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[*39] **Is 'sinister sentencing' here to stay? The Supreme Court fails to clarify the constitutional line between crime and punishment**

Last March, I wrote an article n1 for *Grid & Bear It* predicting how the United States Supreme Court probably would rule in two crucial, post-*Apprendi v. New Jersey* n2 sentencing cases: *United States v. Cotton*, n3 and *Harris v. United States*. n4 I believed that the Court was on its way to finally clarifying the constitutional line between crime and punishment. I was dead wrong. Until the Court enunciates some principle--and as I note below, it will soon have another opportunity to do so--it looks like "sinister sentencing" n5 is here to stay. There are, however, some alternative avenues available for minimizing the specter of sinister sentencing, which I canvass at the close of this article.

n1 *See* Mark H. Allenbaugh, *Between Crime and Punishment: Where Might the Supreme Court Draw the Constitutional Line?*, 26 THE CHAMPION 35 (Mar. 2002).

n2 *530 U.S. 466 (2000).*

n3 *261 F.3d 397 (4th Cir. 2001), rev'd, 122 S.Ct. 1781 (2002).*

n4 *243 F.3d 806 (4th Cir. 2001), aff'd, 122 S. Ct. 2406 (2002).*

n5 In his dissent in *Monge v. California, 524 U.S. 721, 738-39 (1998),* Justice Scalia characterized as "sinister" the following sentencing scheme:

> Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the State then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly caused injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, "vain and idle enactment[s]."

Reviewing the Court's sentencing jurisprudence last March, I argued that the Court would affirm the Fourth Circuit's holding in *Cotton*, which was that failure to include drug quantity--now an acknowledged element of drug offenses--in an indictment, and then to use that unindicted amount to enhance a sentence beyond the otherwise applicable statutory maximum penalty, renders the sentence invalid in light of *Apprendi*. *Apprendi*, after all, held that the Sixth Amendment requires treating factors that increase sentences beyond statutory maximum penalties as elements of a crime. Consequently, according to the Fourth Circuit, using unindicted drug amount to increase the sentence beyond the otherwise applicable statutory maximum would be to "'impose a sentence for a crime over which [the court] does not even have jurisdiction to try a defendant.'" n6

n6 Allenbaugh, *supra* at n. 1 (quoting *Cotton, 261 F.3d at 404).*

My prediction as to *Cotton* was wrong. Recalling the fantasy world of the movie *Minority Report* where citizens are sentenced for crimes they have not committed, it unfortunately appears that fantasy is becoming reality.

In an unanimous opinion, the Court held that although failure to include drug amount in the indictment was plain error, n7 such failure nevertheless did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because the evidence was "overwhelming" and "essentially uncontroverted." n8 Consequently, in a short opinion reflecting more *ipse dixit* than thorough analysis, the Court reversed the Fourth Circuit. According to the Court, "the real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." n9

n7 *See United States v. Olano, 507 U.S. 725, 731 (1993); Johnson v. United States, 520 U.S. 461, 466-467 (1997)* (setting forth plain error test).

n8 *See Cotton v. United States, 122 S. Ct. 1781, 1786 (2002).*

n9 *Id.*

A total mystery

How *Cotton* squares with the Court's prior pronouncement in *Apprendi* that "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury" n10 is a total mystery.

Apparently as long as a sentencing judge finds that the evidence is overwhelming and essentially uncontroverted--much like the "PreCogs" in *Minority Report*--then the "threatening" strictures of *Apprendi's* Sixth Amendment analysis do not apply.

n10 *530 U.S. at 483 n. 10.*

A plurality opinion

My prediction as to *Harris*, however, fared slightly better, but not much. I had predicted that the Court would reverse the Fourth Circuit's holding that *Apprendi* did not apply to factors that triggered mandatory minimum sentences. In other words, I believed that the logic of *Apprendi* would require the Court to hold that factors triggering mandatory minimum sentences are elements of crimes.

In *Harris*, the defendant was found guilty of carrying a firearm in relation to a drug trafficking offense. The applicable penalty statute n11 sets forth a variety of sentencing enhancements that ultimately can result in a life term. These enhancements, rather than increasing the maximum penalty, instead set forth mandatory minimum penalties. For example, if an offender merely possesses a gun, the minimum penalty is five years. But if the offender brandishes a firearm, the minimum penalty is seven years, and if he discharges the firearm, it is ten years.

n11 *18 U.S.C. § 924*(c)(1)(A).

The defendant in *Harris* was found to have brandished a firearm during a drug-trafficking offense, and therefore received a seven year sentence. Without this finding, the fact of which the defendant contested and the district court acknowledged was a "close question," the defendant only would have received a five year sentence.

In an opinion as rancorous as *Apprendi*, five Justices--Breyer, Kennedy (the author), O'Connor, Rehnquist, and Scalia--agreed that "brandishing" is not an element of an offense because it does not affect the maximum penalty, only the minimum. Only four of them, [*40] however, could agreed on this rationale. Justice Breyer, who dissented in *Apprendi*, agreed with the four dissenting justices--Ginsburg, Souter, Stevens (the author of *Apprendi*), and Thomas--that one could not "easily distinguish *Apprendi v. New Jersey* . . . from this case in terms of logic." n12 But rather than follow the principle of stare decisis, Justice Breyer simply reiterated his discontent with *Apprendi*, and refused to apply it to the facts of *Harris*. Consequently, there is no majority holding in *Harris*, only a plurality opinion, which means that the precedential value of *Harris* is limited to the express issue resolved: that "brandishing" is not an element, but a sentencing factor with respect to firearms offenses.

n12 *Harris, 122 S. Ct. at 2421.*

Exploiting this "logic," legislators easily can circumvent constitutional procedural protections simply by being slightly creative in the way they draft criminal legislation. To quote (ironically) Justice Breyer during oral argument in *Apprendi*, "It's just drafting? Is that what it is?" *Harris* evidently means that the difference between crime and punishment simply rests on the whimsy of legislative drafting.

As even the plurality recognized in *Harris*, "the Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor." n13 Yet where there is overwhelming and uncontroverted evidence as to an element, an entire trial can be avoided per the Court's rationale in *Cotton*.

n13 *Id. at 2411.*

So, then, what are those limitations? We still do not know. The Court had the opportunity to provide us with some much needed insight regarding the constitutional line dividing crime and punishment but it failed to do so. All we received instead was insight into the ideological divisiveness among its members. Thus, only did the Court fail to clarify its holding in *Apprendi*, but it muddied the waters even further by issuing a confusing plurality opinion.

In the words of Justice Thomas, "according to the plurality, the historical practices underlying the Court's decision in *Apprendi* with respect to penalties that exceed the statutory maximum do not support extension of *Apprendi's* rule to facts that increase a defendant's mandatory minimum sentence. *Such fine distinctions with regard*

to vital constitutional liberties cannot withstand close scrutiny." n14 Although "the incremental increase between five and seven years in prison may not seem so great in the abstract," "it must seem quite different to a defendant actually being incarcerated." n15 Indeed, what if the mandatory minimum were life imprisonment? According to Justice Thomas, and with a hint of justified sarcasm, "the constitutional analysis adopted by the plurality would hold equally true," for "surely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity." n16

n14 *Id. at 2423* (emphasis added).

n15 *Id. at 2425.*

n16 *Id.*

So, in light of *Cotton* and *Harris*, a factor that triggers a mandatory life term need not be treated as an element. And even if it is treated as an element, it need not be included in the indictment so long as a court (as opposed to a jury) finds there to be overwhelming evidence of the factor.

One cannot help but be reminded of what the Queen said to Alice during her *Adventures in Wonderland*: "No! No! Sentence first--verdict afterwards." To which Alice rightly replied, "Stuff and nonsense!"

All may not be lost

Harris is, after all, only a plurality opinion limited to holding that brandishing a firearm is an element of an offense. *Harris*, therefore, does not preclude the argument that where drug quantity triggers a mandatory minimum, the amount should be considered an element of the offense. Indeed, at least two circuits have held that drug amounts triggering mandatory minimums are elements. n17 *Harris* did not overrule these decisions.

n17 *See, e.g., United States v. Flowal, 234 F.3d 932 (6th Cir. 2000); United States v. Ramirez 242 F.3d 348 (6th Cir. 2001); United States v. Guevara, 227 F.3d 111 (2d Cir. 2001).*

Undoubtedly, the Court will have the chance to once again address the issue. And hopefully this time it will be able to offer us insight and guidance; not confusion and "fine distinctions."

Sentencing factors

In any event, there still remains the issue of due process within the realm of sentencing factors. Unfortunately, much of the post-*Apprendi* opinions and commentary have focused exclusively on whether a factor is or is not an element. Certainly, much hangs in the balance with regard to such a determination. Nevertheless, it is simplistic to frame the debate in such a binary fashion, where everything turns on how the factor is characterized, and only elements are afforded substantive due process consideration. Even after a factor is determined not to be an element, considerations of due process must not stop there. The debate, really should also be about what process is due at sentencing, not just whether a factor is an element.

Interestingly, when the Federal Sentencing Guidelines first were enacted on November 1, 1987, the United States Sentencing Commission refrained from adopting an evidentiary standard for resolving factual disputes at sentencing. Instead, the Sentencing Commission monitored how the standard evolved in case law.

The Sentencing Commission noted that "in pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion." n18 In the guidelines era, however, given that "the court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment," the Commission recognized that "more formality is . . . unavoidable if the sentencing process is to be accurate and fair." n19 It was not until November 1, 1991, after reviewing and considering case law developments, that the Commission adopted the following policy statement: the "use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." n20

n18 United States Sentencing Commission, GUIDELINES MANUAL, § 6A1.3, p.s.

n19 *Id.*

n20 *Id.*

This policy statement, of course, is not set in stone and is not binding on the courts. Furthermore, there does not appear to be any legal impediment, even if there is no legal obligation, to the Sentencing Commission reconsidering the blanket appropriateness of the preponderance of the evidence standard given that it has been over ten years since it first adopted that standard, and especially in light of recent case law development. After all, merely because "a practice is constitutional does not make it wise." n21

n21 *United States v. Lombard, 102 F.3d 1, 5 (1st Cir. 1996).*

As Judge Piersol, Chief Judge of the United States District Court for South Dakota recently observed,

> It is inevitable that future cases will require the imposition of a heightened standard of proof where sentencing enhancement factors become "a tail which wags the dog of the substantive offense." . . . Such development might take place under the existing framework of the sentencing guidelines, through decisions in cases where a higher standard of proof is required by a substantially enhanced sentencing range. . . . In shaping the contours of this standard, the courts would [*41] benefit from an amended Policy Statement that both recognizes the need for a heightened burden of proof in some cases and provides guidance on when and how such a burden should be applied. n22

n22 *United States v. White, 2001 D.S.D. 4, P5* (quoting *McMillan, 477 U.S. at 88).*

Such cases, of course, already exist. n23 Therefore, a re-examination by the Sentencing Commission of the appropriateness of the preponderance of the evidence standard would be well-timed and most welcome.

n23 *See, e.g.*, United States v. Jordan, 256 F.3d (9th Cir. 2001); *United States v. Shonubi, 103 F.3d 1085 (2d Cir. 1997); United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); see also United States v. Geralds, 158 F.3d 977 (8th Cir. 1998).*

Federal rules of evidence

Ironically, where liberty matters most, due process protects the least. At sentencing, a criminal defendant has even less protection with respect to his liberty than a civil defendant has with respect to his property. Although facts must be established by a preponderance of the evidence in both contexts, only in the civil arena do the Federal Rules of Evidence apply. n24 Furthermore, to assess punitive damages against a civil defendant--which, to be sure, is a punishment--the plaintiff must establish that the defendant acted maliciously or wantonly by clear and convincing evidence.

n24 *See Fed. R. Evid. 1101(b)* (stating that the Federal Rules of Evidence do not apply at sentencing).

Given that so much is at stake at sentencing, early in the history of the Federal Sentencing Guidelines, the Advisory Committee on Evidence Rules to the Judicial Conference of the United States Courts "considered the advisability of drafting evidentiary rules that would apply at the sentencing phase." n25

n25 *See* Advisory Committee on Evidence Rules to the Judicial Conference of the United States Courts, Minutes of the Meeting of September 30 - October 2, 1993 (Washington, D.C.), available at http://www.uscourts.gov/rules/Minutes/ev9-30.htm.

On November 12, 1996, the Committee noted that while there was "some interest . . . in extending the Federal Rules of Evidence to sentencing proceedings, given the fact that guidelines proceedings are so fact-driven. . . . There was a general concern that the issue created policy conflicts beyond the scope of the Committee's jurisdiction--given the existence of a statute and a Sentencing Guideline which specifically provide for flexible admissibility, and given the historically broad discretion of the court to consider all information presented at the sentencing hearing. Therefore, the Committee decided not to proceed on this matter at this time." n26

n26 *See* Advisory Committee on Evidence Rules to the Judicial Conference of the United States Courts, Minutes of the Meeting of November 12, 1996 (San Francisco, Calif.), available at http://www.uscourts.gov/rules/Minutes/ev11-1296.htm.

More recently, the American College of Trial Lawyers (ACTL) renewed the call to have the Federal Rules of Evidence apply at sentencing. n27 According to ACTL, "courts have been greatly influenced by pre-guidelines law on evidentiary issues, which freely permitted judges to consider all sorts of information and 'evidence' at sentencing." n28 In the Guidelines era, however, and as the Commission itself has recognized, n29 such informality could jeopardize the accuracy and fairness of sentencing. And as ACTL noted, because such informality has continued in the Guidelines era, "the resulting state of affairs has prompted one circuit judge to remark that 'when it comes to proof of facts undergirding Guideline sentences, the principle courts so often apply is that 'anything goes.'" n30

n27 *See* American College of Trial Lawyers, THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS (1997).

n28 *Id.* at 2.

n29 *See* U.S.S.G. § 6A1.3, p.s.

n30 ACTL, *supra* note 27, at 2 (quoting *United States v. Smiley, 997 F.2d 475, 483 (8th Cir. 1993)* (Bright, J., dissenting)).

Often, such "anything goes" mentality can be seen in the admission of expert testimony during drug sentencing. A recent article in the *ABA Journal* points out how "expert testimony regarding a federal defendant's intent can turn a relatively minor drug possession charge into a far more serious trafficking offense." n31 The same, of course, holds true for financial crimes with regard both to intent and the amount of loss involved. Many of these so-called "experts," however, likely would not withstand the scrutiny of recently revised *Federal Rule of Evidence 702*, which requires that expert testimony be both relevant, and reliable, and permits the court to investigate the reliability of the expert's testimony. n32 Where liberty is at stake the competency of expert testimony should not be lightly assessed.

n31 Mark Hansen, *Dr. Cop on the Stand*, ABA J., May 2002, at 31.

n32 *See id.* at 34.

[*42] **The line between**

With over one million persons currently incarcerated in our state and federal penitentiaries, and with our criminal justice system burdened with mandatory minimum sentencing schemes (which, thankfully, received well-deserved criticism by Justice Breyer in *Harris*), we no longer can afford waiting for the Court to tackle head-on the issue that has been haunting it since *McMillan*: What is the constitutional line between crime and punishment? It is a near certainty that the Court will have to again address this issue in the context of drug sentencing. Hopefully they will get over their differences and provide us with a clear rule to guide our legislators and sentencing commissions in crafting criminal laws and penalties that foster both a more humane justice and a respect for vital constitutional liberties.

In the meantime, there is much that the U.S. Sentencing Commission and the Judicial Conference can do to ensure that due process is not given short-shrift at sentencing. Re-assessing the appropriateness of the preponderance of the evidence standard for all factual determinations at sentencing is one; applying some or all of the Federal Rules of Evidence at sentencing is another. Just as our criminal law is complemented by criminal procedure, so too should our increasingly sophisticated sentencing law be complemented by substantive sentencing procedure. To paraphrase the Sentencing Commission, more formality is in order to prevent the sentencing process from becoming sinister.

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