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MANDATORY MINIMUM SENTENCES AFTER *APPRENDI*: RECENT CASES IN THE TENTH CIRCUIT

INTRODUCTION

Criminal defendants in this country enjoy a constitutional protection that requires the government to prove beyond a reasonable doubt every element that defines the crime with which the defendant is charged.[1] In calling what appears to be an element of a crime something else, such as a "rebuttable presumption" or "affirmative defense," legislatures have evaded the burden of submitting these issues to a jury to be proved beyond a reasonable doubt.[2] Under the federal sentencing guidelines, such elements are referred to as "sentencing factors."[3] Under the guidelines a sentencing judge need only find such sentencing factors by a preponderance of the evidence.[4]

In June 2000, the landmark decision of *Apprendi v. New Jersey*[5] sharply curtailed this use of sentence enhancers. The Supreme Court held in *Apprendi*, that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6] This ruling effectively shifted the burden of proving sentencing factors that increase the statutory maximum penalty away from the sentencing judge and the preponderance of the evidence standard.[7] Instead, the burden was placed back on the prosecutor, with the attendant burden of proving the sentencing factor as an element to the jury under the more rigorous beyond a reasonable doubt standard.[8]

Although the ruling in *Apprendi* produced a broad range of effects on sentencing,[9] this paper focuses on the United States Court of Appeals for the Tenth Circuit's interpretation and application of the *Apprendi* rule in certain cases decided between September 1, 2001, and August 31, 2002. Specifically, this paper examines how the Tenth Circuit has applied the *Apprendi* rule where a defendant's minimum, rather than

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1. *In re* Winship, 397 U.S. 358, 361-68 (1970).
2. Elizabeth A. Olsen, *Rethinking Mandatory Minimums After* Apprendi, 96 NW. U. L. REV. 811, 811 (2002).
3. *See id.*
4. *Id.*
5. 530 U.S. 466 (2000).
6. *Apprendi*, 530 U.S. at 490.
7. *See* Olsen, *supra* note 2, at 812.
8. *Id.*
9. *See* Brooke A. Masters, *High Court Ruling May Rewrite Sentencing; Changes in Guidelines, Raft of Appeals Feared After Justices' Decision*, WASH. POST, July 23, 2000, at A1.

maximum, sentence is increased by sentencing factors that were never alleged or proven at trial beyond a reasonable doubt.

Part I of this survey reviews several landmark cases decided by the Supreme Court from 1970 to the present. Part II of this survey then analyzes two cases from the Tenth Circuit decided in 2001 and 2002, examining how the Tenth Circuit court interpreted and applied the ruling in *Apprendi*. Finally, Part III of this survey suggests that the *Apprendi* rationale be extended to cover increased statutory minimum sentencing, as well as maximum as was prescribed in *Apprendi*.

I. BACKGROUND

To appreciate how the *Apprendi* rule arrived at the Tenth Circuit, it is important to examine some of the key decisions that laid the groundwork for *Apprendi*.

In 1970, the Supreme Court decided the landmark *In re Winship*[10] case. Therein, the Court addressed the question of whether the reasonable doubt standard, rather than the preponderance of the evidence standard, is required during the adjudication of a juvenile case where the juvenile is charged with an act that would constitute a crime if committed by an adult.[11] The case involved a twelve-year-old boy who entered a locker and stole $112 from a woman's purse.[12] If an adult had committed the act, the crime of larceny could be charged.[13] After acknowledging that the evidence against the defendant might not amount to proof beyond a reasonable doubt, the trial judge stated that such proof was not required under the Fourteenth Amendment, relying instead on a preponderance of the evidence standard.[14] After the trial court's decision was affirmed on appeal, the Supreme Court reversed.[15]

In *Winship*, the Court codified the principle that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[16] Although the *Winship* Court clearly established that proof beyond a reasonable doubt of "all essential elements of guilt"[17] was a requirement of due process of law, the Court left open the question of how to define an essential element.[18] Plainly favoring the more rigorous reasonable doubt standard, the Court stated that due process requires

10. 397 U.S. 358 (1970).
11. *Winship*, 397 U.S. at 359.
12. *Id.* at 360.
13. *Id.*
14. *Id.*
15. *Id.* at 360-61.
16. *Id.* at 364.
17. *See id.* at 361.
18. Andrew M. Levine, *The Confounding Boundaries of* "Apprendi-*land:" Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 391 (2002).

that no one should lose his or her liberty unless the government has "'borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable . . . ."[19]

A. Clarifying Winship

The Supreme Court upheld the rationale of *Winship* when it decided the 1975 case of *Mullaney v. Wilbur*.[20] At issue in *Mullaney* was a Maine murder statute which included "malice aforethought, either express or implied," as an element of the crime of murder.[21] The trial court instructed the jury that "malice aforethought is an essential and indispensable element of the crime of murder."[22] Further, the jury was instructed that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied, unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[23] The Court concluded that shifting the burden to the defendant to disprove an element of the crime charged violates the Due Process Clause under *Winship*, and the burden was on the prosecution to prove absence of the heat of passion on sudden provocation under the Maine statute.[24] In *Mullaney*, the district court and initially the First Circuit held that "malice aforethought" was an essential element of the crime charged.[25] The Court, in upholding *Winship*, would not allow the legislature to require the defendant to prove the absence of malice aforethought rather than requiring the prosecution to prove its presence.[26]

If the decision in *Mullaney* removed some of the power of the legislature to define what constitutes an essential element of a crime, *Patterson v. New York*,[27] decided two years later in 1977,[28] perhaps gave some of that power back. In *Patterson*, the defendant was charged with murder under a New York statute similar to Maine's, except the New York statute did not require "malice aforethought, either express or implied."[29] Under the New York statute, a defendant could instead reduce his or her sentence by proving by a preponderance of the evidence that the act was committed while the defendant experienced an "extreme emotional dis-

19. *Winship*, 397 U.S. at 364 (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).
20. 421 U.S. 684, 684 (1975).
21. *Mullaney*, 421 U.S. at 687 n.3 (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (repealed 1976)).
22. *Id.* at 686.
23. *Id.*
24. *Id.* at 703-04.
25. *Id.* at 690.
26. *Id.* at 700-01.
27. 432 U.S. 197 (1977).
28. *Patterson*, 432 U.S. at 197.
29. *Id.* at 198.

turbance."[30] The defendant in the case argued this violated his due process rights, in much the same way the Maine statute had violated Mullaney's, because proving extreme emotional disturbance operated as an affirmative defense.[31]

The Supreme Court affirmed the New York Court of Appeals' rejection of the defendant's argument and distinguished *Patterson* from *Mullaney* on the ground that the statute did not shift the burden to the defendant to disprove an essential element of the crime.[32] The *Patterson* Court emphasized its position by stating that if an intentional killing is shown by proving each element of the crime, "the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances."[33]

Under both the Maine and New York statutes, a defendant would be guilty of murder where the prosecution proves beyond a reasonable doubt that the defendant intentionally killed another.[34] Under both statutes, the defendant can reduce a murder charge to one of manslaughter by proving mitigating circumstances, either by rebutting a "presumption" in Maine, or by asserting an "affirmative defense" in New York.[35] However, in *Mullaney* the sentence was found unconstitutional,[36] while in *Patterson* it was affirmed.[37] The Court effectively reached opposite conclusions in these cases under similar statutes.[38] The important difference between the New York and Maine statutes, however, is that the language of the New York statute does not specifically allow the jury to presume an essential element of the crime charged.[39]

B. What is an "Element?"

After *Patterson*, there remained the question of how far legislatures might go in redefining elements of a crime as sentencing factors.[40] The core issue presented in *Mullaney* and *Patterson*, of exactly what aspects of a crime are required to be proved beyond a reasonable doubt, was further addressed by the Supreme Court in the 1986 case of *McMillan v. Pennsylvania*.[41] In this case, the Court addressed the constitutionality of

30. Levine, *supra* note 18, at 392 (quoting N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975)).
31. *See Patterson*, 432 U.S. at 201.
32. *Id.*
33. *Id.* at 206.
34. ME. REV. STAT. ANN. tit. 17, § 2651 (repealed 1976); N.Y. PENAL LAW § 125.25(1) (McKinney 1975).
35. ME. REV. STAT. ANN. tit. 17, § 2651 (repealed 1976); N.Y. PENAL LAW § 125.25(1) (McKinney 1975).
36. *Mullaney*, 421 U.S. at 703.
37. *Patterson*, 432 U.S. at 201.
38. *See* Levine, *supra* note 18, at 392.
39. *Id.*
40. *Id.* at 393.
41. 477 U.S. 79, 79 (1986).

a legislature enacting a statute requiring sentencing judges to impose a mandatory minimum sentence based on "sentencing factors" presented to the judge at sentencing and found only by a preponderance of the evidence.[42] Under the Pennsylvania statute, such sentencing factors were specifically distinguished from elements of the crime.[43] The Court asserted that the rationale from *Patterson*, that legislatures have great freedom to characterize elements of crimes, controlled the present case.[44] Applying this rationale, the Court concluded that Pennsylvania was free to define what might otherwise appear to be elements of a crime as "sentencing factors," thereby alleviating the State from the burden of proving them beyond a reasonable doubt.[45] "*Patterson* teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties."[46]

The specific sentencing scheme addressed in *McMillan* was Pennsylvania's Mandatory Minimum Sentencing Act,[47] which provided that after a jury had convicted a defendant of certain enumerated felonies, a sentencing judge could increase the sentence within the statutory range.[48] Under this act, if a judge found by a preponderance of the evidence that a defendant committed the felony he or she was convicted of while "visibly possess[ing] a firearm," that judge could impose a mandatory minimum sentence of five years.[49] The Court noted bluntly that the statute acted to "divest the judge of discretion to impose any sentence of less than five years."[50] The Court outlined five reasons for finding this sentencing scheme constitutional.[51] First, the statute did not transgress the limits set forth in *Patterson*.[52] Second, the statute did not create a presumption against the defendant, thereby divesting the prosecution of its burden of proving guilt.[53] Third, the statute did not increase the maximum penalty afforded the sentencing judge.[54] Fourth, the statute created no separate offense with a separate penalty.[55] Finally, the statute did not

42. *McMillan*, 477 U.S. at 80-81.
43. *Id.* at 82 n.1.
44. *Id.* at 85.
45. *Id.* at 85-86.
46. *Id.* at 86.
47. 42 PA. CONS. STAT. § 9712 (1982).
48. *McMillan*, 477 U.S. at 81; *see* Analisa Swan, Apprendi v. New Jersey, *the Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far is Too Far?*, 29 PEPP. L. REV. 729, 739 (2002) (stating that under the statute applied in *McMillan*, after a defendant was convicted, a judge could extend the defendant's sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm).
49. *McMillan*, 477 U.S. at 81 (quoting 42 PA. CONS. STAT. § 9712 (a)).
50. *Id.* at 81-82.
51. *Id.* at 86-88.
52. *Id.* at 86.
53. *Id.* at 87.
54. *Id.*
55. *Id.* at 88.

have the effect of allowing the sentencing factor to be the "tail which wags the dog of the substantive offense."[56]

Although the *McMillan* holding may appear to be a blow against the rights of criminal defendants, the Court stressed that the freedom of the legislature to pursue this course was not without limits.[57] For instance, the Court pointed out that the Due Process Clause prevents states from "discarding the presumption of innocence" and the burden of proving guilt.[58] In fact, the Court stressed, the statute at issue only became effective after the defendant was convicted of the crime charged.[59] Therefore, the fact that the legislature categorized an aspect of a crime as a "sentencing factor," rather than an actual element of the underlying offense, was constitutional because it was within the states established power to define the elements of its crimes.[60] The *McMillan* Court similarly failed to delineate the extent to which legislatures may go in defining, or redefining, elements of crimes as sentencing factors, despite the five-part "test" the Court outlined.[61]

In 1998, in the case of *Almendarez-Torres v. United States*,[62] a 5-4 decision, the Court held that every factor of the *McMillan* five-part test need not be met,[63] even where a sentencing factor increases the statutory penalty, because the judge may determine the presence or absence of facts with respect to sentencing factors.[64] Under the statute at issue in *Almendarez-Torres*, a deported alien, who illegally re-entered the United States, faced a prison sentence of up to two years.[65] However, if the sentencing judge found by a preponderance of the evidence that the previous deportation was for the commission of an aggravated felony, the judge could impose a sentence of as much as twenty years.[66] The Court recognized that because neither *Winship*, nor *Mullaney*, nor *Patterson* provided the necessary guidance to determine whether a sentencing factor, here, recidivism, should be an element, it was necessary to apply the *McMillan* five part test.[67] In doing so, the Court listed the five parts of the test and concluded that the statute at issue

56. *Id.*
57. *Id.* at 85-86.
58. *Id.* at 87.
59. *Id.*
60. *Id.* at 86.
61. *See* Swan, *supra* note 48, at 741.
62. 523 U.S. 224, 225-26 (1998).
63. *Almandarez-Torres*, 523 U.S. at 244-46.
64. Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1059 (1999).
65. *Almendarez-Torres*, 523 U.S. at 226.
66. *Id.* at 226 (quoting 8 U.S.C. § 1326(b)(2) (1994)).
67. *See id.* at 239-43.

failed only the third prong because the sentencing factor increased the maximum allowable penalty.[68]

The Court's reasoning focused on both a careful reading of the statute as well as recidivism's typical role as a sentencing factor.[69] In characterizing recidivism as a sentencing factor, the Court stated that the "relevant statutory subject matter is recidivism," and that it "is as typical a sentencing factor as one might imagine."[70] Despite the potential for an increased maximum penalty under this statute due to a finding of recidivism by a mere preponderance of the evidence, the Court "express[ed] no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence."[71] The Court based this statement on the fact that the defendant had admitted his recidivism when he pled guilty, and it would therefore be difficult to show that a heightened standard of proof would make any difference in his case.[72] Although the *Almendarez-Torres* opinion appeared to embrace the legislature's power to define the difference between an element and a sentencing factor, the Court's emphasis seemed to shift once again, just one year later.

C. Drawing the Line on Elements: Jones v. United States[73]

In 1999, the Court decided the case of *Jones v. United States*.[74] The *Jones* opinion clarified the Court's position on the issue of what aspects of crimes can properly be classified as elements or sentencing factors, which had been hinted at in earlier decisions in this area.[75] At issue in *Jones* was a federal carjacking statute[76] that provided a maximum sentence of fifteen years.[77] However, if serious bodily injury or death resulted, the maximum penalty increased to twenty-five years or life, respectively.[78] The Court held that injury and death were in fact not sentence enhancers, but were essential elements.[79] In doing so, however, the Court recognized the possibility of the opposite view.[80] The Court reasoned that "[a]ny doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule, repeatedly affirmed, that 'where a statute is susceptible of two construc-

68. *Id.* at 242-43.
69. *Id.* at 228, 230.
70. *Id.* at 230.
71. *Id.* at 248.
72. *Id.* at 247-48.
73. 526 U.S. 227 (1999).
74. *Jones*, 526 U.S. at 227.
75. *Id.* at 251 n.11 ("[O]ur decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century.").
76. *Id.* at 230 (quoting 18 U.S.C. § 2119 (Supp. V 1988)).
77. *Id.* (quoting 18 U.S.C. § 2119).
78. *Id.* (quoting 18 U.S.C. § 2119).
79. *Id.* at 239.
80. *Id.*

tions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"[81]

In language that perhaps foretold the later *Apprendi* rule, the Court stated: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[82]

In response to the dissent's concern that the holding would interfere with the states' efforts to bring uniformity to their sentencing guidelines and practices, the Court emphasized that "our decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century."[83] This narrow holding was restricted to facts that increase the maximum penalty and did not directly address the issue raised when a sentencing factor increases the minimum sentence imposed.[84]

In 2000, the Court decided the case of *Apprendi v. New Jersey*.[85] The Court addressed the issue of "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."[86] In *Apprendi*, the defendant was charged with several counts, including first-degree murder, after firing shots into the house of an African-American couple.[87] The defendant pleaded guilty to unlawful possession of a firearm in the second degree, which carried a sentence of five to ten years.[88] At sentencing, if the judge found this crime was not motivated by racial bias, the maximum penalty for this count would be ten years.[89] However, if the judge found the crime was motivated by racial bias, the allowable penalty would increase to thirty years, with a maximum penalty of twenty years on the weapons charge.[90] At sentencing, the judge found by a preponderance of the evidence that the crimes Apprendi was convicted of committing were motivated by racial bias,

81. *Id.* (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).
82. *Id.* at 243 n.6.
83. *Id.* at 252 n.11.
84. *See id.* at 243 n.6.
85. 530 U.S. 466, 466 (2000).
86. *Apprendi*, 530 U.S. at 469.
87. *Id.*
88. *Id.* at 469-70.
89. *Id.* at 470.
90. *Id.*

and the sentence enhancer therefore applied.[91] The defendant was sentenced to twelve years on the weapons possession charge.[92] Effectively, the defendant had been sentenced to twelve years for a crime that carried a maximum penalty of ten years.[93] After the state supreme court affirmed the sentence,[94] the United States Supreme Court granted certiorari and reversed in a 5-4 decision.[95]

After examining its cases in this area, the Court confirmed the opinion expressed in *Jones* that other than prior convictions, facts that increase penalties beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.[96] The Court further endorsed the rule proposed in a concurring opinion in *Jones* that, "'[i]t is 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. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'"[97] In light of this, the Court held that use of the hate-crime sentence enhancer, which had been found by a preponderance of the evidence, and which had effectively raised the maximum penalty from ten to twenty years against the defendant, was unconstitutional.[98]

The principal dissent accused the *Apprendi* majority of overruling *McMillan,* which upheld an increased mandatory minimum sentencing scheme based on sentencing factors.[99] Justice Stevens, writing for the *Apprendi* majority, specifically denied this claim in a footnote,[100] instead limiting the *McMillan* holding to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict."[101] Stopping short of overturning *McMillan*, the Court "reserve[d] for another day the question whether *stare decisis* considerations preclude reconsideration of its [*McMillan*] narrower holding."[102]

After *Apprendi*, the question of whether *McMillan* still stood was presented to the court in *Harris v. United States*.[103] In *Harris*, the defendant was charged with selling illegal narcotics while carrying an uncon-

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91. *Id.* at 471.
92. *Id.*
93. *Id.* at 470, 471.
94. *Id.* at 472.
95. *Id.* at 468, 474, 497.
96. *Id.* at 490.
97. *Id.* (quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring)).
98. *See id.* at 470, 491-93.
99. *Id.* at 533 (O'Connor, J., dissenting) ("[I]t is incumbent on the Court . . . to admit that it is overruling *McMillan*.").
100. *Id.* at 487 n.13.
101. *Id.*
102. *Id.*
103. 536 U.S. 545 (2002).

cealed semiautomatic pistol at his side.[104] The defendant was charged under a federal statute that provided a person convicted of carrying a firearm during the commission of a drug trafficking crime a minimum sentence of no less than seven years, in addition to the punishment for the crime of drug trafficking.[105] The defendant pleaded guilty and was convicted of the drug trafficking charge.[106] The government assumed that the statutory provision defined a single crime and that brandishing a firearm was, therefore, a sentencing factor; thus, the indictment mentioned nothing about brandishing.[107] The district court found that the defendant had brandished a gun and, pursuant to the statute, imposed the mandatory minimum sentence of seven years.[108]

On appeal, the Fourth Circuit rejected the defendant's argument that brandishing a gun was an element of a separate offense that must be included in the indictment and conviction.[109] The court relied on the reasoning that *McMillan* foreclosed his argument "that if brandishing is a sentencing factor, as a statutory matter the statute is unconstitutional in light of *Apprendi*."[110]

On appeal to the Supreme Court, the defendant in *Harris* argued that the constitutional concerns evident in *Apprendi* applied to sentencing factors that increase a defendant's minimum penalty.[111] In affirming the Fourth Circuit's decision, the Court rejected the defendant's argument in another 5-4 decision.[112] The Court began its analysis with a construction of the challenged statute.[113] The Court drew a clear distinction between the elements of the crime listed in the statute and the sentencing factors listed after the elements.[114] The majority reasoned that sentencing factors do not become elements merely because legislatures require the judge to impose a minimum sentence when those facts are found.[115] The Court noted that there is no reason, when viewed from a historical context, that the framers of the Fifth and Sixth Amendments would have considered sentencing factors as elements of a crime, even though they may be stigmatizing and punitive.[116] The Court added, "[T]his conclusion might be questioned if there were extensive historical evidence showing that

104. *Harris*, 536 U.S. at 550.
105. *Id.* at 550-51 (quoting 18 U.S.C. § 924(c)(1)(a)(ii) (1994)).
106. *Id.* at 571-73.
107. *Id.* at 551.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 564-65.
112. *See id.* at 548, 551-52.
113. *Id.* at 551-52.
114. *Id.* at 555-56.
115. *Id.* at 560.
116. *Id.*

facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements."[117]

Justice Thomas, writing for the dissent, recognized that *McMillan* and *Apprendi* were in conflict, and that the "Court's holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi*."[118] He added that his decision would be to reaffirm *Apprendi* and reverse the Fourth Circuit, thereby overruling the *McMillan* holding.[119]

Interestingly, on the same day the Court decided *Harris*, it also affirmed the limits on increased statutory maximum penalties set forth in *Apprendi* when it decided *Ring v. Arizona*.[120] The *Ring* Court invalidated capital sentencing schemes that allow judges to find "aggravating factors" by a preponderance of the evidence, where such factors can lead to imposition of the death penalty.[121]

In this discussion, it is also important to note the Tenth Circuit's 2000 decision of *United States v. Hishaw*.[122] The defendant in *Hishaw* was indicted for intending to distribute "*approximately two . . . ounces of cocaine base*."[123] Two ounces of cocaine base was enough to trigger a sentence of ten-years to life under the relevant statute.[124] However, the term "approximately two ounces" could just as easily be interpreted as actually requiring less than the two ounces to trigger the ten-year to life sentence.[125] Additionally, there was no indication that the jury actually determined what quantity of cocaine the defendant possessed.[126] The *Hishaw* Court concluded that because of the "ambiguous allegation as to the quantity of cocaine base involved, and because of *Apprendi*, . . . the failure to require specific findings regarding the quantity of cocaine constitutes a 'plain or obvious' error."[127]

As evidenced by the disagreement found in *Harris*[128] and *McMillan*,[129] the Supreme Court decisions in many of these cases are strongly divided. At present, facts regarded by the legislature as sentencing factors need only be proved by a preponderance of the evidence, unless they affect the sentence imposed by increasing the maximum al-

117. *Id.*
118. *Id.* at 572 (Thomas, J., dissenting).
119. *Id.* (Thomas, J., dissenting).
120. 536 U.S. 584 (2002).
121. *Ring*, 536 U.S. at 607-08.
122. 235 F.3d 565, 571-72 (10th Cir. 2000).
123. *Hishaw*, 235 F.3d at 575.
124. *Id.* (citing 21 U.S.C. §§ 841(b)(1)(A)(ii), (iii) (1994)).
125. *Id.*
126. *Id.*
127. *Id.*
128. *See Harris*, 536 U.S. at 548.
129. *See McMillan*, 477 U.S. at 80.

lowable penalty.[130] Furthermore, sentencing factors that increase the minimum sentence, even substantially, are outside the purview of *Apprendi*.[131] However, the state of the law in this area appears uncertain and the decisions continue to be volatile. Indeed, even the circuit courts have not been entirely consistent in interpreting and applying *Apprendi*.[132]

II. UNITED STATES COURTS OF APPEALS DECISIONS

A. *Tenth Circuit Cases*

1. *United States v. Lujan*[133]

a. Facts

Defendant Joseph Lujan, along with a co-defendant, set up a sale of one pound of methamphetamine to an undercover law enforcement agent.[134] After he met with the agent, provided a sample, and discussed price and payment, Lujan agreed to supply more methamphetamine.[135] When Lujan brought more of the drug for the agent to purchase, the agent left the scene, purportedly to get more money for the purchase.[136] Officers then apprehended Lujan and seized three pounds of methamphetamine from the scene.[137] Lujan admitted he had originally delivered the methamphetamine to a co-defendant's house, that he knew what the drug was, and that he was to receive compensation for his part in the sale.[138] The defendant was indicted on three counts arising from this attempt to sell approximately three pounds of methamphetamine to the agent.[139] The defendant entered into a plea agreement whereby he pleaded guilty to a single count of conspiring with his co-defendants to possess and distribute more than fifty grams of methamphetamine.[140]

The sentencing judge calculated Lujan's sentence under the Sentencing Guidelines to be between 108 and 135 months, and then said that Lujan would be sentenced to 108 months.[141] The probation officer then

130. *See Criminal Law and Procedure–Leading Cases*, 116 HARV. L. REV. 230, 234-35 (2002) [hereinafter *Criminal Law and Procedure*].

131. *See* United States v. Avery, 295 F.3d 1158, 1171 (10th Cir. 2002).

132. *Compare* United States v. Strayhorn, 250 F.3d 462 (6th Cir. 2001) (extending *Apprendi* to mandatory minimum sentences), *overruled by* Harris v. United States, 536 U.S. 545 (2002), *with* United States v. Mazzio, 2002 WL 31164256 (6th Cir. 2002) (recognizing that *Harris* overruled the Circuit's previous decisions that applied *Apprendi* to mandatory minimum sentences; the Sixth Circuit also recognized that *Harris* overruled *Strayhorn* in *United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002)).

133. 268 F.3d 965 (10th Cir. 2001).

134. *Lujan*, 268 F.3d at 966.

135. *Id.* at 966-67.

136. *Id.* at 967.

137. *Id.*

138. *Id.*

139. *Id.* at 966.

140. *Id.*

141. *Id.* at 967.

pointed out that under the statute the defendant was charged with violating, he was subject to a mandatory minimum of ten years, which the judge then imposed.[142] On appeal to the Tenth Circuit, the defendant argued that his sentence violated the principle enunciated in *Apprendi*, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[143] The defendant's contention was that because of ambiguity in the indictment, its language could be interpreted to mean either fifty grams of pure methamphetamine or fifty grams of a mixture containing only a trace amount of methamphetamine.[144] If the indictment were interpreted to mean a mixture, the defendant's minimum sentence would be five years instead of ten.[145]

b. Decision

The Tenth Circuit at once recognized that the defendant's case, on the facts, did not reveal an *Apprendi* error,[146] since the drug quantity that the defendant pleaded guilty to, and was sentenced for, was specified in the indictment.[147] For the defendant to prevail, therefore, the court acknowledged that he had to "convince [the court] first to modify the rule of *Apprendi* by making it applicable to the mandatory *minimum* sentence established by a particular statute."[148] The court recognized the Sixth Circuit opinion in *United States v. Strayhorn*,[149] which interpreted *Apprendi* as mandating that a drug quantity that triggers a mandatory minimum sentence must be included in an indictment and submitted to a jury.[150] The court said, however, that this was not enough: "Even if we were to follow *Strayhorn* and extend the rationale of *Apprendi* to mandatory minimum sentences, however, that alone would not entitle Lujan to relief." [151] Again, this was because the government's indictment did allege possession of a quantity of the drug sufficient to trigger the mandatory minimum, to which the defendant had pled guilty.[152]

The defendant's argument, however, depended on the specific language contained in the statute.[153] If the fifty grams of methamphetamine referred to in the indictment could actually mean fifty grams of a mixture

142. *Id.*
143. *Id.* (quoting Apprendi v. United States, 530 U.S. 466, 490 (2000)).
144. *Id.* at 969.
145. *Id.*
146. *Id.* at 967-68.
147. *Id.* at 968.
148. *Id.*
149. 250 F.3d 462 (6th Cir. 2001).
150. *Lujan*, 268 F.3d at 969 (citing United States v. Strayhorn, 250 F.3d 462, 468-71 (6th Cir. 2001) (extending *Apprendi* to mandatory minimum sentences; the Sixth Circuit recognized that *Harris* overruled this extension in *Mazzio* and *Leachman*).
151. *Id.*
152. *Id.* at 966-67.
153. *Id.* at 969.

containing a trace amount of methamphetamine, then the minimum sentence would be five years instead of ten.[154] Reviewing only for plain error, the court concluded that the indictment meant fifty grams of methamphetamine, not a mixture.[155] The court concluded that the mandatory minimum sentence was therefore proper under the statute.[156] Because of this, the defendant's sentence would not have changed even if the court had adopted the rule urged by the defendant.[157] In reaching this conclusion, the court declined to actually investigate whether *Apprendi* should be applied to mandatory minimum sentences, and affirmed the sentence imposed by the district court.[158]

2. *United States v. Avery*[159]

a. Facts

On January 30, 2000, a confidential informant notified drug enforcement agents that a man identified as John Avery, the defendant, was selling crack cocaine from his home, and that the informant had personally seen four ounces of cocaine at the defendant's residence.[160] Based on this information, the agents arranged for the informant to buy cocaine from the defendant at the defendant's residence.[161] Thereafter the agents searched the home and recovered, among other items, more than twenty ounces of cocaine and several firearms, including a Colt AR 15 .223 caliber rifle with a high capacity magazine.[162] Avery admitted that he owned the weapons and acknowledged that he sold cocaine from the residence.[163]

On March 7, 2000, an eight-count indictment was issued against the defendant.[164] The defendant was later convicted on all counts,[165] and subsequently appealed the convictions and sentences on count six and count one, which alleged the possession of firearms and cocaine, respectively.[166] With respect to count six, the defendant argued that the indictment failed to allege the rifle he was charged with possessing during a trafficking crime was a "semi-automatic assault weapon."[167] Under the applicable statute, "semi-automatic assault weapons" are defined as

154. *Id.*
155. *Id.*
156. *Id.* at 970.
157. *Id.*
158. *Id.*
159. 295 F.3d 1158 (10th Cir. 2002).
160. *Avery*, 295 F.3d at 1165.
161. *Id.*
162. *Id.* at 1165-66.
163. *Id.* at 1166.
164. *Id.* at 1163.
165. *Id.* at 1164.
166. *Id.*
167. *Id.* at 1169.

weapons "known as . . . Colt AR 15."[168] The defendant was sentenced to a statutory minimum of five years, but the district court increased this sentence to ten years because the firearm that the jury found the defendant possessed was a "semi-automatic assault weapon."[169] Yet neither the indictment nor the jury instructions discussed whether the firearm was a "semiautomatic assault weapon."[170] The defendant argued that even if weapon type was a sentencing factor, the weapon type still had to be "alleged in the indictment, submitted to a jury, and found beyond a reasonable doubt" in order for the court to invoke the mandatory minimum sentence.[171]

Additionally, the defendant appealed count one of the indictment, which charged him with possessing thirteen grams of cocaine.[172] According to the statute the defendant was charged under, this amount of cocaine would raise the statutory maximum penalty from twenty to forty years.[173] The defendant argued, therefore, that the district court's failure to instruct the jury on drug quantity was a violation of his rights under *Apprendi*.[174]

b. Decision

As to count six, the Tenth Circuit began its response to the defendant's argument by referring to the Supreme Court's recent ruling in *Harris*, and its own ruling in *Lujan*.[175] The court noted that under those cases, *Apprendi*'s rationale does not apply "where a fact increases a defendant's mandatory minimum sentence but does not increase the maximum statutory penalty facing a defendant."[176] The court did not stop there, however. Even if the defendant's argument was not foreclosed by the court's interpretation of *Harris*, the argument would still fail due to the wording of the statute under which he was charged.[177] When the jury convicted the defendant on count six of the indictment, it found the defendant guilty of possessing a "Colt AR 15 .223 Caliber rifle" beyond a reasonable doubt.[178] The court called this fact dispositive because in the statute the defendant was convicted of violating, "semi-automatic assault weapons" are defined as weapons "known as . . . Colt AR 15."[179] The fact that was necessary to apply the mandatory minimum sentence had

168. *Id.* at 1171-72.
169. *Id.* at 1169.
170. *Id.*
171. *Id.* at 1171.
172. *Id.* at 1181-82.
173. *Id.* at 1182.
174. *Id.* at 1181.
175. *Id.* at 1171.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 1171-72.

been charged and found by the jury beyond a reasonable doubt.[180] Therefore, the ten-year mandatory minimum sentence was properly invoked and the Tenth Circuit affirmed the defendant's conviction on count six.[181]

As to the defendant's appeal of his sentence on count one, the court began by recognizing that the thirteen grams of cocaine charged in the indictment was enough to raise the statutory maximum penalty from twenty to forty years.[182] The jury, however, was never instructed on the quantity issue.[183] Therefore, there would be an *Apprendi* violation if the defendant was sentenced to more than the statutory maximum.[184] The court recognized that on this point its own decisions had been inconsistent.[185] In some cases, the Tenth Circuit found that failure to submit drug quantity to the jury was not erroneous under *Apprendi*.[186] In other cases, the Tenth Circuit did find error in such a circumstance.[187] However, in this case, because the sentence imposed, seventy-eight months, fell below the original twenty-year maximum, the court declined to find an *Apprendi* violation, despite the increased maximum possible penalty.[188] The Tenth Circuit based its conclusion on the principle that no "substantial right" was violated if the sentence imposed was below the maximum, even assuming there was error in failing to submit drug quantity to the jury.[189] The court affirmed the defendant's conviction on count one, as well as the convictions on all other counts.[190]

B. Sixth Circuit

1. *United States v. Strayhorn*[191]

The rule from *McMillan*, that sentencing factors need only be proved by a preponderance of the evidence where such findings increase the statutory minimum penalty that can be imposed on a defendant, was questioned after the Supreme Court decided *Apprendi*, almost fifteen years after the Court's decision in *McMillan*.[192] The Sixth Circuit appeared to be alone in not following *McMillan* with respect to mandatory

180. *Id.* at 1172.
181. *Id.*
182. *Id.* at 1182.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* (citing United States v. Combs, 267 F.3d 1167, 1182 (10th Cir. 2001); United States v. Eaton, 260 F.3d 1232, 1239 (10th Cir. 2001); United States v. Wilson, 244 F.3d 1208, 1215 (10th Cir. 2001); United States v. Thompson, 237 F.3d 1258, 1262 (10th Cir. 2001)).
187. *Avery*, 295 F.3d at 1182 (citing United States v. Heckard, 238 F.3d 1222, 1235 (10th Cir. 2001)); United States v. Hishaw, 235 F.3d 565, 575 (10th Cir. 2000).
188. *Avery*, 295 F.3d at 1182.
189. *Id.*
190. *Id.*
191. 250 F.3d 462 (6th Cir. 2001) (extending *Apprendi* to mandatory minimum sentences; the Sixth Circuit recognized that *Harris* overruled this extension in *Mazzio* and *Leachman*).
192. *Harris*, 536 U.S. at 548.

minimum sentences,[193] and ignored the Court's holding in deciding the case of *United States v. Strayhorn*.[194]

a. Facts

In *Strayhorn*, an informant notified the Drug Enforcement Administration ("DEA") that the defendant regularly supplied him with marijuana.[195] Upon executing a search warrant at the defendant's residence, agents recovered 48 pounds of marijuana, three thousand dollars in cash, and a handgun.[196] The defendant was indicted and count one charged him with conspiracy to possess and "distribute 'a measurable quantity of marijuana.'"[197] The defendant pled guilty to this count, but reserved the right to challenge the quantity of marijuana attributed to him and relevant under the United States Sentencing Guidelines ("Guidelines").[198] The United States Probation Office's pre-sentence report attributed a total of 414 pounds of marijuana to the defendant, yet gave no indication of how it reached this figure.[199] Taking the defendant's prior criminal history and the fact that he accepted responsibility for the acts charged into account, the defendant was eligible for a sentence of between 57 and 71 months under the Guidelines.[200] The probation officer insisted, however, that the mandatory minimum for conspiracy to possess 414 pounds by a defendant with a prior felony drug conviction was ten years.[201] The defendant reiterated that he wished to plead guilty only to possession of a total of 48 pounds.[202] The defendant was sentenced to ten years.[203]

b. Decision

On appeal the defendant asserted that the district court violated his due process rights by finding the drug quantity by a preponderance of the evidence.[204] The Sixth Circuit noted that pursuant to *Apprendi*, "the government must name in the indictment the quantity of drugs for which it seeks to hold the defendant responsible,"[205] and that if the drug quantity subjects the defendant to an enhanced sentence, it must be considered an element of the offense rather than a sentencing factor.[206] The court then vacated and remanded the defendant's case on the rationale that the finding of drug quantity by a preponderance of the evidence raised the sen-

193. United States v. Hill, 252 F.3d 919, 921 (6th Cir. 2001).
194. 250 F.3d at 470.
195. *Id.* at 464.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 465.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 466.
204. *Id.*
205. *Id.*
206. *Id.* at 467-68.

tence from a maximum of ten years to a minimum of ten years.[207] In doing so, the Sixth Circuit ruled that the defendant's Fifth and Sixth Amendment rights had been violated.[208]

In deciding *Strayhorn*, the Sixth Circuit never acknowledged the Supreme Court's holding in *McMillan*, which would have required a different conclusion under these facts. Additionally, the Supreme Court's decision in *Harris* clearly refuses to apply the *Apprendi* analysis to situations involving increased mandatory minimum sentences.[209]

2. *United States v. Mazzio*[210]

a. Facts

In 2002, the Sixth Circuit court decided *United States v. Mazzio*,[211] wherein it concluded that *Harris* overruled its earlier holding in *Strayhorn*.[212] In April 1999, the defendant, Anthony Mazzio, was stopped by members of a drug task force in Wayne County, Michigan, on the suspicion that he was involved in narcotics activity.[213] When members of the task force searched the vehicle the defendant was driving, they discovered ten kilograms of cocaine.[214] A jury convicted the defendant, and a judge sentenced him to 240 months.[215] The judge determined the quantity of cocaine by only a preponderance of the evidence.[216] The defendant moved for a new trial but the district court denied the motion.[217]

b. Decision

The Defendant appealed on several grounds, including *Apprendi* violations.[218] He claimed that *Apprendi* required that the government charge the quantity of cocaine the indictment and prove the amount to the jury beyond a reasonable doubt, because this fact increased the minimum penalty that the judge could impose on the Defendant.[219] The Sixth Circuit affirmed the trial court, and noted that the government had conceded that an *Apprendi* error occurred in this case.[220] However, the Government made its concession before the Supreme Court decided *Harris*.[221] The Sixth Circuit reversed its earlier position on whether *Ap-*

207. *Id.* at 471.
208. *Id.*
209. *Harris*, 536 U.S. at 556.
210. 2002 WL 31164256 (6th Cir. Sept. 27, 2002).
211. *Mazzio*, 2002 WL 31164256, at *1.
212. *Id.* at *7.
213. *Id.* at *1.
214. *Id.* at *2.
215. *Id.* at *3, *6.
216. *Id.* at *6.
217. *Id.* at *3.
218. *Id.* at *6.
219. *Id.*
220. *Id.*
221. *Id.*

prendi applies to facts that affect mandatory minimum sentences, stating: "[T]he decision in *Harris* leaves little doubt that . . . *Strayhorn* [is] overruled to the extent [it applies] *Apprendi* to enhancements of mandatory minimum sentences."[222] After *Harris*, the majority of circuit courts refuse to extend *Apprendi* to cases that increase mandatory minimum sentences based on sentencing factors.[223]

III. ANALYSIS

It is logical for courts to extend the rationale of *Apprendi* to mandatory minimum sentencing.[224] The prosecution should be required to submit any fact that increases a defendant's sentence beyond the otherwise legislatively mandated range for the offense of conviction to a jury and to prove such a fact beyond a reasonable doubt. This rule would address some of the ambiguity of the *Harris* decision.[225] Certainly it would clarify the extent to which legislatures can redefine crimes in order to avoid the beyond a reasonable doubt standard of proof required by *Apprendi*. The loss of liberty a defendant experiences and the stigma that society attaches to a criminal offense are increased where a sentence is raised beyond the prescribed statutory maximum penalty.[226] But as Justice Thomas noted in his dissent in *Harris*, the results are the same when a defendant is subject to a higher mandatory minimum sentence.[227] "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed."[228]

The concern that defendants have notice of the specific penalties they face in a criminal proceeding likewise compels an extension of *Apprendi* to mandatory minimum sentences.[229] When a legislature defines a crime, the penalties it attaches to that crime serve as notice to the public of what punishment a person may face if he or she commits the crime.[230] Mandatory minimum sentencing schemes do not provide this notice because they expose defendants to increased penalties for the same crime, based on factors not listed as part of the crime or even provided in the indictment when the defendant is charged.[231]

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222. *Id.* at *7.
223. *Leachman*, 309 F.3d at 383; *Avery*, 295 F.3d at 1171; United States v. Harris, 243 F.3d 806, 809 (4th Cir. 2001); United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000); United States v. Aguayo-Gelgado, 220 F.3d 926, 934 (8th Cir. 2000).
224. Levine, *supra* note 18, at 382-83
225. *Criminal Law and Procedure*, *supra* note 130, at 242.
226. Harris v. United States, 536 U.S. 545, 560 (2002).
227. *See Harris*, 536 U.S. at 608-09 (Thomas, J., dissenting).
228. *Id.* at 579-80 (Thomas, J., dissenting).
229. Olsen, *supra* note 2, at 835.
230. *Id.*
231. *Id.*

Finally, even the dissenting justices in *Apprendi* acknowledged that the majority's reasoning in that case extended to mandatory minimum sentences.[232] Writing for the dissent, Justice O'Connor stated, "[T]he Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed -- which, by definition, must include increases or alterations to either the minimum or maximum penalties -- must be proved to a jury beyond a reasonable doubt."[233]

CONCLUSION

"To allow a fact to effect the punishment prescribed by law without treating that fact as an element of the crime thus offends the historic 'invariable linkage of punishment with crime.'"[234] Considering the principles of fairness and due process inherent in our legal system, extending this principle to mandatory minimum sentencing is a natural and logical step. The decisions of the Tenth Circuit Court of Appeals on this issue, though bound by Supreme Court holdings, indicate that the court is willing to consider this step, yet unwilling to take it. There is no doubt, given the constitutional significance of *Apprendi* issues, that courts will be faced with these situations repeatedly in the future. Given the right factual circumstances, and in light of the volatility of the decisions in this area, the Tenth Circuit and the Supreme Court may reconsider their reluctance to take this logical step and require that *any* fact that increases a defendant's sentence beyond the legislatively mandated range for the offense of conviction be proved beyond a reasonable doubt.

Steven Josephy[*]

232. *Id.* at 836.

233. Apprendi v. New Jersey, 530 U.S. 466, 533 (2000) (O'Connor, J., dissenting).

234. Olsen, *supra* note 2, at 835 (quoting *Apprendi*, 530 U.S. at 478).

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