University of Dayton Law Review

Volume 33 | Number 1 Article 3

10-1-2007

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Kirk J. Henderson
University of Pittsburgh

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Cover Page Footnote

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MANDATORY-MINIMUM SENTENCES AND THE JURY: TIME AGAIN TO REVISIT THEIR RELATIONSHIP

Kirk J. Henderson[*]

I. INTRODUCTION

For more than two decades, the United States Supreme Court has allowed mandatory-minimum sentences to be imposed after a judge has made a necessary finding of fact by a preponderance of the evidence. The Supreme Court's jurisprudence in this area began with *McMillan v. Pennsylvania*,[1] which involved Pennsylvania's mandatory-minimum sentence that requires a minimum sentence of at least five years of imprisonment for visibly possessing a firearm while committing certain offenses.[2]

Though the Supreme Court has not explicitly overruled *McMillan*, it has substantially retreated from *McMillan*'s underlying rationale in several recent cases. Those new cases require some factual findings that are necessary for sentencing to be made by a jury beyond a reasonable doubt. With this change in philosophy and the latest change in Court personnel, the time is ripe for the Court to again address this issue to determine if this procedure remains constitutional in light of the Court's new direction in its sentencing jurisprudence.[3]

In this Article, I review the Supreme Court's evolving jurisprudence on this topic. Because the Supreme Court's body of law in this shifting area began with Pennsylvania's mandatory-minimum sentence for visible possession of a firearm, I will use this statute as a template while examining the current state of the law. The conclusion that I reach is that a jury (and not a judge) must find predicate facts beyond a reasonable doubt (and not by a preponderance of the evidence) in order for a defendant to be subjected to a mandatory-minimum sentence. I then observe how the Pennsylvania

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[*] Assistant Public Defender in the Appellate Division of the Law Office of the Public Defender of Allegheny County, Pittsburgh, Pennsylvania; Adjunct Professor of Law, University of Pittsburgh School of Law; B.A., Allegheny College; J.D., Vanderbilt University. The views expressed in this Article do not necessarily reflect the policies, opinions, or views of the Law Office of the Public Defender of Allegheny County or of any other member of that Office. I would like to thank Penn Hackney for early *Apprendi* advice that helped to point me in the right direction.

[1] 477 U.S. 79 (1986).

[2] 42 Pa. Consol. Stat. Ann. § 9712 (2007).

[3] *See e.g.* Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule* Harris, 18 Fed. Sent. R. 255, 257 (2006) (available at 2006 WL 2433749) ("[I]t seems inevitable that the Court will have to revisit *Harris*," which upheld this mandatory-minimum sentence procedure in 2002.).

Superior Court, though not unanimously, has rejected this trend. Because courts and other policy makers fear what impact overruling *McMillan* might have on other aspects of the sentencing phase of a case, I end by analyzing whether any spillover effect may be felt elsewhere in the sentencing realm, again using Pennsylvania as a reference.[4]

II. THE UNITED STATES SUPREME COURT'S SENTENCING REVOLUTION

Pennsylvania requires a mandatory-minimum sentence of five years when a defendant has "visibly possessed a firearm" during commission of an enumerated offense.[5] This statute, found at § 9712 of the Judicial Code, states that the applicability of the statute will not be made until sentencing, will be made by the judge, and will be made by a preponderance of the evidence.[6]

In 1986, the United States Supreme Court considered whether this construct was constitutional in *McMillan v. Pennsylvania*.[7] The Court found that § 9712 did not violate the Fifth and Fourteenth Amendments because it did not increase the statutory maximum sentence of the substantive offense or create a separate offense with a separate penalty.[8] In doing so, the Court noted that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[9]

Thus, for a generation, this construct of allowing judges to find facts necessary for mandatory-minimum sentences was, without a doubt,

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[4] When thinking about this issue, an important point to remember is that the Supreme Court is not attacking the concept of mandatory-minimum sentences. Instead, the question is who should decide if the prosecution has proven that the mandatory sentence applies and by what standard. If the prosecution proves the predicate facts (such as visible possession of a firearm) to a jury beyond a reasonable doubt, then unquestionably the defendant is subject to the mandatory-minimum sentence.

Several justices have expressed displeasure with mandatory-minimum sentences. *See Harris v. U.S.*, 536 U.S. 545, 568 (2002) (plurality) ("Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty."); *id.* at 570 (Breyer, J., concurring) ("During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law . . . ."). These concerns, however, are not part of this question. Instead, the issue is *who* must find the facts that require the imposition of the mandatory-minimum sentence. *See id.* at 568 ("These criticisms may be sound, but they would persist whether the judge or the jury found the facts giving rise to the minimum.").

These types of policy-based concerns with mandatory-minimum sentences are not relevant to deciding who makes the necessary factual findings and by what standard. Interestingly—and underscoring this point—the critiques of mandatory-minimum sentences quoted here in this footnote were written by justices who upheld the current mandatory-minimum scheme.

[5] 42 Pa. Consol. Stat. Ann. § 9712(a).

[6] 42 Pa. Consol. Stat. Ann. § 9712(b).

[7] 477 U.S. 79. This was a 5-4 decision. The majority opinion was authored by Justice Rehnquist and joined by Chief Justice Burger and Justices White, Powell, and O'Connor. Justices Marshall, Brennan, Blackmun, and Stevens dissented.

[8] *Id.* at 87-88 ("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.").

[9] *Id.* at 93.

constitutional. This doctrine began to change, however, with the Court's decision in *Apprendi v. New Jersey*.[10] There, New Jersey punished possession of a firearm for unlawful purposes with a possible ten-year sentence.[11] The state's hate crime law, however, allowed the judge to increase the sentence to up to twenty years by finding by a preponderance of the evidence that the defendant intended to intimidate a defined group (in that case, a racial minority).[12]

The Court found that the application of the hate crime enhancement was unconstitutional because it allowed the enlargement of the maximum-possible sentence when a judge (rather than a jury) found an additional fact by a preponderance of the evidence (rather than beyond a reasonable doubt). The Sixth Amendment right to a jury trial includes the right to have "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum . . . be submitted to a jury, and proved beyond a reasonable doubt."[13] Interestingly, the Court noted that it was not overruling *McMillan*, but it reserved for a future case the question of whether *McMillan* should be overruled.[14]

Justice Thomas in his *Apprendi* concurrence presaged the demise of *McMillan*. After an exhaustive review of the history of the respective roles of judge and jury in sentencing proceedings throughout American history,[15] Justice Thomas concluded that *Apprendi*, "far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* [prior to *McMillan*]—the status quo that reflected the original meaning of the *Fifth* and *Sixth Amendments*."[16] He noted that "it is fair to say that *McMillan* began a revolution in the law regarding the definition of 'crime'" by how it defined what is an element.[17] Justice Thomas argued that the proper way to determine whether a fact is an element to be found by a jury beyond a reasonable doubt is "[i]f a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."[18]

Under this theory, it does not matter that the defendant could be sentenced to the same sentence without the mandatory minimum (e.g., he or she could receive a five-to-ten year sentence either way).[19] Instead,

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[10] 530 U.S. 466 (2000). This was another 5-4 decision. The majority consisted of Justices Stevens (who authored the opinion), Scalia, Souter, Thomas, and Ginsburg. The dissenting justices were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

[11] *Id.* at 468.

[12] *Id.* at 468-69.

[13] *Id.* at 490.

[14] *Id.* at 487 n. 13.

[15] *Id.* at 501-18 (Thomas, J., concurring).

[16] *Id.* at 518 (emphasis in original).

[17] *Id.*

[18] *Id.* at 521.

[19] *Id.*

> [t]he mandatory minimum "entitl[es] the government" . . . to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," . . . it undoubtedly "enters into the punishment" so as to aggravate it, . . . and is an ac[t] to which the law affixes . . . punishment.[20]

Even Justice Breyer's dissent noted the anomaly created by applying *Apprendi*'s rule to maximum but not to mandatory-minimum sentences. He wrote that, "as a practical matter, a legislated mandatory 'minimum' is far more important to an actual defendant."[21] Moreover, "all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a fortiori* to a matter that would increase a statutory minimum."[22] Justice Breyer summarized his position by rhetorically wondering why a new crime is born when a fact increases the maximum, but not when it increases the minimum.[23]

Against this backdrop, the Court two terms later considered whether *McMillan* remained viable in *Harris v. United States*.[24] *Harris* involved a federal mandatory-minimum sentence that was triggered when a judge found by a preponderance of the evidence that the defendant "brandished" a firearm.[25] The Court fractured on whether this was constitutional. A four-justice plurality[26] held that it was constitutional. Four other justices found that it was unconstitutional. The fifth justice for upholding the law was Justice Breyer, who believed that *McMillan* and *Apprendi* are irreconcilable, but who dislikes *Apprendi* and, thus, essentially disregarded it.

The four-justice plurality found *McMillan* and *Apprendi* to be consistent. In short, these justices said that *Apprendi* only applies to increases in the statutory maximum sentence and not to any mandatory-minimum sentence.[27]

Additionally, these four justices said that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the

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[20] *Id.* (citations omitted).
[21] *Id.* at 563 (Breyer, J., dissenting).
[22] *Id.* (citing to and agreeing with Justice Thomas's concurrence at *supra* n. 18).
[23] *Id.* at 563-64 (Breyer, J., dissenting).
[24] 536 U.S. 545 (2002).
[25] *Id.* at 551.
[26] Included in this group are Justice Kennedy (who authored the opinion), Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia. Of course, neither Chief Justice Rehnquist nor Justice O'Connor currently serve on the Court.
[27] *Id.* at 556-68.

Fifth and Sixth Amendments."[28] They believed that when a judge selected any sentence not greater than the statutory maximum, any facts relied upon by the judge to fix that sentence did not need to be proven to a jury beyond a reasonable doubt.[29]

The fifth vote necessary for the decision in *Harris* came from Justice Breyer. He began his concurring opinion by saying that "I cannot easily distinguish *Apprendi v. New Jersey* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction."[30] Instead, he still believed that *Apprendi* was wrongly decided and wrote that "I cannot *yet* accept its rule."[31] In short, if *Apprendi* was wrong, then nothing is unconstitutional about judges finding facts for mandatory minimums. On the other hand, *Apprendi*—if correctly decided—suggests that *McMillan* and *Harris* were and are incorrect. If Justice Breyer were to come to accept *Apprendi* either on the merits or simply as a matter of *stare decisis*,[32] he presumably, then, would change his view on how the Fifth and Sixth Amendments apply to mandatory-minimum sentences.

Justice Thomas authored a dissent, which was joined by Justices Stevens, Souter, and Ginsburg. Justice Thomas argued that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum."[33] This is because "[w]hen a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is 'by definition [an] "elemen[t]" of a separate legal offense.'"[34] Therefore, "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed."[35]

The crux of Justice Thomas's opinion was that a change in the prescribed range of penalties means that the necessary fact to establish this new range is an element of the crime.[36] "[W]hen the legislature provides that a particular fact shall give rise 'both to a special stigma and to a special punishment,'" that fact must be found by a jury beyond a reasonable

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[28] *Id.* at 558.

[29] *Id.* at 565.

[30] *Id.* at 569 (Breyer, J., concurring) (citation omitted).

[31] *Id.* (emphasis added).

[32] *Cf. Rita v. U.S.*, 127 S. Ct. 2456, 2470 (2007) (Stevens, J., concurring) (Though he disagreed with the *Booker* remedy, Justice Stevens joined the majority in this later case on how to apply it, saying: "*Booker* is now settled law and must be accepted as such."); *id.* (Scalia, J., concurring) (Though he also dissented from the *Booker* remedial opinion, Justice Scalia likewise joined the *Rita* majority and said that "[a]s a matter of statutory *stare decisis*, I accept *Booker*'s remedial holding . . . .").

[33] *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

[34] *Id.* (quoting *Apprendi*, 530 U.S. at 483 n. 10).

[35] *Id.*

[36] *Id.* at 575-76.

doubt.[37]

Thus, mandatory-minimum sentences imposed by judicial fact-finding remained constitutional by the tenuous thread of Justice Breyer's belief that *Apprendi* was wrongly decided. Furthermore, five justices (all of whom are still on the Court) agreed that *McMillan* and *Apprendi* are logically inconsistent.[38] *Harris*, however, is not the end of the question, but instead is just the close of the first phase of the shift wrought by *Apprendi*. The Court next would turn to how the Sixth Amendment affected sentences imposed by virtue of mandatory guidelines, even when the statutory maximum for the crimes remained unchanged. These cases would extend *Apprendi*'s reach further and would undercut much of the *Harris* plurality's rationale.

In *Blakely v. Washington*,[39] the Court held that facts supporting a sentence in the aggravated range of Washington's mandatory sentencing guidelines had to be proven to a jury beyond a reasonable doubt.[40] This was true even though the sentence did not increase the statutory-maximum-possible sentence[41] (just as the maximum-possible sentences remained constant in both *McMillan* and *Harris*).

There, Blakely was facing a sentence of 49-53 months in the standard range of the guidelines.[42] The judge was permitted to deviate from the standard range by finding "substantial and compelling reasons justifying an exceptional sentence."[43] The judge found that Blakely had acted with "deliberate cruelty" in executing the kidnapping and sentenced him to 90 months of incarceration, 37 months more than the standard range of the guidelines authorized.[44]

Redefining the concept of what constitutes a "statutory maximum,"[45] the Court wrote that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[46] What that meant in this case was that the "maximum sentence" was not the actual statutory maximum sentence of ten years.[47] Instead, it was the top of

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[37] *Id.* at 576 (quoting *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting)).

[38] Furthermore, two justices from the *Harris* plurality no longer are on the Court (Chief Justice Rehnquist and Justice O'Connor).

[39] 542 U.S. 296 (2004). This was another 5-4 decision. All nine justices voted in this case the same way as they did in *Apprendi*. *See supra* n. 10 (listing how they voted).

[40] *Blakely*, 542 U.S. at 313 ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (emphasis in original)).

[41] *Id.* at 303.

[42] *Id.* at 299.

[43] *Id.* (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (Lexis 2007)).

[44] *Id.* at 300.

[45] *See U.S. v. Booker*, 543 U.S. 220, 329 (2005) (Breyer, J., dissenting) ("*Blakely* redefined 'statutory maximum.'" (quoting *U.S. v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004))).

[46] *Blakely*, 542 U.S. at 303 (emphasis omitted).

[47] *Id.* at 304.

the standard range of the guidelines. For the court to depart above this standard range, any aggravating facts (such as the "deliberate cruelty" determination made there) must be found by a jury beyond a reasonable doubt.[48]

Again, the Court distinguished *McMillan*. It said that *McMillan* concerned a minimum sentence that did not increase the maximum sentence and that did not involve "a sentence greater than what state law authorized on the basis of the verdict alone."[49] Despite this, the Court went beyond *Apprendi*'s holding that the "maximum sentence" meant solely the statutory maximum. Some facts must be proven to a jury beyond a reasonable doubt even if the statutory-maximum-possible sentence remains unchanged.

The following term, in *United States v. Booker*,[50] the Court determined what impact *Blakely* would have on the federal sentencing guidelines. The Court followed *Blakely* and held that the federal sentencing guidelines were unconstitutional because they vested authority to increase a sentence beyond the guideline range in a judge who found facts by a preponderance of the evidence.[51] The remedy that a different majority of the Court developed, however, was to excise the part of the guidelines requiring them to be mandatory.[52] The Court also held that any sentence imposed must be reasonable.[53] This means that that the trial court is free to impose any sentence up to the statutory maximum so long as it is reasonable. It also means that it can impose a sentence down to nothing so long as that is reasonable.[54]

The merits majority noted that *McMillan* began a trend that allowed judges to make factual determinations that "authorized, or even mandated, heavier sentences than would otherwise have been imposed."[55] The problem with this, however, was that "[a]s the enhancements became greater, the jury's finding of the underlying crime became less significant."[56]

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[48] *Id.* at 303-04.

[49] *Id.* at 305.

[50] 543 U.S. 220 (2005). The Court was more fractured than ever in its votes in this case. Five justices joined an opinion on the merits of the argument and five other justices joined an opinion on the remedy. Only Justice Ginsburg was in the majority on both opinions. The five justices who found that the guidelines violated the Fifth and Sixth Amendments were the same five justices in the majority in *Apprendi* and *Blakely*. *See supra* nn. 10, 39 (listing how they voted). The five justices who joined the opinion striking the mandatory nature of the guidelines were the dissenting justices in *Apprendi* and *Blakely*, plus Justice Ginsburg. All told, the case produced five opinions (two of which were majority opinions) and consumed 114 pages of the Court's official reporter.

[51] *Booker*, 543 U.S. at 244 (merits opinion of Stevens, J.).

[52] *Id.* at 259 (remedial opinion of Breyer, J.).

[53] *Id.* at 261-62.

[54] *See id.* at 261-63 (Appellate courts are to review a sentence on appeal to determine whether it is "unreasonable."). The following term, in *Rita*, 127 S. Ct. at 2462, the Court held that guideline-length sentences are presumptively reasonable when being reviewed on appeal. This presumption, however, may be rebutted. *Id.* at 2463 ("For one thing, the presumption is not binding.").

[55] *Booker*, 543 U.S. at 236 (merits opinion of Stevens, J.).

[56] *Id.*

The Court then recognized that this required a retreat from the allowance made in *McMillan*: "The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime."[57]

One way to do this is to remove the mandatory nature of sentencing requirements, which would allow the judge to impose a sentence more in line with the conduct of the defendant. This is what five justices in the *Booker* remedial majority did.[58] Another option is to keep the mandatory sentencing scheme in place, but empower the jury to make the necessary predicate factual findings. This is what the remaining *Booker* justices advocated and what several other jurisdictions have done.[59]

Booker was not just a simple application of *Blakely* to the federal system. In addition to the new remedy it announced, neither majority opinion attempted to distinguish either *McMillan* or *Harris* after the Court had tried to do so in previous cases. In fact, both *Booker* majority opinions are inconsistent with *McMillan* and *Harris*.

Finally, the Court further refined its analysis in *Cunningham v. California*.[60] In this 6-3 decision,[61] the Court was considering California's Determinate Sentencing Law, which prescribed three precise terms of imprisonment for most offenses. In that system, the judge was required to impose the middle-term sentence unless aggravating or mitigating circumstances were found. In other words, three fixed sentences (not sentencing ranges) were possible following a conviction and the judge was to sentence to the middle sentence unless reasons existed for imposing one of the other two sentences. The trial judge was given the power to make this decision on aggravators and mitigators by a preponderance of the evidence.[62]

In Cunningham's case, he could have been sentenced to 12 years at the middle-term sentence, 6 years at the lower-term sentence, or 16 years at

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[57] *Id.* at 237 (merits opinion of Stevens, J.).

[58] *See id.* at 259 (remedial opinion of Breyer, J.).

[59] *Id.* at 284-85 (Stevens, J., dissenting); *id.* at 317 (Thomas, J., dissenting); *Cunningham v. Cal.*, 127 S. Ct. 856, 871 n.17 (2007) (chronicling how other jurisdictions have responded to the *Apprendi* line of cases); *see also Commonwealth v. Kleinicke*, 895 A.2d 562, 584 n. 21 (Pa. Super. 2006) (en banc) (Bender, J., dissenting) (noting the states that have found their sentencing schemes to violate the *Apprendi/Blakely/Booker* line of cases), *allocatur denied*, 929 A.2d 1161 (Pa. 2007).

[60] 127 S. Ct. 856 (2007).

[61] *Id.* As noted above, all of the previous cases involved 5-4 votes. Chief Justice Roberts, without comment, joined the other five justices from the *Apprendi*, *Blakely*, and *Booker* merits majority opinions. *See supra* nn. 10, 39, 50 (listing how the justices voted in those cases). Justice Alito found himself aligned with the remaining two dissenters from those cases. *See supra* nn. 10, 39, 50; *Cunningham*, 127 S. Ct. at 873.

[62] *Cunningham*, 127 S. Ct. at 861-62.

the upper-term sentence. The trial judge, finding that the aggravators outnumbered the mitigators, imposed the top-term sentence of 16 years.[63]

The California Supreme Court resisted an *Apprendi*-style challenge by finding that the upper-term defined the "statutory maximum." This was so, the California Court reasoned, because defendants could not expect a guarantee that the upper term would not be imposed. The California Supreme Court also believed that the exercise of this discretion, to be judged on a reasonableness standard, was no different than the discretion authorized to federal judges by the *Booker* remedial majority.[64]

The United States Supreme Court, however, disagreed and found instead that any upper-term sentence required the jury to find the aggravating fact beyond a reasonable doubt. Rather than the "statutory maximum" being the upper-term sentence, the judge was required to impose a middle-term sentence of 12 years, "nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."[65] The judge lacked any discretion to impose a greater sentence without the finding of additional facts, a finding that, thus, had to be made by a jury beyond a reasonable doubt. "Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."[66]

In sum, the Supreme Court found that any aggravating fact-finding rested with the jury and not with the judge. This was true even though the statutory-maximum sentence did not increase.

While *Apprendi* and *Harris* dealt with whether the statutory-maximum sentence increased, *Blakely*, *Booker*, and *Cunningham* did not. Under these latter cases, whether the absolute statutory maximum for the offense increases or stays the same is irrelevant for constitutional purposes.

III. BEFORE A MANDATORY-MINIMUM SENTENCE MAY BE IMPOSED, PREDICATE FACTS FIRST MUST BE PRESENTED TO A JURY AND PROVEN BEYOND A REASONABLE DOUBT

The core principle that runs through *Apprendi*, *Blakely*, *Booker*, and *Cunningham* is that when a fact fixes a sentencing range by increasing its starting point and, thus, limits a judge's discretion in what sentence he or she may impose, that fact must be found by a jury (and not by the judge) and it must be found beyond a reasonable doubt (and not by a mere preponderance of the evidence). *Apprendi* began this march. Its holding

[63] *Id.* at 860.
[64] *Id.* at 869-70 (discussing *People v. Black*, 113 P.3d 534, 543-48 (Cal. 2005)).
[65] *Id.* at 870.
[66] *Id.*

(limited, of course, by the facts in that case) applied to an increase in the maximum sentence. *Harris*, the second mandatory-minimum case, not surprisingly upheld judicially-found facts for mandatory minimums following *Apprendi*'s limited application to an increase in statutory maximums.

Blakely and then *Booker* and now *Cunningham*, however, have expanded *Apprendi* to cover cases when the statutory maximum was not increased. The guidelines in *Blakely* and *Booker* were mandatory (which distinguishes them from Pennsylvania's advisory guidelines).[67] The jury verdict gave a guideline range and the judge was free to pick a sentence within this authorized range. When a judge found an additional fact by a preponderance of the evidence, however, the guideline range increased and the judge then had to impose a sentence within this new range. In other words, the jury's verdict authorized a sentence of at least A months up to at most B months, but a judicial finding of an additional fact called for a greater sentence of at least X months up to at most Y months. This additional fact that raised the starting point for the judge to exercise his or her discretion is what made the schemes in *Blakely* and *Booker* unconstitutional.

The sentencing regime in *Cunningham*, rather than dealing with traditional guidelines, operated more like a mandatory-sentencing scheme. The jury verdict gave a specific sentence and a judge-found fact required a specific sentence above what the jury authorized. Again, the maximum remained constant.

Booker nicely illustrates how the judicial factfinding raised the sentencing range possible for the defendant. The defendant there was found guilty by the jury of possessing 92.5 grams of crack cocaine.[68] This called for a sentence in the range of 210 to 262 months.[69] At sentencing, based upon new evidence, the judge found by a preponderance of the evidence that Booker also possessed an additional 566 grams of crack (that he had never been charged with possessing).[70] Based upon this additional judicial finding, the sentence increased to a range of 360 months to life.[71] Thus, Booker's sentence increased from 21 years 10 months to at least 30 years based upon evidence found only by the judge and only by a preponderance of the evidence.[72] This finding, however, did not affect the statutory

[67] *See infra* nn. 113-27 and accompanying text (explaining why advisory guidelines remain unaffected by *Booker*, *Blakely*, and *Cunningham*).

[68] *Booker*, 543 U.S. at 227 (merits opinion of Stevens, J.).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

maximum sentence, which remained at life imprisonment.[73]

The mandatory-minimum sentence for firearm possession in Pennsylvania acts in the same way as the guideline increase in *Booker*. When the judge finds by a preponderance of the evidence that a defendant visibly possessed a firearm, he or she must impose a minimum sentence of at least five years and at most half of the statutory maximum.[74] For a first-degree felony such as robbery, this means a sentence between 5-10 and 10-20 years.[75] The judge cannot depart below this mandatory minimum sentence regardless of the guidelines or for any reason.[76] In short, without a change in the statutory maximum sentence, the beginning point for the sentence raised from no incarceration to 5-10 years. The judge's sentencing discretion was limited by a fact not found by the jury and was required to be higher than it likely otherwise would have been. This is no different than what happened in *Blakely*, *Booker*, and *Cunningham*.

Looking at a hypothetical Pennsylvania case for an armed robbery conviction involving a threat of serious bodily injury[77] (for example, by brandishing a handgun) for a run-of-the-mill defendant with a prior record score of two, Pennsylvania's sentencing guidelines would call for 24-36 months in the standard range plus or minus 12 months in the aggravated or mitigated ranges.[78] In this case, the mandatory-minimum sentence would exceed the standard range by two years and the aggravated range by one year. Though judges can depart from these guideline ranges,[79] virtually all sentences in Pennsylvania are within the guidelines.[80] For a typical, garden-variety armed robbery, the defendant, thus, likely would be sentenced within the guidelines. Therefore, the defendant's sentence would be substantially

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[73] *Id.*

[74] This is because the minimum cannot exceed half of the maximum sentence. 42 Pa. Consol. Stat. Ann. § 9756(b). In those limited situations when the mandatory minimum is greater than half of the maximum, a minimum in excess of half of the maximum is permitted. *Commonwealth v. Hockenberry*, 689 A.2d 283, 289 (Pa. Super. 1997), *allocatur denied*, 695 A.2d 784 (Pa. 1997) (a 7-10 year sentence is legal when the statutory maximum is 10 years and a 7-year mandatory-minimum sentence applies); *Kleinicke*, 895 A.2d at 580 n. 19 (Klein, J., dissenting) (noting this exception).

[75] 18 Pa. Consol. Stat. Ann. § 3701(a)(1)(i)-(ii) (1972) (a robbery in which a victim has suffered serious bodily injury or been threatened with it or put in fear of it is a first-degree felony); *id.* at § 1103(1) (A first-degree felony can receive a punishment up to twenty years of incarceration.).

[76] *See* 42 Pa. Consol. Stat. Ann. § 9712(a) (2007); Pa. Code tit. 204, § 303.9(h) (1985); *Commonwealth v. Mitchell*, 883 A.2d 1096, 1104 (Pa. Super. 2005).

[77] *See* 18 Pa. Consol. Stat. Ann. § 3701(a)(1)(ii).

[78] *See* Pa. Code tit. 204, § 303.16 (the Basic Sentencing Matrix). This calculation was based upon an Offense Gravity Score of 9 and a Prior Record Score of 2, which leads to a Matrix calculation of 24-36 +/- 12.

[79] *Commonwealth v. Walls*, 926 A.2d 957, 964-65 (Pa. 2007); *see infra* nn. 82-83 and accompanying text and n. 116 (discussing *Walls*).

[80] In 2006 in Pennsylvania, only 3% of all sentences exceeded the guidelines. Pa. Commn. on Sentencing, *Sentencing in Pennsylvania: 2006 Annual Report* 42, http://pcs.la.psu.edu/2006AR.pdf (2007). *See also Kleinicke*, 895 A.2d at 589-90 n. 27 (Bender, J., dissenting) (In 1999, only 5.1% of all cases exceeded the recommended guideline range.).

increased by this judicially-found fact of visible possession of a firearm.[81]

Significantly, as the Pennsylvania Supreme Court recently held, Pennsylvania's guidelines do not require the sentencing court to impose a sentence within them.[82] Because the guidelines are advisory only, a judge can always chose to give a sentence of no incarceration at all if that would be reasonable.[83] For purposes of this constitutional analysis, this point is crucial, perhaps even determinative.

Absent the mandatory minimum, the starting point for a Pennsylvania judge to consider would have been no incarceration. A fact found by the judge by the preponderance of the evidence would raise the starting point to 5 years. After *Blakely*, *Booker*, and *Cunningham*, whether the statutory maximum changes or not is irrelevant, and the operation of the mandatory minimum in this case, thus, is no different than the operation of the guidelines in *Blakely* and *Booker*. In *Blakely*, the judge-found fact raised the sentence's starting point from 49 to 90 months.[84] In *Booker*, the judge-found fact raised the sentence's starting point from 210 to 360 months.[85] In a Pennsylvania case with a firearm mandatory-minimum sentence, the judge-found fact would raise the sentence's starting point from 0 to 60 months.

Consequently, the judicial finding would preclude the judge from even considering a sentence of less than 5-10 years. As Justice Thomas wrote using numbers identical to Pennsylvania's scheme, "[t]he mandatory minimum 'entitles the government' . . . to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5)."[86] Accordingly, "in terms of absolute years behind bars, . . . the differential here is unquestionably of constitutional significance."[87]

Consequently, *Apprendi*, *Blakely*, *Booker*, and *Cunningham* have deprived *McMillan* and *Harris* of any vitality. *McMillan*'s holding "that there is no Sixth Amendment right to jury sentencing, even where the

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[81] In some cases, the conviction will necessarily lead to the factual finding of visible possession of a firearm. For example, the victim testifies that the defendant robbed her at gunpoint. The defense is one of mistaken identity and the gun possession is uncontested. In other cases, however, the defendant may indeed challenge whether he or she visibly possessed a firearm during the robbery. *See Mitchell*, 883 A.2d at 1107 n. 13 (discussing how the jury's verdict may not always necessarily lead to the conclusion that the defendant visibly possessed a firearm). Regardless, the jury and not a judge must make this determination.

[82] *Walls*, 926 A.2d at 964-65. The *Walls* Court said that "the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors—they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." *Id.*

[83] *Id.* at 963; 42 Pa. Consol. Stat. Ann. § 9781(c)-(d).

[84] *Blakely*, 542 U.S. at 300.

[85] *Booker*, 543 U.S. at 227 (merits opinion of Stevens, J.).

[86] *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring) (citation omitted).

[87] *Id.* at 495 (majority).

sentence turns on specific findings of fact"[88] simply is not true any more. To the contrary, any time a fact raises the starting point for a sentencing range and limits a judge's sentencing discretion, the Sixth Amendment requires the jury to find that fact.

At its crux, this question is about who should decide a fact that sets a minimum sentence and by what standard it should be decided. As the *Blakely* Court put it,

> [t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," . . . rather than a lone employee of the State.[89]

Finally, submitting this question to the jury would be, at most, a "modest inconvenience." Whether a defendant visibly possessed a firearm is a fact that already would be intricately involved in the prosecution's case. For example, the prosecution would not try to prove that a defendant committed a robbery without also alleging that he or she possessed a gun. All that would be required would be a separate line on the verdict form filled out by the jury. For robbery, in addition to "guilty" or "not guilty," the form merely would ask, "if guilty, did the defendant visibly possess a firearm?"[90] That is the nature of the "inconvenience."[91]

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[88] *McMillan*, 477 U.S. at 93.

[89] *Blakely*, 542 U.S. at 313-14 (quoting William Blackstone, *Commentaries* vol. 4, *343). Who makes this factual determination is what the jury-trial right is all about. "The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Booker*, 543 U.S. at 238-39 (merits opinion of Stevens, J.) (quoting Alexander Hamilton, *The Federalist No. 83*, 499 (C. Rossiter ed. 1961)); *see also Apprendi*, 530 U.S. at 501-18 (Thomas, J., concurring) (recounting in great detail the historical basis for why the jury must make these findings). The Founding Fathers trusted a jury of one's peers to make this factual determination, not a single judge who is employed by the state.

[90] *See Kleinicke*, 895 A.2d at 580-81 (Klein, J., dissenting) (discounting the "mayhem" that many fear, Judge Klein said that "[j]ust as in a theft case, where there is a special interrogatory to determine the value of the property taken, in other situations there will be a line added to the verdict sheet as to the amount of the drugs, the distance from a playground, whether a firearm was used, etc.").

[91] This would not be the nightmare scenario feared by several justices that juries will have to consider all potential sentencing factors and find them all beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting) ("There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury."). Members of Pennsylvania Superior Court also have worried about how this would impact trials and sentencing in Pennsylvania. *Kleinicke*, 895 A.2d at 573-74 ([T]he Court worried that "[e]ach finding by a sentencing judge that 'enhanced' a sentence would arguably have to be submitted to an impaneled jury and proven beyond a reasonable doubt. Sentencing proceedings would become second jury trials.").

To the contrary, however, the jury would be determining the presence or absence of *one* additional fact that already has been included within the body of evidence it has had to consider. This is akin to a jury determining whether a defendant who killed someone with malice also possessed the specific intent to kill that person. If the jury finds that he or she did, the defendant is guilty of first-degree murder (with a mandatory life sentence); if not, the defendant is guilty of third-degree murder (with a maximum sentence of 20-40 years). *See* 18 Pa. Consol. Stat. Ann. §§ 2501-2502 (differentiating

If this creates any inconvenience at all, it would be offset by a streamlined sentencing proceeding. The judge would not be required to hold a hearing about whether the defendant in fact visibly possessed a firearm.[92] The checked box on the verdict form would answer that question.[93]

IV. PENNSYLVANIA'S COURTS' DISTINCTIONS (SO FAR) OF THE EVOLVING UNITED STATES SUPREME COURT CASELAW

The Pennsylvania Supreme Court has yet to entertain a challenge to a mandatory-minimum sentence based upon *Apprendi* and its progeny. The Superior Court, however, has twice heard and rejected the argument that the *Apprendi/Blakely/Booker* line of cases has overruled *McMillan* and *Harris*.

In *Commonwealth v. Mitchell*,[94] the Superior Court held that *McMillan* remains good law despite the principles announced in these recent cases. The Court held that the firearm mandatory in § 9712 remains constitutional as applied by focusing on the maximum sentence, which did not change.[95] The Court did not consider the core concept that a finding of a fact that fixes a higher starting point for a sentencing range and limits a judge's sentencing discretion must be found by a jury beyond a reasonable doubt.

The following year in *Commonwealth v. Kleinicke*,[96] the Superior Court, en banc, considered this question in the context of a different mandatory-minimum requirement. There, police seized 693 live marijuana plants from the defendant's property. They, however, only tested 15 of these plants. After conviction, the jury was polled as to how many

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the different degrees of murder). Requiring the jury to find this one additional element in a homicide prosecution does not cause the train of justice to become derailed.

[92] *See* 42 Pa. Consol. Stat. Ann. § 9712(b) ("The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence . . . .").

[93] Even if a court should find that this simple procedure should somehow cause a burden to the system, the United States Supreme Court has said that this inconvenience must bow to the defendant's Sixth Amendment rights.

> We recognize, as we did in *Jones*, *Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the *Sixth Amendment*—has always outweighed the interest in concluding trials swiftly.

Booker, 543 U.S. at 236 (merits opinion of Stevens, J.) (emphasis in original).

[94] 883 A.2d 1096 (Pa. Super. 2005).

[95] *Id.* at 1107.

[96] 895 A.2d 562 (Pa. Super. 2006). The mandatory minimum at issue in *Kleinicke* dealt with Pennsylvania Consolidated Statutes Annotated title 18, § 7508(a)(1)(iii), which required a 5-year mandatory-minimum sentence for anyone found to have possessed 51 live marijuana plants.

marijuana plants they believed the defendant possessed. Eleven jurors believed he had possessed 693 plants, but one juror believed that he only possessed 15 plants. At sentencing, the judge found that the defendant actually possessed 693 plants and sentenced him pursuant to the mandatory-minimum sentence that was triggered by possession of 51 or more live marijuana plants.[97]

On appeal, the defendant argued that this violated the teachings of *Apprendi* and *Blakely*. The Superior Court determined that these cases and *Booker* did not have any impact on the Supreme Court's mandatory-minimum caselaw because the judicial factfinding did not increase the statutory maximum sentence.[98] Relying upon *McMillan*'s language that "there is no *Sixth Amendment* right to jury sentencing, even where the sentence turns on specific findings of fact"[99] the Court found that the *Blakely* and *Booker* cases had no effect on *McMillan*.[100]

The Superior Court was far from unanimous in its *Kleinicke* decision. Judge Klein authored a dissent that was joined by Chief Judge Ford-Elliott. Judge Bender also wrote a dissent.

Judge Klein noted that the United States Supreme Court rejected the requirement that the maximum sentence must increase in order for the Fifth and Sixth Amendments to apply.[101] He also noted that minimum sentences in Pennsylvania have a far greater impact than maximum sentences in determining how much time a defendant will actually spend in prison: "[T]he overwhelming numbers of cases in Pennsylvania are more affected by the minimum sentence than the maximum."[102] Thus, "the practical effect

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[97] *Kleinicke*, 895 A.2d at 565.

[98] *Id.* at 566, 571.

[99] *Id.* at 569 (quoting *McMillan*, 477 U.S. at 93) (emphasis in original).

[100] *Id.* at 571. The Court also based its decision on *Williams v. N.Y.*, 337 U.S. 241 (1949). In *Williams*, the Supreme Court held that a judge could overrule a jury's recommendation of life by imposing the death penalty after reviewing new information at sentencing. The Superior Court focused on the allowance in *Williams* that sentencing courts may rely upon all "pertinent information" at sentencing without regard to "'rigid adherence to restrictive rules of evidence properly applicable to the trial.'" *Kleinicke*, 895 A.2d at 574 (quoting *Williams*, 337 U.S. at 247).

This theory has fallen out of favor and almost certainly would be rejected by the current Supreme Court. Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 Regent U. L. Rev. 387, 389 (2007) (*Williams* "has limited, if any, viability today."); *id.* at 402 ("[S]ubsequent cases and other constitutional developments have significantly undermined the Court's reasoning in *Williams*, leaving it, at best, diluted."); *id.* at 403-28 (showing how *Williams* has been effectively overruled by the Court's subsequent death penalty cases, by the sentencing cases of *Apprendi*, *Blakely*, *Booker*, and *Cunningham*, and by recent Confrontation Clause cases).

[101] *Kleinicke*, 895 A.2d at 579 (Klein, J., dissenting).

[102] *Id.* at 580. To illustrate his point, Judge Klein posited this hypothetical:

> [W]e would be left to ponder why in a theft case a jury must decide beyond a reasonable doubt whether the value of the thing taken was $1999.00 making the crime a misdemeanor, or $2001.00 making the crime a felony -- with the concurrent increase in sentencing, but a judge may decide by a fair preponderance of evidence whether a drug defendant possessed 20 live marijuana plants (a

of the United States Supreme Court cases would be negligible if we were to ignore factors that have a major impact on the sentence and the time a defendant will spend incarcerated."[103]

In sum, Judge Klein "believe[s] that *McMillan* and *Harris* have in fact been overruled by *Booker* and any fact relating to the crime that . . . requires a mandatory minimum . . . must be determined by the jury."[104]

Judge Bender also dissented in *Kleinicke*. He likewise believed that *Blakely* and *Booker* overruled *McMillan* and *Harris*. He said:

> [S]ome might contend this legislative trend [of post-trial judicial factfinding by a preponderance of the evidence] essentially steamrolled over key rights guaranteed to all citizens by the United States Constitution, and kept right on track until the momentum first slowed in *Apprendi*, then hit a halt in *Blakely*, and finally went into reverse in *Booker*.[105]

Prior to *Blakely*, "the glue that allowed all of the various sentencing decisions to adhere to one another in convincing fashion" was the limitation that restricted those cases to an increase in the statutory maximum for a crime.[106] This changed, however, because "the glue of the above rationale began to dissolve in *Blakely*, as the sentence imposed upon Blakely *after* the court-added enhancement was still safely within the limits authorized by statute."[107]

Instead of just considering the impact on the maximum sentence, the Supreme Court began to look at the real-life consequences of allowing the judge, rather than a jury, to find facts for sentencing purposes. "*Blakely* clearly shifted the focus away from what the sovereign was legally authorized to impose and directed it toward the real-life consequences of judicial factfinding within the sentencing scheme in question."[108] In Pennsylvania, the real-life consequences are that mandatory-minimum

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> minimum one year sentence) or 21 plants, subjecting the defendant to a three year minimum sentence. Why the thief should be granted greater constitutional protection than the marijuana dealer is not immediately answerable.
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> I note, too, the thief, having been convicted on all relevant elements beyond a reasonable doubt, would be sentenced under the guidelines which allow a judge to deviate either higher or lower given the circumstances. However, the marijuana possessor is sentenced based upon a mere preponderance of the evidence to a mandatory minimum from which no lower deviation is allowed. Yet under the current analysis of the law, the stricter punishment is subject to lesser review.

Id. at 579 n. 18.

[103] *Id.* at 577.

[104] *Id.*

[105] *Id.* at 583 (Bender, J., dissenting).

[106] *Id.* at 586.

[107] *Id.* (emphasis in original).

[108] *Id.* at 588.

sentences almost always result in the defendant serving more time in prison than he or she otherwise would.[109]

> Against this backdrop, Judge Bender saw that the problem is that
>
> those portions of Pennsylvania's sentencing scheme that dictate the application of enhancements or mandatory minimums based upon judicial factfinding clearly have the effect of increasing a prisoner's stay in jail based upon those judicially found facts extraneous to the verdict, the same as in *Blakely* and *Booker*.[110]

If *McMillan* and *Harris* had controlled, *Blakely* and *Booker* would have been decided the other way because the statutory maximum sentences did not change in those cases.[111] Therefore, *Blakely* and *Booker*—and not *McMillan* and *Harris*—govern, and this requires the jury to find the predicate facts beyond a reasonable doubt.

The Pennsylvania Supreme Court has not yet ruled on what impact *Blakely* and *Booker* have on the Commonwealth's mandatory-minimum sentences.[112] It, though, recently decided a case that upheld the guidelines against a *Blakely/Booker* attack in *Commonwealth v. Yuhasz*.[113] After reviewing each of the *Apprendi*, *Blakely*, and *Booker* decisions, the Court determined that Pennsylvania's guidelines are constitutional because the Commonwealth's guidelines are advisory. Discussing *Booker*, the Court noted that the United States Supreme Court found that advisory guidelines that recommended rather than required a sentence would pass constitutional muster.[114] "As it is evident that Pennsylvania's Sentencing Guidelines are merely advisory, the United States Supreme Court's holding in *Booker* makes clear that they do not violate the Sixth Amendment."[115]

Interestingly—and significantly—the Court's holding rested primarily on the fact that Pennsylvania's guidelines are advisory. Though discussing how the maximum remained constant, the Court made clear that the guidelines avoided constitutional difficulties by being advisory. Therefore, instead of relying upon the maximum-sentence rationale from *McMillan*, *Apprendi*, and *Harris*, the Court instead focused on the more recent *Blakely* and *Booker* thinking. The Court, thus, seems to have rejected the theory relied upon by Superior Court in *Mitchell* and *Kleinicke*. If the

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[109] *Id.* at 592 ("Certainly the average defendant exposed to mandatory minimums will spend increased periods of time in prison due to the application of mandatory minimum sentences.").

[110] *Id.* at 591.

[111] *Id.* at 587.

[112] The Supreme Court denied allowance of appeal in *Kleinicke*, 929 A.2d 1161 (Pa. 2007). Had it taken this case, it would have been the Court's first foray into this area.

[113] 923 A.2d 1111 (Pa. 2007).

[114] *Id.* at 1119.

[115] *Id.*

Pennsylvania Supreme Court remains consistent and applies this same reasoning to mandatory-minimum sentences when it considers that issue, the logical conclusion would be to find that facts triggering a mandatory-minimum sentence must be found by a jury beyond a reasonable doubt. In other words, the Court's rationale in *Yuhasz* is closer to the analysis set out in the *Kleinicke* dissents than it is to that in the majority.[116]

V. REVERSING *MCMILLAN* WOULD HAVE NO IMPACT ON ADVISORY GUIDELINES, WHICH REMAIN CONSTITUTIONAL UNDER *BLAKELY*, *BOOKER*, AND *CUNNINGHAM*

Courts and other policy makers likely will be concerned with a state's sentencing scheme if mandatory-minimum sentences are required to be proven to a jury beyond a reasonable doubt. More to the point, they may fear that a state's sentencing guidelines will be found to be unconstitutional if the current procedure for mandatory-minimum sentences is declared to be violative of the Fifth and Sixth Amendments. For example, when the Pennsylvania Superior Court was deciding the mandatory-minimum issue in *Commonwealth v. Kleinicke*, it went way beyond the question it was considering by wondering what might happen in Pennsylvania if guideline departures also were required to be proven to a jury beyond a reasonable doubt.[117] Given Pennsylvania's guideline system, this fear was misplaced.

Pennsylvania's guidelines operate differently than the compulsory guidelines at issue in *Blakely* and *Booker* (and, for that matter, the scheme in *Cunningham*). The guidelines in *Blakely* and *Booker* effectively set the sentences by requiring them to be imposed in a single, very narrow range. Pennsylvania's guidelines, on the other hand, allow departure.

> [D]eviation is upheld if supported by reasons indicating that the deviation is not unreasonable in light of the factors a sentencing court considers pursuant to *42 Pa.C.S. § 9721(b)*, which include the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.[118]

As already discussed, the Pennsylvania Supreme Court recently upheld the guidelines in the face of an *Apprendi/Blakely/Booker* attack in

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[116] The Court's recent decision in *Walls*, 926 A.2d 957, does not touch upon the constitutionality of the guidelines. It merely holds that the guidelines are "advisory guideposts" that "recommend . . . rather than require a particular sentence." *Id.* at 965. Interestingly, this conclusion is consistent with both *Booker* opinions. *See Booker*, 543 U.S. at 233 (merits opinion of Stevens, J.); *id.* at 259 (remedial opinion of Breyer, J.).

[117] *Kleinicke*, 895 A.2d at 572-74.

[118] *Id.* at 573 (emphasis in original).

Commonwealth v. Yuhasz.[119] The Court found that the guidelines operate constitutionally because they are advisory.[120] What made the *Blakely* and *Booker* guidelines unconstitutional was that they were mandatory and provided a limited range in which the judge could exercise discretion.[121]

Mandatory-minimum sentences, however, obviously are not advisory. Once a judge finds a predicate fact by a preponderance of the evidence, he or she must impose the mandatory-minimum sentence regardless of any other considerations in the case. Therefore, Pennsylvania's guidelines and its mandatory-minimum sentence requirements are apples and oranges. Finding the latter to be unconstitutional will have no impact on the former.

The *Kleinicke* court worried that "[i]f we held that sentencing enhancements that do not impact the maximum sentence authorized by the jury verdict fell within the ambit of *Apprendi*, *Blakely*, and *Booker*, serious disruption in the sentencing process would result."[122] The court was concerned that "[e]ach finding by a sentencing judge that 'enhanced' a sentence would arguably have to be submitted to an impaneled jury and proven beyond a reasonable doubt. Sentencing proceedings would become second jury trials."[123]

Under *Yuhasz*, *Blakely*, and *Booker*, however, this fear simply will not be realized. The proper focus is not on where a sentence falls vis-à-vis the guidelines (as speculated by the *Kleinicke* court), but rather on whether the sentencing range is *mandatory* (as in *Blakely* and *Booker*). With Pennsylvania's guidelines, no one fact acts to *require* at least a certain sentence. The judge's discretion is bounded only by reasonableness. While the judge must consider the guidelines and other relevant factors,[124] the ultimate sentence can be anything between nothing and the statutory maximum even when certain aggravating factors are present.[125] Had the Superior Court in *Kleinicke* held that a mandatory-minimum sentence could be imposed only if a jury has found a predicate fact beyond a reasonable doubt, this holding would have had no impact whatsoever upon Pennsylvania's advisory guidelines.

Illustrating this point, under the guidelines, the judge can find aggravating factors, but still impose a standard-range sentence, or even go lower. The judge may find that the crime has had a tremendous impact upon the life of the victim, which could warrant an aggravated-range sentence.

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[119] *Yuhasz*, 923 A.2d at 1111; *see supra* nn. 113-16 and accompanying text.
[120] *Yuhasz*, 923 A.2d at 1119.
[121] *Id.* at 1117.
[122] *Kleinicke*, 895 A.2d at 573.
[123] *Id.* at 573-74.
[124] *Walls*, 926 A.2d at 964.
[125] *Yuhasz*, 923 A.2d at 1118-19.

Because the guidelines are advisory, however, the judge is *not required* to impose an aggravated range sentence when this fact has been found. He or she can determine that the defendant is not a danger to the community, that this was not a particularly egregious violation of the law, and consequently sentence the defendant in the standard range or below.[126] In a compulsory guideline scheme (such as in *Blakely* and *Booker*), however, the judicial finding of an aggravating fact fixes the guideline range higher, often far above what it otherwise would have been, and it prohibits the judge from departing from this range.

With the mandatory-minimum sentence scheme, likewise, once the judge finds the predicate fact (such as visible possession of a firearm), he or she *must* impose the mandatory sentence regardless of any countervailing considerations that might otherwise have influenced the sentence that the judge imposed.[127] This is no different than how the compulsory guidelines in *Blakely* and *Booker* operated. It is this unavoidable requirement to impose a certain sentence that makes mandatory-minimum sentences similar to the compulsory guidelines that were struck down as unconstitutional in *Blakely* and *Booker*. In the same vein, the mandatory-minimum's compulsory requirement is what differentiates mandatory-minimum statutes from advisory guidelines such as those in Pennsylvania, which allow for downward departures when appropriate.

In other words, the constitutional problems with mandatory-minimum sentences simply do not apply to advisory guidelines. The *Kleinicke* court's fears about the impact on Pennsylvania's guideline system were completely unwarranted.

VI. CONCLUSION

The United States Supreme Court again will have to address whether a jury must find predicate facts beyond a reasonable doubt before a mandatory-minimum sentence may be imposed. Its decisions in *Blakely*, *Booker*, and *Cunningham* have eroded *McMillan* and *Harris* to such an extent that they are dubious at best and, more likely, no longer good law. The Court's most recent cases have all but said that these types of sentencing facts must be found by a jury beyond a reasonable doubt. The Court seems poised to apply this requirement to mandatory-minimum sentences.

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[126] These are some of the general standards that a sentencing court must consider when imposing sentence. *See* 42 Pa. Consol. Stat. Ann. § 9721(b).

[127] *Cf. McMillan*, 477 U.S. at 82 n. 2 (The sentencing judges in the four cases consolidated for *McMillan* found § 9712 to be unconstitutional and imposed sentences below the 5-year mandatory minimum: 3-10 years, 1-6 years, 11½-23 months, and 4-8 years; on remand from the Supreme Court, these four defendants would have been subjected to sentences of at least 5-10 years even though the sentencing judges obviously thought that these defendants deserved less.).

Until then, many jurisdictions undoubtedly will choose to follow *McMillan* and *Harris* without regard for how *Blakely*, *Booker*, and *Cunningham* have eviscerated the holdings in those cases. That is what the Pennsylvania Superior Court twice has done. With existing decisions like this and others likely to follow in other jurisdictions, the United States Supreme Court, therefore, will have to step in to pronounce *McMillan* and *Harris* dead and to acknowledge that the principles articulated in *Blakely*, *Booker*, and *Cunningham* require a jury to find beyond a reasonable doubt any predicate facts necessary for the imposition of a mandatory-minimum sentence.