatory life sentence for piracy.[3] Congress has at times enacted mandatory minimums to address particular concerns, such as bribing meat inspectors,[4] but they were never comprehensively aimed at a whole class of criminal conduct.

Beginning in the mid-1980s,[5] however, this trend changed. In response to the crack cocaine epidemic and the growing rate of drug-related homicides, a series of laws were enacted that created mandatory minimum sentences for dozens of drug crimes, based primarily on the type and quantity of the drug involved.[6] Distributing 500 grams of cocaine, for example, carries with it a mandatory minimum prison term of five years; five kilograms gets you at least 10.[7] If you carry a gun during a drug trafficking crime, you will be sentenced to at least five additional years; if you brandish the gun, you get seven more years; if the gun is discharged for any reason, 10 more years.[8]

Although many mandatory minimums are aimed at drug crimes, Congress has enacted dozens of other statutes with mandatory minimums for crimes such as identity theft, sex offenses, child pornography and immigration violations, often in response to public outcry over particular criminal acts. Since 1986, these statutes have successfully made their way through Congress about every two years.[9] All told, there are currently about 200 federal mandatory minimum statutes on the books, 150 of which have been added in the last 30 years.

To be fair, riddled throughout this drastic increase in the number of mandatory minimums are congressional efforts to mitigate some sentencing provisions' rigidly harsh effects. For example, in 1994, Congress enacted the so-called "safety valve" statute,[10] providing a way out of (under) the mandatory minimums for certain lower-level, non-violent drug offenders. And President Barack Obama recently signed into law an act that reduced the sentencing disparity between crack and powder cocaine and eliminated the five-year mandatory minimum for simple possession of crack cocaine.[11] But these efforts are few and far between—only about 5 percent of federal mandatory minimum statutes have provisions that give judges discretion to alleviate the unforgiving nature of some mandatory minimums.

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Over the last few years, sentencing reform has predominantly been a product of the judiciary. Given the direction of the Supreme Court's recent sentencing decisions, the mandatory minimum issue may be next on its docket. Though some mandatory minimums are a result of findings made by the jury, many are based on post-conviction judicial fact-finding. After *Blakely*, *Booker* and their progeny, the latter will have a hard time withstanding Supreme Court scrutiny.

To discern the constitutional future of mandatory minimums, we must first address its history.

'McMillan' and Beyond

The issue first arose in *McMillan v. Pennsylvania*,[12] in which the U.S. Supreme Court examined Pennsylvania's Mandatory Minimum Sentencing Act, which provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum sentence of five years imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the crime. The statute expressly stated that visible possession of a firearm was not an element of the crime.[13]

In a 5-4 decision, the Court held that due process does not require "sentencing factors" to be proved beyond a reasonable doubt and that the legislature has discretion to choose which factors are elements of a crime and which relate only to post-conviction sentencing determinations. The Pennsylvania statute, the majority explained, "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion…."[14] Thus, under *McMillan*, elements of a crime must be proved to a jury beyond a reasonable doubt, but sentencing factors can be proved to a judge at sentencing by a preponderance of the evidence.

Sixteen years later, the Supreme Court, in *Harris v. United States*,[15] considered mandatory minimums for the first time in a post-*Apprendi*[16] world. *Apprendi* changed the sentencing landscape, holding it "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[17]

Harris, like *McMillan*, was a 5-4 decision. The majority held that whether a firearm is "brandished" is a "sentencing factor" that can be proved to a judge after trial. But on the issue of whether *McMillan* survived *Apprendi*, no faction of the Court could command a majority. Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy, and Antonin Scalia distinguished mandatory minimums from statutory maximums, believing that the former do not alter the sentencing range but "merely require the judge to impose 'a specific sentence *within the range* authorized by the jury's finding that the defendant [was] guilty.'"[18]

Justices Clarence Thomas, Ruth Bader Ginsburg, David Souter and John Paul Stevens disagreed, arguing that *McMillan* was overruled by *Apprendi*. Justice Stephen Breyer, the swing vote, stated that the *Harris-Apprendi* distinction was illogical but refused to extend *Apprendi* to mandatory minimums based on his disagreement with *Apprendi* itself.

As recently as last year, the Supreme Court, in *United States v. O'Brien*,[19] was again presented with whether a particular fact to be proved (whether a firearm was a machine gun) was an element of the offense or merely a post-conviction sentencing factor. Though the Court unanimously held that the factor at issue was an element, Justices Stevens and Thomas

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each wrote separately to note their continued disagreement with *McMillan* and *Harris*.

The *McMillan-Apprendi* dichotomy has created discomfort among some lower courts. Since *Blakely* and *Booker*, defendants sentenced to mandatory minimums have argued that *Harris* is no longer good law.[20] Though some circuit courts have criticized the *Apprendi-Harris* distinction,[21] none has gone as far as holding that *Harris* has been overruled.

Unintended Consequences

Mandatory minimums can, in appropriate cases, serve as an effective deterrent and protect against unwarranted disparities in sentencing. But one cannot ignore the fundamental unfairness of their "unintended consequences."[22] A case from the U.S. Court of Appeals for the Seventh Circuit vividly illustrates this point.

Jennifer Krieger and Jennifer Curry were friends. Ms. Krieger used fentanyl, a prescription pain medication, to manage the pain associated with her severe spinal cord problems. Before going out one night, Ms. Krieger gave Ms. Curry, who was addicted to drugs, one of her fentanyl patches. Ms. Curry's mother found her dead on the couch the next day. There was no suggestion that Ms. Curry's death was anything but unintentional.

Ms. Krieger was charged with and pled guilty to distribution of drugs under 21 U.S.C. §§841(a)(1) and (b)(1)(c), which provides for a maximum sentence of 20 years and no mandatory minimum. The pre-sentencing report recommended a sentencing range of 10-16 months. The government, however, argued that the distribution resulted in death, which, if proven, would require a mandatory minimum sentence of 20 years.

Notably, the government originally charged Ms. Krieger with the aggravated crime of distributing drugs resulting in death. It later returned a superseding indictment for simple distribution, recognizing that it would be unable to prove beyond a reasonable doubt that death resulted, in part because its main witness (the medical examiner who performed the victim's autopsy) fled the country "under a cloud of suspicion."[23] When the government later asked for the 20-year sentence, the defendant sought leniency on the grounds that she was a single mother who had been the victim of rape and physical violence and was suffering from significant medical and psychological problems and substance abuse.

The district court stated that although the government did not prove beyond a reasonable doubt that Ms. Curry's death resulted from the drug Ms. Krieger gave her, it had proven this fact by a preponderance of the evidence, the burden of proof applicable to post-conviction sentencing factors. Because the "death resulting" factor was a sentencing determination under applicable precedent, the court explained, it had no choice but to sentence Ms. Krieger to the mandatory minimum of 20 years.[24] The maximum sentence for distributing the relatively small amount of drugs involved was also 20 years, which the district court could not exceed under *Apprendi*. Thus, the mandatory minimum and statutory maximum converged, and the district court literally had no sentencing discretion whatsoever. Ms. Krieger, who was charged with distribution of a small amount of narcotics, was effectively sentenced for homicide.

On appeal, the Seventh Circuit recognized both the unfairness of Ms. Krieger's sentence and how illogical it is to treat mandatory minimums differently from statutory maximums. Though "[t]he thread by which *McMillan* hangs may be precariously thin," the court felt obligated to affirm the 20-year sentence.[25]

Counting Votes

Much has changed since the 5-4 split in *Harris-Blakely* and its progeny fundamentally altered sentencing jurisprudence, and the Court has added four new members to its ranks.

Of the justices on today's Court, three have made it relatively clear that they do not believe *McMillan* survived *Apprendi*. Justice Thomas has been most explicit, authoring the dissent in *Harris* and the aforementioned concurrence in *O'Brien*. Justice Ginsburg has consistently sided with the majority in the sentencing reform cases since *Apprendi* and joined Justice Thomas' dissent in *Harris*. Justice Breyer, although initially opposed to *Apprendi*, has since recognized that *Harris* is logically inconsistent with *McMillan* and has implied that this issue is ripe for reconsideration.[26]

Justice Kennedy, the author of the majority opinion in *Harris* and a dissenting judge in *Apprendi*, is unlikely to alter course. Justice Scalia's position—which some have called "the Scalia conundrum"[27]—remains unclear. He led the charge for changes in sentencing jurisprudence in *Apprendi* and *Blakely*, but sided with Justice Kennedy's plurality in *Harris* without authoring an opinion to explain his vote. Whether and how he will attempt to reconcile his votes in more recent decisions with *Harris* remains to be seen.

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As for the new justices, one can only guess. Justice Samuel Alito seems likely to vote to uphold the statutory maximum/mandatory minimum distinction, given statements to that effect in his dissent in *Gall*.[28] On the other hand, Justice Sonia Sotomayor has appeared ready to reject *Harris* and *McMillan* for some time.[29] Chief Justice John Roberts is less predictable. Although he joined the *Apprendi*-extending opinion in *Cunningham v. California*,[30] his Sixth Amendment decisions by no means paint a clear picture of how he views mandatory minimums. And Justice Elena Kagan, the newest addition to the Court, has not yet had an opportunity to opine on recent sentencing jurisprudence.

Thus, at least three—and perhaps as many as seven—justices seem inclined to alter course.

Conclusion

McMillan is—and deserves to be—on life-support. Not only is it hard to reconcile with *Apprendi*, but its underlying logic was eviscerated by the groundbreaking decisions in *Blakely* and *Booker*, which cast a pall over judicial fact-finding in mandatory sentencing regimes and "substantially undermined" *McMillan's* reasoning.[31] And because *Harris'* post-*Apprendi* affirmation of *McMillan* garnered the votes of only four justices, stare decisis considerations should not prevent the Court from re-examining and even overturning the decision.

Treating mandatory minimums differently than statutory maximums simply does not make sense. If "the prescribed range of penalties" cannot be changed by judicial fact-finding, as *Apprendi* held, then it should make no difference whether a post-conviction factor "raises the floor or raises the ceiling of [that] range."[32] Indeed, mandatory minimums give even greater weight to judicial fact-finding than statutory maximums—the court must sentence a defendant to at least the mandatory minimum, while it has the option (but is not required) to go higher than an initially prescribed maximum.

In attacking mandatory minimum sentences resulting from post-conviction, judicial findings of fact, counsel should not simply argue that the factor is an element of the crime that must be proven to a jury beyond a reasonable doubt. Go for the jugular and attack *McMillan* itself—in due time, you may find yourself appearing before a Supreme Court ready and willing to remedy its jurisprudential inconsistencies.

1. Blakely v. Washington, 542 U.S. 296 (2004) (prohibiting judges from increasing defendant's maximum sentence based on facts other than those proved to a jury beyond a reasonable doubt or admitted by defendant).
2. *United States v. Booker*, 543 U.S. 220 (2005) (holding federal Sentencing Guidelines unconstitutional and making the guidelines "effectively advisory").
3. See 18 U.S.C. §1658(b) (holding a false light); 18 U.S.C. §1651-53 (piracy crimes).
4. See 21 U.S.C. §622.
5. Congress enacted mandatory minimum sentences for certain drug laws in the 1950s, see, e.g., Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767; Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567, but repealed almost all of them in 1970, see Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. 801 et seq.).
6. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in various sections of 18, 21, and 31 of the U.S. Code); Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §6470(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§846, 963).
7. 21 U.S.C. §841(a), 841(b)(1)(A)-(B).
8. 18 U.S.C. §924(c)(1)(A)(i)-(iii).
9. See Carl M. Cannon, "America: All Locked Up," Nat'l J., Aug. 15, 1998, at 1906.
10. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001(a), 108 Stat. 1796 (codified at 18 U.S.C. §3553(f)).
11. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§2-3, 124 Stat. 2372 (amending 21 U.S.C. §§841, 844).
12. 477 U.S. 79 (1986).
13. Id. at 85-86 (citing 42 Pa. Cons. Stat. §9712(b) (1982)).
14. Id. at 87-88.
15. 536 U.S. 545 (2002).
16. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
17. Id. at 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).
18. *Harris*, 536 U.S. at 563-64 (quoting *McMillan*, 530 U.S. at 494 n.19) (emphasis and alterations in original).
19. 130 S. Ct. 2169 (2010).
20. See, e.g., *United States v. Colon*, 391 Fed. Appx 890, 890 (1st Cir. 2010); *United States v. Duncan*, 413 F.3d 680, 682-83 (7th Cir. 2005).
21. See, e.g., *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005); *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005).
22. See Christopher Mascharka, "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences," 28 Fla. St. U. L. Rev. 935, 935 (2001).
23. *United States v. Krieger*, __F.3d__, 2010 WL 4941979, at *1 (7th Cir. Dec. 7, 2010). The medical examiner was, according to the circuit court, "a tax cheat, a scofflaw, and had been disciplined for entering into a sexual relationship with a patient to whom he illegally supplied prescription medication." Id. at *11.
24. *United States v. Krieger*, No. 06-cr-40001-JPG, 2009 WL 112428, at *8 (S.D. Ill. Jan. 16, 2009).
25. *Krieger*, 2010 WL 4941979, at *9-10.
26. See Transcript of Oral Argument at 20, *United States v. O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569).
27. See, e.g., Benjamin J. Priester, "The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wagging," 60 SMU L. Rev. 209, 233 (2007).
28. See *Gall v. United States*, 552 U.S. 38, 64 (2007) (Alito, J., dissenting).
29. While on the Second Circuit, then-Judge Sotomayor joined an opinion that openly criticized *Harris*. See *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005) ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped").
30. 549 U.S. 270 (2007).
31. *O'Brien*, 130 S. Ct. at 2182 (Stevens, J., concurring).
32. *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).