Buffalo Law Review

Volume 46 | Number 1 Article 6

1-1-1998

30=20: "Understanding" Maximum Sentence Enhancements

Frank R. Herrmann
Boston College

30=20: "Understanding" Maximum Sentence Enhancements

FRANK R. HERRMANN†

INTRODUCTION

After a long and hard-fought trial, a jury has convicted your client of kidnapping. A statute defines kidnapping as the forcible taking or holding of another against that person's will. The statute permits the court to punish your client by twenty years in prison for the kidnapping. If the judge at sentencing finds your client accomplished the kidnapping with a weapon, the statute permits thirty years imprisonment.

You and your client now stand before the judge who will impose sentence. The judge announces she has read affidavits the prosecutor supplied her for sentencing. On the basis of those submissions, the judge believes that your client probably used a weapon during the kidnapping. She makes a finding that he did so. You object:

> Your honor, I understand I am bound by the jury's verdict with respect to the kidnapping, although neither my client nor I agree with it. But the jury said nothing about the use of a weapon. The verdict addresses only what the indictment charged. The prosecutor did not include any mention of a weapon in the indictment. Because the indictment did not raise the issue of a weapon, Your Honor never instructed the jury on the matter. Had we been given notice, we could have prepared our defense at trial in light of a complete and formal accusation about the weapon. We had no opportunity to do so. Moreover, at trial the prosecution called no witnesses to establish my client used a weapon. Had the prosecutor done so, I could have vigorously confronted those witnesses and cross-examined them. I also could have called witnesses to refute them. We had no chance to do that. Had the prosecution charged my client with using a weapon, due process would have required the prosecution to carry the burden of proving its charge beyond a reasonable doubt. By

---

† Assistant Professor of Law, Boston College; A.B. Fordham University, 1969; J.D., Boston College Law School, 1977. I gratefully acknowledge the helpful criticisms made of earlier drafts of this article by Boston College Law School Professors Sharon Beckman, Michael Cassidy, Phyllis Goldfarb, James Rogers, and Dean Avian Soifer. Most especially, I wish to thank Professor Ingrid Hillinger whose friendship, encouragement, and expertise made this possible.

> only raising the matter at sentencing, the prosecution hopes to escape that burden. My client is now deprived of the verdict of a jury on the issue of using a weapon. My client should not lose his due process rights guaranteed him at trial because the prosecutor chose to raise the use of a weapon only at sentencing. Consequently, I ask Your Honor either to disregard the issue of whether my client used a weapon, or to accord my client all the due process protections he would have had if the prosecution had formally charged him with the use of a weapon.

The sentencing judge responds:

> Counsel, your requests are denied. You seem to think we are here to try your client. We've done that. You lost. We are here now simply to impose punishment for his crime. The statute allows me to impose a sentence of twenty years for kidnapping, but thirty years if I find the defendant used a weapon. I have found your client probably used a weapon. I impose the maximum sentence of thirty years in prison. Next case.

Was your client entitled to the due process protections of a criminal trial for the use of a weapon before the judge added ten years to the defendant's sentence for kidnapping? Appellate courts say no. This Article argues the contrary. When a statute permits a court to punish more harshly due to an aggravating factor than it could without the factor (for example, thirty years for kidnapping with a weapon rather than twenty years for kidnapping without a weapon), the due process protections of a criminal trial should apply to the aggravating factor before a judge can impose the lengthier punishment. This Article will refer to statutes that permit greater punishment for the aggravated commission of a crime as "maximum-enhancing statutes." The term "maximum" refers to the greatest punishment the statute permits for commission of the crime in its unaggravated form (for example, twenty years for kidnapping without the use of a weapon).

Part I considers the Supreme Court's rationale for refusing to apply full due process safeguards to other types of sentencing schemes. This background will reveal the unique quality of maximum-enhancing statutes and establish why the due process protections of a criminal trial should apply to sentencing under maximum-enhancing statutes. Part I, therefore, undertakes to explain courts' rationales to deny criminal defendants full criminal due process under discretionary sentencing, mandatory minimum sentencing, and guideline sentencing. Part II focuses on maximum-enhancing statutes. It isolates and analyzes the courts' rationales for denying criminal defendants full criminal due process under them. Part II argues that no convincing rationale justifies reduced due process for maximum-enhancing stat-

utes, no matter what one's views of the due process reasoning underlying other sentencing structures. Part III will argue that, if courts applied full criminal due process protection to maximum-enhancing factors, it is unlikely that legislatures would try to avoid the safeguards by artful drafting of criminal statutes. The Article will conclude that courts should apply the full protections appropriate to a criminal trial to findings that enhance a maximum sentence.

I. THE RATIONALE FOR DENYING DUE PROCESS PROTECTIONS AT SENTENCING

A. Williams v. New York:[1] *The Rationale for Denying Due Process Protections at Discretionary Sentencing*

A vast difference exists between an accused's rights at trial and a convicted defendant's rights at sentencing. At trial, a criminal defendant is entitled to the full panoply of due process protections: the right to counsel,[2] notice of the charges,[3] to compulsory process,[4] to confront and cross-examine adverse witnesses,[5] to trial by jury,[6] and the right to have the prosecution prove the elements of the offense beyond a reasonable doubt.[7] After conviction, a defendant stands in a radically different position. These due process guarantees vanish except for the right to counsel.

A traditional criminal statute defines the elements of a crime and sets out a maximum penalty permitted for its commission. A judge has the discretion to impose any penalty within the maximum the statute prescribes. The statute does not require the judge to make any fact-finding before imposing sentence. The jury's finding that the defendant committed the elements of the crime permits the judge, without more, to impose the maximum penalty, if the judge wishes.

The United States Supreme Court set out the rationale for denying due process claims under discretionary sentencing in

---

1. 337 U.S. 241 (1949).
2. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
3. *See* Russell v. United States, 369 U.S. 749, 766 (1962).
4. *See* Washington v. Texas, 388 U.S. 14, 19 (1967).
5. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).
6. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Baldwin v. New York, 399 U.S. 66, 69 (1970).
7. *In re* Winship, 397 U.S. 358, 364 (1970). A defendant is also entitled to the effective assistance of counsel. *See Gideon*, 372 U.S. at 335. This is the only trial right that also attaches at sentencing. *See* Mempa v. Rhay, 389 U.S. 128, 136 (1967).

Williams v. New York.[8] The case involved a traditional discretionary sentencing statute. In *Williams*, a jury had convicted the defendant of murder and recommended a life sentence. The murder statute permitted a maximum sentence of death, if the judge found it appropriate. At sentencing, the judge considered information the probation department and other sources had supplied against the defendant. The information included accusations of other crimes for which the defendant had not been convicted and an allegation that he had a "morbid sexuality." The defendant had no opportunity to confront, cross-examine, or rebut the sources who had supplied the information used against him at sentencing. The judge relied on this information to reject the jury's recommendation of life and instead to impose a death sentence. The Supreme Court noted that "[w]ithin limits fixed by statutes, New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants. Here, for example, the judge's discretion was to sentence to life imprisonment or death."[9] The New York statute further provided a sentencing judge could consider "information about the convicted person's past life, health, habits, conduct, and mental and moral propensities."[10] According to New York procedural policy, consideration of such factors was intended to aid judges in intelligently exercising their discretion. New York permitted its judges to consider such information, even though it came from sources outside the courtroom and, therefore, from those whom a defendant had no opportunity to confront or cross-examine.

Williams challenged the New York sentencing scheme arguing due process entitled him to confront and cross-examine the sources used against him at sentencing. The Supreme Court rejected Williams's challenge, noting that historically, a sentencing judge could "exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and the extent of punishment to be imposed within limits fixed by law," including affidavits from persons not appearing in court and the judge's personal knowledge.[11] A sentencing judge must select an appropriate sentence within the maximum limit set by statute. A judge needs "the fullest information possible concerning the defendant's life and characteristics"[12] to perform this task.

---

8. 337 U.S. 241 (1949).
9. *Id.* at 244-45.
10. *Id.* at 245.
11. *See id.* at 246.
12. *Id.* at 247.

According to the Court, sentencing information helps a judge decide whether to do what the conviction already entitles the judge to do. By virtue of Williams's conviction alone, the judge had the power to sentence Williams to death. He could do so without any hearing and without giving any reason.[13] Information about Williams's other crimes and his morbid sexuality simply helped the judge to decide the defendant should die. Absent the information, the judge could still sentence the defendant to death.

The *Williams* rationale for denying due process claims at discretionary sentencing fails to address an obvious problem. The *Williams* Court blinks away any difference between the judge who says, "I sentence you to death for this murder" and the judge who says, "I sentence you to death for this murder because I believe reports that you committed other bad acts and have a morbid sexuality." The *Williams* Court saw no difference between choosing a punishment on solidly proven grounds and one based on untested allegations.

The difference, however, is clear to any defendant. For Williams, the difference was between life and death. Williams may have lived but for the untested information in sentencing affidavits.[14] In a defendant's eyes, the reliability of the sentencing information is as critically important as evidence introduced against him at trial. For the *Williams* Court, the sentencing finding was a "collateral issue"[15] not important enough to warrant the due process protections that attach at trial. Only one

---

13. *See id.* at 251.

14. Arguably, full due process protections should accompany a finding of such consequence. In fact, Congress has provided extensive procedural safeguards in death-penalty proceedings. The Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598 (1994), entitles a defendant to notice of aggravating circumstances and a jury determination, based on proof beyond a reasonable doubt, that the aggravating factor exists. The Act demonstrates that the provision of greater procedural safeguards does not impose an unmanageable burden on sentencing practice. State death-penalty statutes provide equal or greater protections. New York provides the right to notice that the prosecution intends to use evidence of any aggravating factor against a defendant and a unanimous jury-finding concerning any aggravating circumstance, proven beyond a reasonable doubt. *See* N.Y. CRIM. PRO. LAW § 400.27.7 (McKinney 1997). *See also* N.J. STAT. ANN. § 2C:11-3 (West 1995). The Supreme Court, however, has not constitutionalized these statutory procedural guarantees. The Court continues to rely on *Williams* for the proposition that the Due Process Clause is not "a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Williams*, 337 U.S. at 251. The Due Process Clause does not offer the protections of a criminal trial for sentencing factors, even when death is the consequence of the sentencing finding. *See* Spaziano v. Florida, 468 U.S. 447, 460 (1984) (holding that there is no constitutional requirement that a jury determine the appropriateness of capital punishment).

15. *Williams*, 337 U.S. at 247.

fact counted. After trial, judges can impose the maximum sentence at their discretion without further ado. "We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."[16]

The engine driving the *Williams* Court's rationale was not logic but experience. Judges need information if they are to exercise their sentencing discretion prudently. The Court feared over-burdening judges with the requirements of full criminal due process for sentencing factors. "We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."[17] Judges could not tailor punishment to the individual criminal if the due process safe-

---

16. *Williams*, 337 U.S. at 252. In 1949, the *Williams* Court noted "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247. The Court cited reformation and rehabilitation of defendants as "important" sentencing goals. "Retribution is no longer the dominant objective of the criminal law." *Id.* at 248. Today, Congress has largely repudiated these goals and once again embraced retribution. The Sentencing Reform Act of 1984 lists the purposes of criminal punishment as just punishment, adequate deterrence, and preservation of the public safety. 18 U.S.C § 3553(a)(2) (1994). *See also* U.S. SENTENCING GUIDELINES MANUAL, § A (1995). Rehabilitation is the last consideration. In so far as *Williams'* holding depends upon the now discarded notions of rehabilitation, *Williams'* denial of due process protections at sentencing is undermined. "Depriv[ing] sentencing judges of this kind of information" no longer "undermine[s] modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." *Williams* 337 U.S. at 249-50. It is beyond the scope of this Article, however, to argue that full due process protections should apply to discretionary sentencing proceedings.

17. *Williams*, 337 U.S. at 250. Justices Rutledge and Murphy dissented. In his dissent, Justice Murphy explained:

> The record before us indicates that the judge exercised his discretion to deprive a man of his life, in reliance on material made available to him in a probation report, consisting almost entirely of evidence that would have been inadmissible at the trial. Some, such as allegations of prior crimes, was irrelevant. Much was incompetent as hearsay. All was damaging, and none was subject to scrutiny by the defendant. Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of the proceedings against him. I agree with the Court as to the value and humaneness of liberal use of probation reports as developed by modern penologists, but, in a capital case, against the unanimous recommendation of a jury, where the report would concededly not have been admissible at the trial, and was not subject to examination by the defendant, I am forced to conclude that the high commands of due process were not obeyed.

Williams, 337 U.S. at 253.

guards of a criminal trial had to accompany each additional finding made at sentencing. *Williams,* therefore, drew the due process line at conviction. A defendant is entitled to full safeguards during trial. Once convicted, the defendant's due process rights under discretionary sentencing are virtually extinct.[18] So long as the sentence imposed does not exceed the maximum authorized by statute, judicial reliance on information introduced at the sentencing hearing does not deprive defendants of their due process rights under discretionary sentencing schemes. The judge has the discretion to impose the maximum sentence upon conviction after trial.

B. Specht v. Patterson: *The Limits of the* Williams *Rationale*

Eighteen years after its decision in *Williams,* the Supreme Court addressed a due process challenge to a different kind of sentencing scheme. In *Specht v. Patterson,*[19] the defendant claimed he was entitled to the due process rights of notice and a full hearing at his sentencing.[20] The defendant was convicted of taking indecent liberties.[21] The conviction carried a maximum term of ten years. Colorado's Sexual Offender Act,[22] however, permitted a judge to sentence a person convicted of indecent liberties to a term from one day to life as a sexual offender if the judge found the defendant posed a threat of bodily harm or was an habitual offender and mentally ill.[23] These factors were not elements of the crime of indecent liberties.[24] The Sexual Offender Act permitted the judge to make the additional findings without affording the defendant the opportunity to be heard. The defendant had no right to confront or cross-examine wit-

---

18. In Meachum v. Fano, 427 U.S. 215 (1976), the Supreme Court stated:

> The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him . . .

Id. at 224. Among the rights surviving conviction are the rights to substantial religious freedom, to access to the courts, and to freedom from invidious discrimination based on race, and a right not to be arbitrarily deprived of a state-created right. *See* Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974).

19. 386 U.S. 605 (1967).

20. *Id.* at 607.

21. *Id.*

22. COLO. REV. STAT. ANN. § 39-19-1 to -10 (West 1994).

23. *See Specht,* 386 U.S. at 607.

24. *See id.* at 608.

nesses or to present or compel evidence in his behalf.[25] The Tenth Circuit,[26] relying on *Williams*, held the sentencing scheme did not violate the Due Process Clause. The Circuit Court reasoned that the defendant received all his due process rights at the time of trial. Upon conviction, he was subject to whatever loss of liberty the legislature prescribed for his crime.

The Supreme Court reversed, holding the Colorado sentencing scheme violated the Due Process Clause. The Court reaffirmed that, in the discretionary sentencing context of *Williams*, the Due Process Clause did not require a sentencing judge to hold a hearing or permit a defendant to participate in it. "We held in *Williams v. New York* . . . that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed."[27] However, the Supreme Court refused to extend *Williams* to the facts of *Specht*. Under the Colorado scheme, Specht received a greater punishment than his conviction for indecent liberties permitted. He was subject to the greater penalty only because the sentencing judge made an additional factual finding that the defendant was a sexual offender. Because at the sexual offender hearing Specht received a "magnified sentence,"[28] based on a factual finding that was not an element of the crime for which he was convicted (indecent liberties), Specht faced a "radically different situation"[29] than the defendant in *Williams*.[30] The Supreme Court held Specht was entitled to a full judicial hearing before the judge could impose the greater sentence:[31]

> At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.[32]

---

25. *See id.* at 610-11.

26. *See* Specht v. Patterson, 357 F.2d 325, 326 (10th Cir. 1966).

27. *Specht*, 386 U.S. at 606.

28. *Specht* adopted as its own the language the Third Circuit used in United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966), to strike down a comparable sentencing scheme.

29. *Specht*, 386 U.S. at 608.

30. *Id.*

31. *See id.* at 609-10.

32. *Id.* (quoting United States *ex rel.* Gerchman, 355 F.2d at 312). At the time the

Some appellate courts have opined that it was the bifurcated nature of the Colorado sentencing proceedings that made *Specht* radically different from *Williams*.[33] The *Specht* Court noted the Colorado scheme made a conviction for indecent liberties the basis for commencing another proceeding under the Sexual Offenders Act.[34] But, for *Specht,* dividing the hearings into two was constitutionally significant only because the second hearing required "a new finding of fact that was not an ingredient of the offense charged" in the first hearing.[35] It would elevate form over substance to conclude due process is satisfied if the judge imposes the magnified sentence based on additional fact-finding at one hearing rather than two.[36]

C. McMillan v. Pennsylvania:[37] *Guiding the Discretion to Punish*

Mandatory minimum sentencing statutes restrict the sentencing judge's traditionally broad discretion. The statutes typically describe certain aggravating circumstances concerning the crime itself or the defendant's background. They require judges to determine if the designated circumstances were present. If a judge finds such aggravating facts exist, the judge is no longer free to sentence anywhere within the maximum range, as under a discretionary sentencing statute. Rather, the judge *must* impose at least the minimum sentence prescribed in the statute. The judge retains the discretion to impose a sentence greater than the minimum. The uppermost limit on the sentence remains the maximum term the statute prescribes for the elements of the crime.

Supreme Court decided *Specht,* it had not yet applied to the States the due process guarantee of trial by jury. It did so one year later. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Three years after *Specht,* the Court applied to the States the due process safeguard of proof beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970).

33. *See, e.g.*, United States. v. Stewart, 531 F.2d 326, 332 (6th Cir. 1976).

34. *See Specht*, 386 U.S. at 608.

35. *Id. See also* Watson v. Borg, 1995 WL 630002, at *2 (N.D. Cal. 1995) ("Specht v. Patterson held that a defendant at sentencing has the right of confrontation when sentencing is dependent upon a new finding of fact that was not an element of the offense for which the defendant was convicted.").

36. In Chandler v. Fretag, 348 U.S. 3, 10 (1954), the Supreme Court held the Due Process Clause entitled the defendant to counsel before a judge could magnify the defendant's sentence from three years to life on the basis of additional fact-finding made at a single hearing.

37. 477 U.S. 79 (1986).

For example, assume a kidnapping statute imposes a maximum sentence of twenty years. It also lists the use of a weapon as an aggravating factor. It mandates a minimum five-year sentence if the aggravating factor is present. If, at the sentencing hearing, the judge finds the convicted defendant used a gun to commit the offense, the judge's traditional discretion is cabined. The judge must, at a minimum, sentence the defendant to five years.

Must a court afford a defendant the full due process protections of a criminal trial before a judge can impose a mandatory minimum sentence? According to the United States Supreme Court, no.[38] *McMillan* v. *Pennsylvania* involved a due process challenge to the validity of a state mandatory minimum statute. The Pennsylvania statute[39] punished the commission of certain enumerated felonies with at least five years in prison if the defendant visibly possessed a firearm in the course of the designated felonies.[40] Each of the felony convictions carried possible maximum sentences in excess of five years regardless of aggravating circumstances. The statute expressly stated that visible possession was not an element of any of the offenses.[41] It authorized the sentencing judge to find visible possession and permitted the judge to base his or her finding on a preponderance of the evidence.[42]

A jury convicted each of the four defendants of one of the felonies.[43] Each sentencing judge refused to impose the required statutory minimum, holding the statute unconstitutional.[44] The cases were consolidated on appeal. The Pennsylvania Supreme Court unanimously concluded the statute did not violate the Due Process Clause. It reasoned that the legislature did not intend visible possession of a weapon to be an element of any of the defendants' offenses. Moreover, the sentencing statute did

---

38. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986).

39. Mandatory Minimum Sentencing Act, 42 PA. CONS. STAT. § 9712 (1982). For the text of the statute, see *McMillan*, 477 U.S. at 81-82 n.1.

40. The felonies designated were murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault, kidnapping, or attempts to commit the same. 42 PA. CONS. STAT. §9712(a) (1982).

41. *See id.* § 9712(b).

42. *See id.* A legislature may list aggravating factors in the penalty clause of a criminal statute, or the legislature may create a separate sentencing statute containing a list of factors which aggravate crimes defined in separate criminal statutes.

43. The defendants were variously convicted of aggravated assault (maximum sentence of ten years), voluntary manslaughter (maximum sentence of ten years), and robbery (maximum sentence of twenty years). *See McMillan*, 477 U.S. at 82, 87.

44. *Id.*

not increase the maximum sentence. The statute "merely require[d] a minimum sentence of five years, which may be more or less than the minimum sentence that might otherwise have been imposed."[45] Arguing before the United States Supreme Court, the defendants maintained the Pennsylvania statute deprived them of the due process right to proof beyond a reasonable doubt as well as a Sixth Amendment right to a jury trial regarding visible possession of a weapon.

The Court in *McMillan* upheld the constitutionality of the mandatory minimum act.[46] It largely deferred to legislatures to define the elements of a crime.[47] Because the Pennsylvania legislature chose not to include visible possession among the defined elements, visible possession was only a sentencing factor.[48] The due process requirements of proof beyond a reasonable doubt traditionally attach only to the elements of a crime, not to sentencing factors. "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged . . . ."[49]

At the core of *McMillan*'s rationale for denying full due process in mandatory minimum sentencing is the Court's view that a conviction authorizes a judge to impose the maximum sentence. The *McMillan* Court affirmed the *Williams* doctrine developed in the context of discretionary sentencing. According to *McMillan,* a defendant convicted under a mandatory minimum statute is not entitled to any more due process at sentencing than a defendant subject to traditional discretionary sentencing.[50] The mandatory nature of the sentence does not change the due process calculus.[51] A discretionary sentencing process *permits* the judge to impose a particular sentence based on sentencing findings. A mandatory minimum statute simply *requires* it. So long as the mandatory minimum punishment remains within the maximum the court could impose in its discretion, the defendant suffers no additional harm.

This assertion rests on *McMillan*'s view that a conviction strips a defendant of liberty up to the maximum sentence per-

45. *Id.* at 83.

46. *McMillan*, 477 U.S. at 91.

47. *See id.* at 85.

48. *See id.* at 85-86.

49. *See id.* at 85 (emphasis added) (quoting Patterson v. New York, 432 U.S. 197, 210 (1977)).

50. *See id.*

51. *See id.* at 92.

mitted for the elements of the crime.[52] A defendant has already received full due process with respect to the elements. Without any surviving liberty interest to protect, there is no longer a need for due process. So, for example, imposition of a mandatory term of at least five years based on the use of a weapon would not deprive a convicted kidnapper of any liberty interest. Conviction alone caused the defendant to lose a twenty-year liberty interest.

However, *McMillan* explicitly cautioned: "there are constitutional limits to the state's power [to define the elements of a crime]."[53] *McMillan's* deference to the legislature, therefore, was not absolute. The Court recognized that if a legislature crossed constitutional limits, due process protections would apply to a sentencing factor. "In certain limited circumstances," the Court notes, "the due process requirement of proof beyond a reasonable doubt applies to facts not formally identified as elements of the offense charged."[54]

Although the Court declined to delineate all of the circumstances that might trigger Due Process protections for aggravating factors, it did set down certain express boundaries. The Pennsylvania statute, the Court observed, remained within due process boundaries because it did not create any impermissible presumption of guilt or relieve the prosecution of its burden of proving guilt, or change the definition of any existing crime. In addition, as the Court repeatedly noted, a finding of visible possession of a firearm did not subject a defendant to greater punishment than was available for the crime alone.[55] It did not expose a defendant to a higher maximum than he or she might otherwise receive. McMillan's situation, therefore, was not like Specht's.[56] The Pennsylvania statute merely dictated the precise weight to be accorded the aggravating factor within the range permitted for the elements of the felonies.[57]

> Section 9712 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 in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The act] "ups the ante" for the defendant

---

52. *See id.* at 83-84, 88, 92.

53. *See id.*, 477 U.S. at 86.

54. *Id.* The Supreme Court held in *In re* Winship, 397 U.S. 358 (1970), that due process requires proof of every element of a crime. *Id.* at 364.

55. *See McMillan*, 477 U.S. at 82, 83, 87-88, 89.

56. *Id.* at 89.

57. *Id.* at 89-90.

only by raising to five years the minimum sentence which may be imposed within the statutory plan.[58]

D. *Another Form of Guided Discretion: Sentencing Guidelines*

The appellate courts have applied *McMillan's* due process analysis to sentencing guideline schemes.[59] Sentencing guideline schemes specify factors which aggravate a crime. With respect to these factors, the guidelines function much like mandatory minimum statutes. A court must impose a sentence in a particular range within the statutory maximum, depending upon the circumstances of the crime and the defendant's criminal history. So, for example, if a defendant is convicted of kidnapping under a statute carrying a twenty-year maximum, a sentencing guideline might require a judge to impose a sentence of at least five years, if the judge finds that the defendant used a weapon to accomplish the kidnapping.[60] Arguably, guidelines create a liberty interest in a sentence below the maximum because a judge is no longer free under the guidelines to impose the statutory maximum by virtue of the conviction alone, as under discretionary sentencing.[61] The circuit courts, however, have uniformly adopted the view that guidelines do not create any liberty interest in a sentence below the maximum.

The following language is typical:

> The Guidelines have made the defendant's interest in a fair sentence more defined and protectable. However, we emphasize that the convicted defendant's liberty interest is not an interest in the maximum guideline sentence set by the offense of conviction alone . . . . The Supreme Court has recognized that due process protects a defendant's interest in fair sentencing, but has emphasized in the same cases that the interest is not defined as a liberty interest in a sentence below the statutory maximum.[62]

---

58. *Id.* at 87-88.

59. *See id.*; United States v. Vonstein, 105 F.3d 667 (9th Cir. 1997); United States v. Restrepo, 946 F.2d 654, 656 (9th Cir. 1991) (en banc).

60. U.S. SENTENCING GUIDELINES MANUAL § 2A4.1(3) (1995) mandates a two level increase if a dangerous weapon was used in a kidnapping.

61. For trenchant criticisms of federal sentencing under the guidelines, see Deborah Young, *Fact-finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994); David Yellin, *Illusion Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992).

62. *Restrepo*, 946 F.2d at 659.

The appellate courts can largely avoid the question of what due process rights ought to be afforded the defendant at guideline sentencing, so long as they deny that a defendant retains a liberty interest in a sentence below the statutory maximum.[63] Because conviction alone has extinguished the defendant's liberty interest in anything below the statutory maximum, nothing is left for due process to protect.

II. THE PROBLEM: WHAT RATIONALE JUSTIFIES DENYING FULL CRIMINAL DUE PROCESS UNDER MAXIMUM-ENHANCING STATUTES?

One genre of statutes differs markedly from mandatory minimum statutes and sentencing guideline schemes. Maximum-enhancing statutes, as this Article uses the term, are statutes which permit or require a sentencing court to impose a sentence greater than that available, were the judge to consider only the elements of the crime.[64] For example, assume a kidnapping statute defines the offense as restraining or taking another by force or the threat of force. It allows imprisonment for no more than twenty years if the defendant is convicted of the crime. However, it permits, or requires, a sentence of thirty years if the sentencing judge finds the defendant used a weapon in committing the kidnapping. This is a maximum-enhancing statute. The sentence is lengthened or "enhanced" over what it would otherwise be, based on a fact or circumstance described in the penalty clause of the statute.

---

63. In *Burns v. United States*, 501 U.S. 129 (1991) (Souter, J., dissenting), Justice Souter, joined by Justices White and O'Connor, expressed the view that "a defendant enjoys an expectation subject to due process protection that he will receive a sentence within the presumptively applicable range in the absence of grounds defined by the Act as justifying departure." *Id.* at 147. But, as the *Restrepo* court points out, "the presumptively applicable range is the range established after consideration of all the sentencing factors set out in the Guidelines, not before." *Restrepo*, 946 F.2d at 658 n.8.

64. As examples of federal maximum-enhancing statutes, see 18 U.S.C. § 2113(d) (1997) (increasing penalty if defendant assaulted victim or used dangerous weapon in the commission of a bank robbery); 18 U.S.C. § 924(c) (1976) (increasing penalty if defendant used a firearm in commission of a felony); 18 U.S.C. § 2119 (1996) (increasing penalty for car jacking if defendant caused serious bodily injury or death resulted); 21 U.S.C. § 844(a) (1990) (increasing penalty depending upon amount of illegal drug possessed); 18 U.S.C. § 922(g) (1996) (increasing penalty for unlawful possession of firearm if defendant was a three time felon); 18 U.S.C. § 111(a)(1) (1994) (increasing penalties for resisting correctional officer if defendant used weapon or caused bodily injury). As examples of state maximum-enhancing statutes, see MONT. CODE ANN. § 46-18-221(1) (1978) (increasing penalty for use of weapon during commission of felony); CAL. PENAL CODE § 12022(a)(1) (West 1990) (increasing penalty for use of weapon during commission of felony); MINN. STAT. § 609.1352(1)(1) (1989) (increasing penalty if offense motivated by sexual impulse on part of predatory behavior).

Maximum-enhancing statutes create a sentencing structure very different from discretionary sentencing or sentencing under mandatory minimum schemes or guidelines. Under a discretionary sentencing structure, a kidnapping defendant may lose twenty years of liberty, whether or not he or she used a weapon. Under a mandatory minimum scheme, a defendant will forfeit at least five years of liberty if the judge finds the defendant used a weapon. A guideline may require a convicted kidnapper to be sentenced more harshly within the maximum allowed for kidnapping, if the defendant used a weapon. In these instances, in the prevailing view of the circuit courts, all the safeguards of a criminal trial precede any loss of liberty the defendant will suffer by virtue of conviction. The statute set out the maximum term for the crime and the sentence did not exceed the maximum.

Can the same hold true for maximum-enhancing statutes? Under a common-sense view of the matter, the judge adds an extra term to what the crime alone permits. The judge thereby deprives the defendant of more liberty than a bare conviction would entail. What was twenty years for kidnapping becomes thirty years for kidnapping with a gun. Of course, the motive for imposing the "enhanced" sentence is apparent. Such a defendant is worse than one who commits the kidnapping without the aggravating factor. But, however sound the reason for imprisonment, the Due Process Clause guarantees that the state may not imprison a person for a crime without first according the defendant all the protections of a criminal trial.[65] How can a defendant constitutionally suffer the additional loss of liberty without the due process protections of a criminal trial?

Does the *Williams/McMillan* approach to sentencing justify the denial of full due process protections for maximum-enhancing statutes? *McMillan* recognized that a statutory scheme different from discretionary sentencing or mandatory-

65. "Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees." Chapman v. United States, 500 U.S. 453, 465 (1991). "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979). Penal statutes may not be applied "without due process of law and without according [persons] the rights guaranteed by the Fifth and Sixth Amendments, including notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel." Kennedy v. Rusk, 372 U.S. 144, 163 (1963). When a legislature wishes to punish a person, it "must provide for a judicial trial to establish the guilt of the accused." Wong Wing v. United States, 163 U.S. 228, 236 (1896).

minimum sentencing might cross the constitutional line and trigger the safeguards of a criminal trial. Unlike the Pennsylvania statute before the Court in *McMillan*, maximum-enhancing statutes expose a defendant to greater punishment than the range "already available to [a court] without the special finding of [an aggravating circumstance]."[66] Indeed, the Court had already held one such statutory scheme violated Due Process. The Court in *McMillan* distinguished *Specht's* maximum-enhancing scheme from the mandatory minimum statute before it. It did not overrule or limit *Specht*. It left *Specht's* reasoning entirely intact. In upholding the constitutionality of the Pennsylvania sentencing structure, the *McMillan* Court relied on the fact that the sentencing factor in *McMillan* did not increase the maximum punishment. Given this reasoning and *McMillan's* continuing adherence to *Specht*, is there any justification for providing anything less than full criminal due process for sentencing findings under maximum-enhancement statutes? Courts have offered several justifications but none withstands close scrutiny.

This Article will now examine the principal theories courts use to conclude maximum-enhancement statutes do not trigger the full due process protections of a criminal trial before a judge sentences a defendant to a term longer than allowed for the elements of the crime alone. The Article will conclude that none of the theories holds up to scrutiny.

A. *It All Depends on What You Call It: "Element" or "Sentencing Factor"—An Attempt to Justify Reduced Due Process By Characterization*

Legislatures have the power to specify certain conduct as an element of a crime. But not everything a legislature includes in a criminal statute is an element of the defined crime. Statutes contain penalty provisions that are distinct from the elements. The penalty provisions bear on the amount of punishment meted out for the crime. A legislature may exclude specified conduct from the definition of the crime, making it part of the statute's penalty clause. When a penalty clause describes aggravating conduct, courts will refer to the conduct as a sentencing factor or an enhancement, not an element of the crime.

A maximum-enhancing statute singles out particular conduct which serves to increase a defendant's punishment over what it could be without consideration of that conduct. Defend-

66. *McMillan*, 477 U.S. at 88.

ants sentenced under an enhancement statute may receive a greater penalty than they otherwise could. But for the aggravating conduct, the sentence would be less. Understandably, some defendants have argued they were denied due process safeguards when they were subjected to an increased sentence based on conduct described in the criminal statute's penalty provision without the usual due process safeguards associated with the state's right to deprive a defendant of liberty.

In responding to this challenge, some courts have asked whether a legislature intended to make conduct an element of a crime or part of the penalty clause.[67] Conduct determined to be "merely" a sentencing factor automatically justifies reduced due process.[68] They reason that *Winship* requires full trial due process only for elements. A sentencing factor is not an element. Therefore, full due process does not attach to such conduct even though it increases the defendant's sentence.[69] Characterizing the conduct as a "sentencing factor" establishes the convicted defendant's rights or, rather, lack thereof.

This reasoning is flawed. *McMillan* expressly noted that facts not formally identified as elements of the offense charged may trigger due process in some circumstances.[70] The Pennsylvania statute did not fall among those circumstances because it did not authorize a sentence in excess of that otherwise allowed for the offenses of conviction. Labeling enhancement conduct as a "sentencing factor" begs the real question: does the factor trigger criminal due process protection? The judicial treatment of 21 U.S.C. § 844(a) of the Drug Abuse Prevention and Control Act[71] demonstrates the labeling approach fails to answer

---

67. *See, e.g.*, United States v. Sotelo-Rivera, 931 F.2d 1317, 1319 (9th Cir. 1991) (holding that drug quantity is not element of offense of possession but is relevant only to penalty provision); United States v. Oliver, 60 F.3d 547, 552 (9th Cir. 1994) (finding that Congress intended serious bodily injury or death to be penalty enhancing factor not element of car jacking); United States v. McGatha, 891 F.2d 1520, 1524 (11th Cir. 1990) (holding that Congress intended prior convictions to be sentencing enhancements for illegal possession of firearm).

68. *See McGatha*, 891 F.2d at 1521; United States v. Segien, 114 F.3d 1014, 1018 (10th Cir. 1997).

69. *See Segien*, 114 F.3d at 1019 (citing cases).

70. *McMillan*, 477 U.S. at 86.

71. 21 U.S.C. § 844(a) (1996). The statute reads, in pertinent part:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction [for a drug offense], he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years . . . . Notwithstanding the preceding sentence, a person convicted

this question.

In pertinent part, the Act authorizes a penalty of not more than one-year in prison if a defendant knowingly and intentionally possessed a controlled substance.[72] But the Act authorizes imprisonment for not less than five nor more than twenty years if a defendant possessed more than five grams of cocaine base (crack).[73] Do the criminal due process safeguards of a criminal trial precede a finding that the defendant possessed over five grams of cocaine base? To answer this question, the circuit courts have tried to discern what the legislature intended.[74] Did Congress want quantity to be an element of the crime or a sentencing factor? A defendant's rights hinge on the proper characterization.

With so much in the balance, courts examining § 844(a) have expended a great deal of effort to determine whether Congress intended quantity to be an element or a sentencing factor. They have parsed the express wording and structure of the statute, its use of titles and paragraph headings, and the placement of semi-colons. They have reviewed its legislative history. They have teased out the defined elements of the crime from the statute's penalty provisions. Motivating these efforts is the premise that legislative intention determines whether or not a defendant will receive the due process protections of a criminal trial.

United States v. Butler[75] is a good illustration of the method at work. The defendant argued he was entitled to an express jury-determination following appropriate instructions that he was in possession of more than five grams of cocaine base.[76] The Ninth Circuit Court meticulously analyzed the statute. It determined that Congress stated all the elements of the § 844(a) defined crime in the first sentence: "It shall be unlawful for any person knowingly and intentionally to possess a controlled substance . . ."[77] The second sentence, according to the court, refers only to the penalty to be imposed: "Any person who violates this

---

under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years . . . .

72. *See id.*

73. *See id.*

74. For cases interpreting § 844(a) as a sentencing factor, see United States v. Monk, 15 F.3d 25 (2d Cir. 1994); United States v. Smith, 34 F.3d 514 (7th Cir. 1994). *But see*, United States v. Puryear, 940 F.2d 602 (10th Cir. 1991) (element of crime); United States v. Michael, 10 F.3d 838 (D.C. Cir. 1993) (same).

75. 74 F.3d 916 (9th Cir. 1996).

76. *Id.* at 921.

77. *Id.*

subsection may be sentenced to a term of imprisonment not more than one year . . . ."[78] The third sentence, authorizing a five- to twenty-year sentence if the mixture or substance "contains cocaine base" in excess of five grams, was also part of the Act's penalty clause. This sentence "reflect[s] Congress's intent to direct the district courts to impose more severe penalties if the controlled substance is cocaine base."[79] In *Butler's* view, possession of cocaine base was not an element of the defined crime because it was not included in the first sentence's definition. Nor did possession of cocaine base comprise a separate crime which would have triggered criminal due process safeguards.[80] Because "cocaine base" is a sentencing factor and not an element of the defined offense, the defendant was not entitled to a jury finding and proper instructions on the issue of cocaine base.[81]

At no point does the court explain why full due process did not apply to a factual finding that increased the punishment for the elements alone. The court determined the legislative label ("sentencing factor") and then deferred to it. The court never explained why that label would obviate the defendant's due process claim. *Specht* requires due process safeguards when a defendant's punishment is magnified because of a sentencing factor.[82] *McMillan* indicated a statute should trigger due process if a sentencing factor increases the maximum. Waving the magic wand and incanting "sentencing factor," does not make the due process question disappear.

Other circuits have faced similar challenges to § 844(a). In fact, the Ninth Circuit in *Butler* relied upon the Second and Seventh Circuits as persuasive authority for rejecting the defendant's claim of denial of due process.[83] Yet neither of these opinions explains why the legislature's intended label "sentencing factor" automatically reduces a defendant's due process protections when § 844(a) increases punishment beyond what the elements alone permit. In *United States v. Monk*,[84] the defend-

78. *Id.* at 922.

79. *Id.*

80. *See id.* If Congress had intended to create a new crime of possession of cocaine base, it would have inserted a requirement of *mens rea*, just as it did in the first sentence.

81. *Id.* at 924.

82. *See* discussion *supra* Part I.B

83. *Butler*, 74 F.3d at 922-23.

84. 15 F.3d 25 (2d Cir. 1994). A jury convicted the defendant of possession of cocaine base, but the judge did not instruct the jury concerning the amount of cocaine base necessary for conviction.

ant claimed he was entitled to have a jury determination regarding the quantity of cocaine base he was charged with possessing. The Second Circuit held the first sentence of § 844(a) defined the elements of the crime. The third sentence simply indicated the punishment.[85] As a result, the defendant was not entitled to a jury finding on the amount of cocaine base.[86] The court's analysis ended when it labeled quantity as "sentencing factor." It never explained why the label justified the curtailment of due process.

In also rejecting a due process challenge to § 844(a)'s sentence enhancement for quantity, the Seventh Circuit indicated some glimmer of recognition that labeling cannot end the due process analysis. In *United States v. Smith*,[87] a jury convicted Smith of simple possession of cocaine base under § 844(a), but made no determination of quantity.[88] At sentencing, the district court found Smith possessed more than five grams of cocaine base and sentenced him to 82 months in prison.[89] But for this judicial finding, the defendant could not have lost his liberty for more than twelve months. The defendant claimed on appeal that he was entitled to a jury-finding on the quantity of cocaine base.[90] The court analyzed § 844(a) in the same manner as the Second Circuit:

> [W]e cannot accept Mr. Smith's contention that the quantity of cocaine base possessed is an essential element of possession of cocaine base in violation of [section] 844(a). Instead, we agree with *United States* v. *Monk* . . . which held that quantity is not an element of simple possession of cocaine base under § 844(a).[91]

However, unlike the Second Circuit, the Seventh Circuit went on with its analysis. It looked to *McMillan* to justify its conclusion that a jury need not determine the sentencing factor:

> In *McMillan* v. *Pennsylvania* . . . the Supreme Court recognized that increasing the penalty for an offense through the use of a mandatory minimum sentence whenever the sentencing judge found that the defendant "visibly possessed a firearm" during the commission of the offense was permissible. The defendant in that case was not confronted with a "radically different situation" from the usual sentencing proceeding . . . . Nor

85. *Id.* at 27.
86. *Id.*
87. 34 F.3d 514 (7th Cir. 1994).
88. *Id.* at 517.
89. *Id.*
90. *Id.* at 518.
91. *Id.* at 517.

> was the defendant faced with a situation in which the government was attempting to avoid the mandate of In Re *Winship* . . . . Similarly, in this case Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor."[92]

The Seventh Circuit's reliance on *McMillan* is misplaced. It adopted the term "sentencing factor" from *McMillan*, but neglected the context in which it was used. In fact, *McMillan's* logic does not apply to the facts before the Seventh Circuit in *Smith*. Both *McMillan* and *Smith* involved the same ultimate question: did the defendant lose liberty because of a judicial finding a jury should have made? In *McMillan*, the Court held the Sixth Amendment did not require a jury to find the defendants visibly possessed a firearm. Visible possession was a sentencing factor and, more importantly, the defendants did not suffer any greater loss of liberty than what they might have suffered for the elements alone. The *McMillan* Court recognized that labeling conduct a "sentencing factor" does not fully answer a petitioner's due process claim. *McMillan* simply explained why visible possession, as a sentencing factor, was not entitled to the criminal trial protections of a jury-finding or proof beyond a reasonable doubt under the Pennsylvania statute. The petitioners' loss of liberty was within the range allowed for the defined crime without regard to any aggravating conduct. Therefore, *McMillan* attributed the defendant's loss of liberty to the crime alone.

In its analysis of § 844(a), the Seventh Circuit in *Smith* adopted the methodology of *McMillan* and searched for legislative intent. The court concluded that the legislature intended the quantity of cocaine to be a sentencing factor. The court then tried to explain why a judge and not the jury could make the quantity finding. But its analogy of "quantity" to *McMillan's* "visible possession" breaks down. *McMillan's* visible possession did not result in a loss of liberty beyond what was authorized for the crime alone. "Quantity" under § 844(a) does. It increases the range available to the judge from one year (a misdemeanor) to five- to twenty-years. The *Smith* court ignored this crucial difference between § 844(a) and the Pennsylvania statute involved in *McMillan*. It was satisfied with attaching the same label, but, as noted, a label does not explain what justifies increased punishment without the due process protections that precede crimi-

92. *Id.* at 520.

nal punishment. The *Smith* court mentions *Specht* only once.[93] It correctly notes that *McMillan's* facts were not like *Specht's*. But it fails to take into account that *Smith's* facts are not like *McMillan's*. In *Smith,* the judicial fact-finding exposed the defendant to radically different sentencing consequences. In fact, *Smith* is like *Specht* and should trigger the due process safeguards of a criminal trial.

A Sixth Circuit panel exposed the inadequacy of labeling in *United States v. Rigsby*.[94] A jury convicted the defendant of unlawfully manufacturing marijuana.[95] The jury did not determine whether the defendant manufactured eighty-nine thousand plants, as the prosecution claimed, or whether, as the evidence would have allowed, the defendant manufactured only one plant. At sentencing, the court found by a preponderance of the evidence that the defendant manufactured over one thousand plants. This additional finding increased the defendant's possible punishment from five years to a range of ten years to life.[96]

On appeal, the defendant argued the district court erred when it failed to advise the jury concerning the significance of the amount of marijuana. The court had instructed the jury that "[a]s far as you are concerned, the number of one thousand marijuana plants in count one is of no significance."[97] The *Rigsby* panel acknowledged "the great weight of authority holding that quantity is not an element of a section 841 offense."[98] The panel, nonetheless, disagreed with that authority, including its own circuit's controlling precedent.[99] *Rigsby* noted that other circuits reached their conclusion that quantity was not an element of the offense on the basis that quantity is listed under the penalty clause of § 841.[100] In company with these circuits, *Rigsby* was willing to assume that Congress intended to make quantity a consideration only for sentencing.[101] Nonetheless, *Rigsby* recognized "we are not required to hold that quantity may be considered for sentencing by the district judge under the preponder-

93. *Id.*

94. 943 F.2d 631 (9th Cir. 1991).

95. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A). Defendant was also charged with carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c) and illegal possession of a shotgun in violation of 26 U.S.C. § 5861(d). *Rigsby*, 943 F.2d at 634.

96. The court sentenced Rigsby to 151 months on the drug counts.

97. *Rigsby*, 943 F.2d at 641.

98. *Id.* at 640.

99. *Id.*

100. *Id.* at 641.

101. The panel indicated that it doubted the validity of the assumption. *See id.* at 641 n.6.

ance of evidence standard merely because it is listed under the penalty provision."[102] *Rigsby* correctly grasped that *McMillan* retained limits on legislatures. "Legislative bodies do not have the unfettered discretion to lessen the government's burden of proof of a criminal charge simply by characterizing a factor as a penalty consideration rather than as an element of the offense."[103] On *Rigsby's* view, allowing a judge to determine quantity undermines the fundamental principle of justice that a defendant has a right to a jury trial respecting critical facts about the alleged crime.[104] *Rigsby* understands that the function of a factor, not its label, is critical. The finding of quantity exposed the defendant to "a substantially greater penalty of at least ten years up to life imprisonment compared to a maximum of five years"[105] if the defendant manufactured less than 50 kilograms. Allowing a judge to find quantity and impose the greater sentence violates a defendant's right to a trial by jury. Although the *Rigsby* panel stood by its reasoning, it was constrained by its own circuit's precedent,[106] to affirm the defendant's sentence.[107] At present, the panel's voice is a poignant cry in the wilderness.

B. *Make the Enhancement Disappear*

By labeling particular conduct as a sentencing factor, a court is implicitly holding that a statute has not created a separate crime. A court may accurately interpret legislative intent when it finds a legislature intended conduct as a sentencing factor and not a separate crime. It may also be that a "sentencing factor" should wear that label if that is what the legislature intended. But, whatever its label, a maximum sentence enhancer appears to punish the conduct that caused the enhancement. *McMillan* does not offer any justification for reduced due process in such a case. On the contrary, *McMillan* upheld Pennsylvania's minimum sentence increase because it did *not* "alter[ ] the maximum for the crime."[108] If the legislative label of "sentencing factor" does not justify elimination of due process safeguards for maximum sentence enhancers, is there anything else that does?

---

102. *Id.* at 641.
103. *Id.*
104. *Id.* at 643.
105. *See id.*
106. *See* United States v. Hodges, 935 F.2d 766 (6th Cir. 1991).
107. *See Rigsby*, 943 F.2d at 643.
108. McMillan v. Pennsylvania, 477 U.S. 79, 87 (1986).

The First Circuit sought to make *McMillan's* "beyond the maximum" principle compatible with reduced due process for maximum sentence enhancers. In *United States v. Rivera-Gomez*,[109] the First Circuit Court did not merely label the conduct as a sentencing factor. It made the enhanced portion of the defendant's sentence disappear.

In *Rivera-Gomez*, the trial court sentenced the defendant to life in prison for a car jacking in which death occurred. 18 U.S.C. § 2119 provided in relevant part:

> whoever, possessing a fire arm . . . takes a motor vehicle that has been transported or shipped in interstate commerce from a person . . . by force and violence or by intimidation . . . shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[110]

A jury convicted Rivera-Gomez of carjacking. At sentencing, the judge found that death had resulted in the course of the carjacking. The defendant attacked the constitutionality of his sentence. He conceded that "death results" is not an element of carjacking. He claimed that the life sentence punished him for conduct for which he was not charged.[111]

The First Circuit examined the wording and structure of the carjacking statute. In its view, the first section defines the base offense and the following two sections "clear the way for enhanced sentences if either serious bodily injury or death results from the commission of the carjacking offense." According to the First Circuit, Congress did not intend the "death results" provision of the act to be an element of the offense, nor did it intend to create a new species of carjacking offense (carjacking when death results). It intended "simply to augment the sentences for certain aggravated carjackings . . . ."[112]

---

109. 67 F.3d 993 (1st Cir. 1995).

110. Congress has amended the Act to require a specific intent to cause death or serious bodily harm. *See* Violent Crime Control and Law Enforcement Act of 1994, § 60003(a)(14), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

111. *See Rivera-Gomez*, 67 F.3d at 1000.

112. *See id.* at 1000-01.

The court then explained why due process does not require indictment and proof of a fact that "simply" augments a sentence:

> Having concluded that 18 U.S.C. § 2119(3) is a sentence-enhancing factor, we next consider the constitutionality . . . of appellant's life sentence on count 3 [in which death resulted]. Viewed as a sentence-enhancing factor, subsection (3) represents a congressional judgment that the punishment for committing the crime of carjacking should be harsher if the offense, as actually perpetrated, includes conduct that produces the demise of a victim. In this sense, the architecture of the carjacking statute bears a family resemblance to the design of the federal sentencing guidelines, which make generous use of "sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity." For example, under U.S.S.G. § 1B1.3, "this court has repeatedly upheld the inclusion as relevant conduct of acts either not charged or charged but dropped," and authorized resort to that conduct as a sentence-enhancing datum. By like token, a defendant convicted of drug trafficking will find his sentence enhanced if it turns out that he possessed a dangerous weapon during the commission of the crime . . . .[113]

The court analogized an enhancement sentence to a guidelines sentence. Guidelines sentences, the court reasoned, increase punishment on the basis of aggravating factors. A finding of aggravating circumstances under the guidelines does not require the full safeguards of criminal due process. Therefore, the court concluded, the safeguards are not required under the carjacking act either, when it increases punishment on the basis of aggravating circumstances.

This analogy is flawed. Yes, fact-finding under the guidelines does not require full criminal due process. But that is because any increase the guidelines permit must remain within the statutory maximum. The guideline sentence is valid, as long as the statutory maximum is valid. But it does not follow that the statutory maximum is valid because the guideline is valid.

For example, suppose a statute subjects kidnapping to a penalty of twenty years. A guideline then requires a sentence of at least ten years if the defendant used a weapon to accomplish the kidnapping. Under *McMillan,* the guideline sentence of ten years is valid without full due process safeguards for the weapon finding because the ten years for the weapon remains within the twenty-year statutory maximum for the kidnapping.

---

113. *Id.* at 1000-01 (case citations and statute citations omitted).

If, however, the statute called for twenty years for kidnapping, but thirty years for kidnapping accomplished with a weapon, a guideline range up to thirty years would be valid only if the increased statutory maximum itself was valid. The enhanced penalty upheld in *Rivera-Gomez* was not within the maximum guideline range for simple carjacking. The guideline range does not validate the extra ten years.

Rivera-Gomez's analogy does not explain why the statutory increase, of ten years in this case, over the sentence available for the elements can be imposed without full due process safeguards. Indeed, the First Circuit Court went so far as to deny flatly that "death results" even altered the maximum for the elements:

> Appellant is not being punished for the uncharged crime of murder, but, rather, he is being punished more severely for the crime of carjacking because his conduct during the commission of the crime led to the loss of a victim's life. Of course, the burgeoning use of sentence enhancers by Congress and the Sentencing Commission as part of the catechism of punishment poses an obvious danger that, in extreme circumstances, the lagniappe might begin to overwhelm the main course. In all probability, there are constitutional limits on the way sentencing factors can be deployed in the punishment of a substantive offense. But that proposition is only of academic interest where, as here, the sentence enhancement scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty."[114]

How can the court attribute this sentence to the elements alone when the elements do not permit more than a fifteen-year term? Life in jail is more than fifteen years in jail. Ask any defendant. A life sentence for "death results" alters the maximum penalty for the elements of carjacking.

On the basis of *McMillan*, *Rivera-Gomez* admits "[i]n all probability, there are constitutional limits on the way sentencing factors can be deployed in the punishment of a substantive offense."[115] But faced with one of those limits, an increase in the maximum, the *Rivera-Gomez* court blinked it away. It denied that the sentencing factor altered the statutory maximum. Apparently, the factor did not *increase* the maximum, but established a *new* maximum, still based on the same elements. If this view is correct, *no* sentence alters the maximum available for the elements alone. This approach formalistically respects *McMillan's* logic but simultaneously guts it of all possible force.

---

114. *Id.* at 1001.
115. *Id.*

C. *The "Subset" Theory of Enhancements*

It is possible to effect the same disappearance using different language. Some courts speak of the enhancers as delimiting a "subset" or "portion" of defendants whose aggravating conduct has made them eligible for an "increased" sentence.[116] This "increase," however, is not considered an increase over the base offense for the elements. Rather, it expands the base. The "increase," therefore, is for the elements alone. This difference in base is justified on the ground that one defendant may commit the elements of a crime in a more aggravating fashion, or with a worse character, than another. The "subset" approach, like that in *Rivera-Gomez*, acknowledges that an enhanced sentence is greater than a lesser term (e.g., life is greater than fifteen years). But both assume the harsher sentence represents punishment for the elements only.

In *United States v. Haggerty*,[117] the defendant challenged his sixty-six month term of imprisonment imposed under 8 U.S.C. § 1326. Paragraph (a) of the statute authorized a two-year term of imprisonment for any deported alien who re-enters the United States. Paragraph (b), under which Haggerty was sentenced, authorized a twenty-year term, for any re-entering alien "whose deportation was subsequent to a conviction for commission of an aggravated felony." Haggerty's indictment did not allege a prior aggravated felony. He claimed the indictment was invalid for failure to charge an element of the offense for which he was punished.

The Eighth Circuit had to decide whether the prior conviction was an element of Haggerty's offense or a condition triggering enhancement. The court analyzed the statutory language. It determined that subsection (a) defined the crime of illegal reentry,[118] and "subsection (b) does no more than single out subsets of those persons reentering the country illegally for more severe punishment."[119] Because the prior felony was a sentence enhancer and not a separate offense, the court held the indictment did not have to charge the prior aggravated felony.[120]

The *Haggerty* court did not elaborate on its subset theory.

---

116. *See, e.g.*, United States v. Haggerty, 85 F.3d 403 (8th Cir. 1996); United States v. Ryan, 9 F.3d 660, 667 (8th Cir. 1993), *cert. denied*, 514 U.S. 1082 (1995); United States v. Rush, 840 F.2d 574, 577 (8th Cir. 1988) (en banc); United States v. West, 826 F.2d 909 (9th Cir. 1987).

117. 85 F.3d 403 (8th Cir. 1996).

118. *See id.* at 405.

119. *Id.*

120. *See id.* at 405-06.

Indeed, it borrowed the language from other opinions,[121] which also did not explain it. Nonetheless, the theory is alluring. Under the subset theory, the penalty clause of an enhancement statute divides the set of all those convicted of the crime into groups deserving differing punishments. The legislature has not created one maximum sentence and then particular appropriate sentences along this range. Rather, the legislature has created different maximum sentences depending on aggravating factors. Assume, for example, a legislature imposes a maximum of twenty years for kidnapping accomplished without a gun and a maximum of thirty years if the kidnapping is accomplished with a gun. Under the "subset" theory, the legislature has not *increased* the penalty for kidnapping when it is accomplished with a gun. It has simply declared that kidnapping is punishable by thirty years for the subset of persons who accomplish it by use of a gun. This legislative sentencing structure, it may be argued, is analogous to discretionary sentencing. Traditionally, judges made similar divisions based on their discretion. They divided defendants into those more and less worthy of punishment, depending on the defendant's character and the way in which the offense was committed. Full due process was not required for traditional sentencing procedures. The conviction alone substantially diminished the defendant's liberty interest (or due process rights) to the extent of the maximum period of confinement.[122] Why invoke full due process merely because a statute now guides the dividing process that previously lay within the judge's discretion? Indeed, reply the subset theorists, full due process is *not* triggered.

This approach leaves something in the shade. Under traditional sentencing, a defendant lost his due process right to liberty to the extent of the maximum sentence under the statute. Thus, a defendant convicted of an offense carrying a maximum of twenty years lost his due process right to twenty years of liberty. The source of that loss included any considerations the judge might entertain about the defendant's character or method of committing the crime. The entire twenty years was initially protected by due process but forfeited upon conviction after a criminal trial. The defendant's liberty beyond the statutory maximum was not threatened. His due process right to that

---

121. *See Ryan*, 9 F.3d at 667-69 (finding 18 U.S.C. § 844(i) to be enhancement provision); *Rush*, 840 F.2d at 577 (finding Armed Career Criminal Act amendment to possession of firearm statute to be enhancement provision).

122. *See* Meachum v. Fano, 427 U.S. 215, 224 (1976); McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986).

liberty was not lost. But, a maximum-enhancing statute allows a defendant convicted of a crime whose elements carry a twenty-year maximum (protected by full due process) to lose his liberty for thirty years because he falls into a "subset." Why are the defendant's last ten years less protected than the first twenty? Although the subset theory may not raise due process problems under traditional sentencing, it fails to explain or justify a defendant's loss of liberty under an enhancement statute. In effect, the theory is nothing more than a naked assertion that a state may take a defendant's liberty for aggravating conduct without full trial due process. Of course, it is possible to assert the entire thirty years are attributable to the elements alone to which full due process attached, but this is no more than *Rivera-Gomez's* denial that a sentencing enhancer alters a maximum.

D. *Deny that* McMillan *Requires Full Trial Due Process for Maximum-Enhancements*

A court could candidly approach the due process problem posed by a maximum-sentence enhancer. Rather than escaping the due process puzzle by ignoring the increase above the maximum, a court could deny that the increase makes any difference for due process purposes. But such an approach would conflict directly with *McMillan's* logic. Nonetheless, several courts have ventured down this road.

In *United States v. Lowe*,[123] the defendant claimed he was entitled to a jury-finding before he could be exposed to a maximum-enhanced sentence under the Armed Career Criminal Act.[124] Rejecting the defendant's claim, the Seventh Circuit asserted that *McMillan* did not intend its "greater or additional punishment" analysis to be the sole test of whether full trial due process attaches to aggravating circumstances.[125] Admittedly, *McMillan* indicated a variety of ways a sentencing scheme might transgress due process boundaries. It might violate the presumption of innocence, unconstitutionally lighten the government's burden of proof, or disproportionately punish a sentencing factor.[126] But nothing in *McMillan* suggests a statute would

123. 860 F.2d 1370 (7th Cir. 1988).

124. 18 U.S.C. § 924.

125. *See Lowe*, 860 F.2d at 1379. The Tenth Circuit similarly dilutes the significance of *McMillan's* language. *See* United States v. Segien, 114 F.3d 1014, 1019 (1997) (stating increase over maximum is only one concern of *McMillan*).

126. *See McMillan*, 477 U.S. at 87-88.

have to cross every one of these boundaries before it violates due process. In the *Lowe* court's view, because the Armed Career Criminal Act did not violate due process in every way possible, it did not violate it at all.

After *Lowe*, the Ninth Circuit made its attempt to relegate *McMillan's* "additional punishment" language to the dust-bin. In *Nichols* v. *McCormick*,[127] the defendant was convicted of kidnapping and assault. After the sentencing judge found the defendant used a weapon, the judge imposed an additional ten-year term under a state weapons enhancement statute. The court could not have imposed such a lengthy sentence without its separate fact-finding concerning the weapon.

On appeal, the defendant claimed his enhanced sentence violated his right to due process and his right to a jury-finding.[128] The *Nichols* court candidly acknowledged that "the Montana statute, unlike that of Pennsylvania in *McMillan*, allows the sentencing court to impose a penalty in excess of that permitted by the underlying offense."[129] But the court in *Nichols* considered the defendant's reading of *McMillan* too narrow.[130] The Ninth Circuit, like the Seventh in *Lowe*, took the view that *McMillan's* "beyond the maximum" limit was just one of several factors reviewing courts should consider in judging the due process validity of maximum-enhancing statutes. *McMillan*, *Nichols* noted, also cautioned against statutes which redefine elements of an offense as sentencing factors, and against statutes which relieve the prosecution of its burden of proving all the defined elements beyond a reasonable doubt. *Nichols* concluded that because the legislature did not commit the last two sins, it did not matter that it committed the first. This reasoning takes *McMillan's* logic off its foundations. Under *McMillan*, a conviction accompanied by the full protections of a criminal trial strips a defendant of his or her liberty interest up to the maximum permitted for the offense. *McMillan* offers no justification for depriving a defendant of liberty beyond the maximum without full due process protections. *Nichols* acknowledged that this is precisely what happened to the defendant before it. Rather than grant the due process protections which *McMillan* requires, the *Nichols* court decided not to take *McMillan* seriously.

Blithe dismissal of *McMillan* is no longer possible. A recent Supreme Court decision dispels any doubt about the importance

127. 929 F.2d 507 (9th Cir. 1991).
128. *See id.* at 509.
129. *Id.* at 510.
130. *Id.*

of the line *McMillan* drew around "greater or additional" punishment and suggests that lower court attempts to blur the line are erroneous. In *Witte* v. *United States*,[131] the Court explained precisely why it upheld the statute at issue in *McMillan*:

> Significantly, we emphasized that the statute at issue "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 in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm" . . . . That is, the statute "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor . . . . For this reason, we approved a lesser standard of proof provided for in the statute . . . ."[132]

A sentence enhancer that increases punishment beyond the statutory maximum goes beyond the boundary established by *McMillan*. It threatens the defendant's liberty interest and requires the due process safeguards of a criminal trial.

E. *A Special Category: Maximum Sentence Enhancements Based on Prior Convictions*

Recidivist statutes typically authorize, or mandate, greater maximum sentences if a defendant is convicted of a new crime and has been convicted of a specified number or kind of prior criminal offenses. When prior convictions increase the maximum punishment beyond what it could be absent the prior convictions, judicial reliance on the prior convictions to increase the defendant's punishment may raise limited due process issues. For instance, the prosecution's duty to give a defendant notice of its intent to rely on the convictions and the timeliness of the notice. But beyond these limited questions, the use of prior convictions to enhance punishment does not pose the critical due process issues that enhancements not based on prior convictions do. Whether a legislature intends a prior conviction to be an element of an offense or simply a sentence enhancer, the defendant has already received full trial due process for the prior conviction. For this reason, federal appellate courts have rejected

---

131. 515 U.S. 389 (1995). The defendant was convicted of distributing cocaine. Complying with the Federal Sentencing Guidelines, the trial judge sentenced him for the cocaine offense and increased his sentence in light of uncharged drug offenses. A grand jury later indicted the defendant for the same conduct that contributed to his cocaine sentence. The United States Supreme Court held this did not violate Double Jeopardy. *Id.* at 403. *See infra* text accompanying notes 145-52.

132. 515 U.S. at 401.

claims that maximum sentence enhancements based on prior convictions violate due process.[133]

Buckley v. Butler[134] illustrates this analysis. The defendant, after conviction of armed robbery, was sentenced under a Louisiana multiple-offender statute.[135] The Fifth Circuit explained why the defendant could receive a higher maximum sentence as a repeat felon without the due process rights that attach to a criminal trial:

> [Recidivist statutes] do not relate to determining what the accused has done, but rather to what the state has previously determined that the accused has done. And that previous determination must have been a formal, judicial determination of guilt; and hence one as to which the full measure of constitutional protections was available. The scheme of the statutes, therefore, cannot properly be understood as intended or calculated to infringe on the rights attending determination of whether the accused has engaged in criminal conduct.[136]

The Fifth Circuit did not rest content after labeling the predicate convictions as a sentencing factor. The court went on to explain why full due process need not attach to the maximum-enhancer at issue. The determination of the defendant's enhancing conduct had previously occurred with full due process.

The circuit courts have adopted *Buckley's* reasoning and applied it to maximum sentence enhancements imposed under the federal Armed Career Criminal Act.[137] That Act penalizes any person convicted of a felony who received, possessed, or transported any firearm in interstate commerce.[138] The Act sets a maximum punishment of five years for the offense.[139] But in the case of a person with three previous convictions for robbery, or burglary, or both, the statute mandates imprisonment for at least fifteen years.[140] Reviewing courts now consistently hold that Congress intended the predicate convictions to be sentence enhancements only.[141] Because the prior convictions are en-

---

133. The Supreme Court has upheld repeat-offender statutes against due process and double jeopardy challenges. *See* Moore v. Missouri, 159 U.S. 673, 677 (1895); Oyler v. Boles, 368 U.S. 448, 451 (1962); Nichols v. United States, 511 U.S. 738 (1994).

134. 825 F.2d 895 (5th Cir. 1987).

135. LA. REV. STAT. ANN. § 529.1D (West 1997).

136. *Buckley*, 825 F.2d at 903.

137. 18 U.S.C. § 921 (West 1997).

138. *Id.* § 922(g).

139. *Id.* § 924(a)(1).

140. *Id.* § 924(e)(1).

141. *See* United States v. McGatha, 891 F.2d 1520, 1524 (11th Cir. 1990) (listing

hancements rather than elements of a new crime, the circuit courts have rejected defendants' due process claims. The indictment need not charge the prior convictions.[142] The state need not prove the convictions to a jury beyond a reasonable doubt.[143] The defendant is not entitled to a jury instruction concerning the prior convictions.[144] The reviewing courts offer more than mere labeling to justify their rejection of these rights. They emphasize that the defendant's enhancing conduct has already received all the safeguards of a criminal trial. This approach indirectly supports the conclusion that due process rights should attach to maximum-sentence enhancement schemes.

In *United States v. McGatha*,[145] the Eleventh Circuit labeled as a sentencing factor the three prior convictions portion of the Armed Career Criminal Act.[146] The court then explained why it was unnecessary to submit the sentencing factor to the jury:

> The mandatory sentencing provisions of § 924(e), applicable only after the defendant has been convicted of one of the predicate offenses described in § 922(g), closely resemble a recidivist provision. As with the typical recidivist provision, the sentencing factors are not submitted for jury consideration since no additional fact finding is necessary—the defendant has received the totality of constitutional protections due in the prior proceeding on the predicate offense.[147]

That the prior convictions received "the totality of constitutional protections" distinguishes the use of such prior convictions at sentencing from other conduct described by maximum sentence enhancers. Requiring full trial due process for the prior convictions would be redundant.

Recidivist sentencing is a type of sentence enhancement. However, the due process reasoning that supports such recidivist sentencing does not apply beyond its narrow context.[148] On the contrary, it underscores the need for full due process protections when the enhancement is based on conduct not proven with full due process protection.

---

cases holding Armed Career Criminal Act is a sentence enhancement statute).

142. *See* United States v. Rumney, 867 F.2d 714 (1st Cir. 1989).

143. *See* United States v. Blannon, 836 F.2d 843 (4th Cir. 1988).

144. *See* United States v. Hawkins, 811 F.2d 210 (3d Cir. 1987).

145. 891 F.2d 1520 (11th Cir. 1990).

146. *Id.* at 1525.

147. *Id.* at 1526.

148. Like the Seventh Circuit in *Lowe*, the *McGatha* court rejected *McMillan's* "greater or additional punishment" language as the sole test for measuring whether a sentencing factor becomes an element of an offense. This view is no more valid in *McGatha* than in *Lowe*. *See supra* text accompanying note 125.

F. *The Double Jeopardy Analogy*

Witte acknowledges the significance of *McMillan's* "greater punishment" analysis. The Pennsylvania statute in *McMillan* was valid because the defendants' punishment did not exceed the maximum attributable to the elements of the crimes alone. Doesn't a statute, then, trigger the full safeguards of a criminal trial if a sentencing factor results in punishment greater than the elements permit? The conclusion would seem inescapable unless the enhanced portion of the sentence is attributable to the elements alone. If a statute punishes kidnapping by twenty years in prison but its penalty clause raises the maximum to thirty years for use of a weapon, is the extra ten years somehow attributable solely to the elements? If so, no enhancement exists beyond the base term of twenty years allowed for the elements. The "extra" ten years is absorbed into the base term and becomes the same as *McMillan's* enhancement within the maximum. And, as in *McMillan*, the added ten years would not trigger full criminal due process because the defendant's liberty interest is attributed solely to the elements.

Witte points to two instances in which "punishment" due to aggravating factors is not punishment for the factors but punishment for the elements alone. Neither instance explains the absence of full trial due process for maximum-enhancers.

1. *Double Punishment Challenges under the Double Jeopardy Clause.* The defendant in *Witte* was convicted of distribution of cocaine. Witte had also distributed drugs on three previous related occasions, although he was never indicted for those offenses. Nonetheless, at sentencing, the court took into account Witte's earlier conduct and tripled his sentence, as the Federal Sentencing Guidelines direct. A grand jury later indicted Witte for the same three drug offenses that had increased his sentence. Witte claimed he was in jeopardy of being punished twice for the earlier conduct. The Court rejected his claim. "Where the legislature has authorized . . . a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of double jeopardy inquiry."[149] In effect, the sentencing judge did not punish Witte for the earlier conduct when it tripled Witte's sentence. He was punished only for his conviction.

In reaching this conclusion, the Court applied the reasoning it used to validate repeat-offender statutes challenged on double

149. Witte v. United States, 515 U.S. 389, 403 (1995).

punishment grounds. Recidivist statutes, the Court in *Witte* explained, increase the penalty for the latest crime only. No portion of the increased punishment is attributable to the earlier crimes. The enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."[150]

A recidivist defendant, therefore, is not punished twice for the same conduct. By parity of reasoning, Witte was not in jeopardy of being punished twice for his earlier drug-related conduct. He was never punished once for it. For double jeopardy purposes, *all* of his sentence, just like all of a recidivist's sentence, is attributable solely to his conviction. The defendant is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment."[151]

If, for double jeopardy purposes, a recidivist defendant's enhanced punishment is attributable solely to the elements of his latest crime, should an enhanced sentence be attributed solely to the elements for due process purposes? If a maximum-enhanced sentence is not "punishment" for the enhancing factors, then a defendant has no liberty interest at stake when a judge considers the factors. Without a liberty interest, there would be nothing for the Due Process Clause to protect. If a maximum-enhanced sentence is attributable solely to the conviction for purposes of due process as well as double jeopardy, then the due process puzzle is solved.

The Court in *Witte*, however, was careful to restrict its punishment allocation to an analysis of the appellant's Double Jeopardy claims.[152] The Court understood that what is reasonable for one purpose may be indefensible for another. Different questions require different answers. A double-punishment claim looks to whether a defendant was or might be punished. When a defendant has committed previous crimes and stands for sentencing on a new offense, a judge has sound reason to increase the punishment for the latest conviction. Earlier punishment did not deter

150. *Id.* at 410.

151. *Id.* at 401-03.

152. In a concurring opinion, Justices Scalia and Thomas reject *Witte's* double jeopardy logic: "We do not punish you twice for the same offense," says the Government, "but we punish you twice as much for one offense solely because you also committed another offense, for which other offense we will also punish you (only once) later on." *Id.* at 407. Justices Scalia and Thomas would hold the Double Jeopardy Clause does not protect against double punishment.

the defendant. In punishing a repeat-offender more harshly for the most recent offense, a judge is not punishing the earlier offenses again. Recidivist cases, therefore, allocate all of a defendant's sentence to the latest offense for double punishment purposes.

The Court treated a recidivist's sentence differently, however, when a defendant challenges a sentence on due process grounds. Here the question is not whether a judge has already punished a defendant. The issue is how much process was due before the judge could impose the penalty. When the potential penalty exceeds the maximum available for the elements of conviction, the Supreme Court has recognized that the defendant retains a liberty interest in the additional term of years. In *Specht* v. *Patterson*, as noted earlier,[153] the defendant was convicted of a sexual offense carrying a maximum possible sentence of ten years. A state sentencing statute made him subject to a possible sentence of life imprisonment if, in addition to his crime, he was found to be dangerous or an habitual offender. The sentencing statute did not create a new crime. Thus, from *Witte's* point of view, Specht's entire sentence could be attributed to the elements of his conviction for double jeopardy purposes. Nevertheless, the Court in *Specht* held that Due Process entitled the defendant to the safeguards of a criminal trial before a judge could impose a separate sentence based on the sentencing factor. The *Specht* Court did not allocate the defendant's sentence to his conviction for due process purposes. Thus, *Specht* establishes that a convicted defendant retains an interest in not being deprived of liberty beyond the maximum term prescribed for the elements alone.

2. McMillan's *"Necessary Implication." Witte* cites *McMillan* as a second instance when the court allocated the entirety of a sentence to the elements of conviction. In *McMillan*, it will be recalled, a Pennsylvania statute mandated a five-year sentence for certain felony convictions if a judge, at sentencing, found the defendant visibly possessed a weapon during the commission of the felony. *Witte*, referring to sentencing factors as "offender-specific information," drew an implication from *McMillan*:

> [B]y authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in "punishment" for the conduct . . . . These decisions [double punishment

153. *See supra* text accompanying notes 19-23.

> challenges to recidivist statutes and *McMillan*] reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.[154]

This statement acknowledges that a defendant is entitled to "the procedural protections attendant to a criminal trial" if the defendant will be punished for a sentencing factor. *Witte* indicates the *McMillan* Court was bound to accord its petitioners complete criminal due process if the petitioners' sentences constituted punishment for visible possession of a weapon. *McMillan*, as *Witte* correctly noted, held that the Pennsylvania statute punished the defendants only for the elements of their crimes. The act did not punish them for visible possession, even though the possession finding triggered a five-year minimum penalty. *McMillan's* allocation of the petitioners' entire punishment to the conviction alone is formally defensible only because, as *McMillan* "significantly" acknowledges, the five-year term was within the maximum punishment already available to the judge for the conviction alone. Every moment of liberty lost, therefore, could be attributed to facts found with the protections of full criminal due process. No sentencing findings were necessary to deprive the defendants of their liberty. In the case of maximum-sentence enhancers, however, attribution of the whole punishment solely to the conviction is not tenable. The judge cannot impose an increased maximum solely on the basis of facts found with the full safeguards of a criminal trial. Additional factual findings are necessary. When these findings increase the sentence above what the jury's verdict would permit, the defendant loses more liberty than the conviction alone authorizes. In the context of maximum-enhancing statutes, the allocation of a defendant's entire sentence to the conviction alone represents a gratuitous refusal to grant the safeguards of a criminal trial to a defendant's potential deprivation of liberty.

G. *When the Tail Wags the Dog: Sentencing Findings that Require the Due Process Protections of a Criminal Trial*

Appellate courts refuse to apply the due process protections of a criminal trial to "sentencing factors." The courts hold a sentence punishes a defendant solely for committing the elements of the crime. No part of the sentence punishes a defendant for the conduct that enhanced the sentence. This is so, courts hold,

---

154. *Witte*, 515 U.S. at 400-01.

even when punishment is greater than the simple elements of the crime permit. The Supreme Court in *Witte* indicated the due process consequences of this formalistic position: "[B]y authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in 'punishment' for such conduct."[155] That is to say, if consideration of sentencing factors resulted in punishment *for* the factors, the procedural safeguards of a trial would have to preface any punishment.

In one extreme circumstance, the Supreme Court has indicated a readiness to abandon its allocation of a sentence solely to the elements of a crime. In *McMillan,* the Court noted Pennsylvania's mandatory minimum statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[156] The statute merely raised to five years the minimum sentence which a judge could impose within a twenty-year maximum. This did not cross the constitutional line. However, the *McMillan* Court indicated the result might be different if the weapon finding disproportionately influenced the sentence. The Court did not indicate when a sentencing factor's influence becomes disproportionate, or how an appellate court can recognize the disproportion. Perhaps, if Pennsylvania's statute required the weapon finding to trigger a minimum of fifteen years out of a possible twenty, rather than just five years out of twenty, the Court would have held the weapon factor played such a disproportionate role in sentencing that the tail wagged the dog. It would have acknowledged the punishment was *for* the aggravating conduct and not just for the elements of the crime. In *Witte,* the Court cautiously reserved the question of whether "the enhancing role played by the relevant conduct [was] so significant . . . that consideration of that conduct in sentencing has become 'a tail which wags the dog of the substantive offense.' "[157]

The Court's concern with possible disproportionality shows the Court is aware its formalism has limits. It will have to abandon the position that a sentence punishes only the elements of a crime when reality makes clear the punishment is for the aggravating conduct.[158] Disproportionality is one way to

155. *Witte,* 515 U.S. at 400.

156. *McMillan* , 477 U.S. at 88.

157. *Witte,* 515 U.S. at 403. The defendant raised no disproportionality claim based on due process. He relied only on a double jeopardy claim.

158. In practice, disproportionality claims have not been successful. *See, e.g.,* Lom-

force the recognition. It may be the only way in the case of statutes such as Pennsylvania's. Where the aggravated punishment (five years) remains within the maximum available for the elements (twenty years), there may be no way to tell the punishment is really for the aggravating conduct, unless the conduct disproportionately enhances the sentence. In the case of maximum-enhancing statutes, however, there is no need to depend upon disproportionality to clarify the purposes of the punishment. As soon as a punishment exceeds the term prescribed for the elements alone, the excess punishment must be *for* the conduct. Otherwise, a court could not impose it. Once it is clear the punishment is for the conduct, the safeguards of a criminal trial are required, as *Witte* necessarily implies.

III. AN OBJECTION TO DUE PROCESS PROTECTIONS FOR MAXIMUM-ENHANCED SENTENCING

If courts were to acknowledge that criminal trial safeguards must precede maximum-enhanced sentencing, it may be objected that a legislature might try to circumvent the demands of due process by a simple expedient. A legislature could abandon maximum-enhancing statutes and revert to traditional discretionary sentencing. It could expand the maximum penalties available for the elements alone. For example, instead of penalizing kidnapping by twenty years imprisonment and kidnapping with a weapon by thirty years, a legislature could punish kidnapping itself by thirty years. In such case, under the *Williams* rationale applied to discretionary sentencing, due process protections would not attach to the sentencing finding. The defendant could lose thirty years of liberty on the basis of the conviction alone, whether or not he used a weapon. If a legislature can escape due process safeguards by artfully drafting its statutes, why put the legislature to the trouble in the first place?

In fact, a legislature is unlikely to abandon maximum-enhancing statutes in an attempt to avoid due process protections. The graded structure of maximum-enhancing statutes serves a desirable purpose. It protects less culpable defendants from excessive punishment when they commit only the unaggravated crime. Maximum-enhancing statutes reserve harsher punishment for the worse criminal. If a legislature expanded the penalties available for the simple elements of a crime, it would

---

bard v. United States, 102 F.3d 1 (1st Cir. 1996), *cert denied*, 117 S.Ct. 2437 (1997). For criticisms of the standard, *see* Herman, *supra* note 61, at 334; Young, *supra* note 61, at 339.

create greater penalties than it deems appropriate for the simple elements merely to avoid complying with the mandates of the Due Process Clause. Would legislators expose themselves, or their families, or members of their own electorate, to life imprisonment for possessing *any* amount of cocaine, just to deny the safeguards of criminal trial to those who possess great amounts?[159] The "continued functioning of the democratic process"[160] provides some assurance that legislatures will not increase penalties in order to make an end-run around due process guarantees. A legislature can harshly penalize serious criminals without placing less culpable citizens at risk of draconian punishment. It can maintain the graded structure of maximum-enhancing statutes. But when it does so, the protections of a criminal trial should attach to the enhancing conduct.

CONCLUSION

Appellate courts have failed to justify the denial of criminal due process protections at sentencing for maximum-enhancing conduct. Judicial efforts to analogize maximum-enhanced sentences to punishment under discretionary statutes fail. An increased maximum sentence cannot be attributed solely to the elements. Perhaps in the rush to "lock up criminals," courts have forgotten that thirty is more than twenty and always will be. The elements alone do not permit the longer sentence. The increased portion is punishment *for* the aggravated conduct that causes the increase. Characterizing the aggravating conduct as a "sentencing factor" does not change the reality of what the punishment is for. A defendant sentenced to thirty years for kidnapping with a weapon, who could only be sentenced to twenty years for kidnapping without a weapon, is punished with ten years for using the weapon. Call the weapon use an "element;" call it a "sentencing factor." Unless the due process protections of a criminal trial have preceded the finding that caused ten *additional* years of punishment, the finding deprives a defendant of liberty for criminal conduct without the safeguards of a criminal trial.

---

159. "Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant that consideration of that conduct has become 'a tail which wags the dog of the substantive offense.'" *Witte*, 515 U.S. at 403 (quoting *McMillan*, 477 U.S. at 88).

160. *See McMillan*, 477 U.S. at 93 (Marshall, J., dissenting), (Stevens, J., dissenting) (the democratic process will restrain legislatures from circumventing due process).

Granted, a defendant may belong to a "subset" of convicts who deserve additional punishment. Worse criminals deserve heavier penalties. But criminal trial protections should attach in determining whether an accused *is* a worse criminal deserving a greater penalty than the crime otherwise permits.

Judicial formalism attributes all punishment to the elements of a crime. Consequently, legislatures can create two crimes but call them one. The first is composed of the simple elements the legislature defines. Full due process protections apply to finding those elements. But when a defendant receives a maximum-enhanced sentence, the court imposes punishment for a second, greater crime. Formalism denies the existence of the second crime. It perceives "a mere sentencing factor." Defendants have better eyes. They see they are punished for aggravating conduct that a court found without the due process of law.