

BRIEF REVIEW OF THE CASE LAW RELATING TO MANDATORY MINIMUM SENTENCING PROVISIONS

Mandatory minimum statutes have produced substantial litigation in the federal courts, ranging from the interpretation of the statutes themselves to cases addressing their constitutionality. Challenges to the constitutionality of mandatory minimum sentencing have generally been unsuccessful, and the Supreme Court has repeatedly affirmed their compliance with due process and the right to a jury trial. The federal courts have also engaged in extensive discussion concerning the application of mandatory minimum penalties as a matter of statutory interpretation, as well the relationship between mandatory minimum statutes and the now-advisory sentencing guidelines. This appendix provides a selected overview of those decisions.

A. SUPREME COURT DECISIONS

1. *Judicially-Determined Sentencing Factors*

It is well-established that the Constitution requires the prosecution to prove every element of a crime beyond a reasonable doubt and guarantees the defendant's right to have a jury determine offense elements unless waived.¹ These related rights, protected by the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments, have been invoked by those challenging mandatory minimum sentencing statutes.

In *In re Winship*,² the Supreme Court held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”³ Subsequently, in *Mullaney v. Wilbur*,⁴ the Court applied *Winship* to conclude that a state law violated due process by requiring a defendant charged with murder to prove that he killed with adequate justification in order to be convicted of only manslaughter. The state offered a narrow reading of *Winship* that would have limited its holding “to those facts which, if not proved, would wholly exonerate the defendant.”⁵ The Court disagreed with this interpretation, explaining that *Winship* applies not only to those facts that are essential to establishing guilt or innocence, but also to those facts that establish degrees of criminal culpability. The Court saw the differing sentences for murder and manslaughter under the applicable state law (murder carried a mandatory life sentence, but manslaughter could be punished with as little as a nominal fine) as highly relevant. “[W]hen viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction the distinction established by [the state] between murder and manslaughter may be of greater importance than

¹ United States v. Booker, 543 U.S. 220, 230 (2005).

² 397 U.S. 358 (1970).

³ *Id.* at 364.

⁴ 421 U.S. 684 (1975).

⁵ *Id.* at 697.

the difference between guilt or innocence for many lesser crimes.”⁶ Thus, the Court viewed *Winship* as concerned with the function of the facts being proven rather than the formalistic labels applied to them.⁷

Two years later, in *Patterson v. New York*,⁸ the Supreme Court held that requiring defendants to prove affirmative defenses does not violate due process. “Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant.”⁹ The Court distinguished *Mullaney* on grounds that the state legislature treated the relevant facts (in that case, emotional disturbance as a justification for murder) as an affirmative defense rather than a fact necessary to convict the defendant.¹⁰ Unlike the defendant in *Patterson*, the defendant’s conviction in *Mullaney* necessarily depended on a fact (the existence of malice) presumed by the prosecution’s proof of the crime’s other elements. This presumption of a necessary fact violated due process because the government could not require the defendant to negate a “fact which the State deem[ed] so important that it must be either proved or presumed.”¹¹ *Patterson* thus explained that a state does not have to prove every fact that goes to the “blameworthiness of an act or the severity of punishment authorized for its commission” beyond reasonable doubt; rather, due process requires only “that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.”¹²

In *McMillan v. Pennsylvania*,¹³ the Supreme Court applied its earlier decisions to a Pennsylvania mandatory minimum sentencing statute. The statute at issue required five years’ imprisonment for certain crimes if the sentencing judge found by a preponderance of the evidence that the defendant visibly possessed a firearm in the commission of the offense. The Court first noted that *Patterson* controlled because, as the Court “stressed” in that case, “in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive,” and the Pennsylvania statute treated the defendant’s visible possession of a firearm as a “sentencing factor that comes into

⁶ *Id.* at 697–98.

⁷ *See id.* at 699 (“*Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the State,’ and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.” (citation omitted) (quoting *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914)).

⁸ 432 U.S. 197 (1977).

⁹ *Id.* at 211.

¹⁰ *See id.* at 210–11 & n.12.

¹¹ *Id.* at 215.

¹² *Id.* at 214–15.

¹³ 477 U.S. 79 (1986).

play only after the defendant has been found guilty of one of the [enumerated] crimes beyond a reasonable doubt.”¹⁴

While the Court acknowledged that “in certain limited circumstances *Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged,” it was “persuaded by several factors that Pennsylvania’s Mandatory Minimum Sentencing Act [did] not exceed those limits.”¹⁵ First, the Pennsylvania statute established no presumptions of the kind described in *Patterson* and disapproved of in *Mullaney*. Second, the statute did not establish the range of potential sentences based on judicially-determined sentencing factors, unlike the fact at issue in *Mullaney*, because the Pennsylvania statute “operate[d] 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.” Finally, the Court concluded that there was no evidence that the state had enacted the mandatory minimum statute “in order to ‘evade’ the commands of *Winship*.” “The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor.”¹⁶ Accordingly, the Court held that the mandatory minimum statute did not violate due process.¹⁷

The Supreme Court, in *Castillo v. United States*,¹⁸ again addressed whether a firearm statute contained an offense element requiring proof beyond a reasonable doubt or a sentencing factor that, if found by the trial judge, would trigger a mandatory minimum penalty. The statute, 18 U.S.C. § 924(c)(1), prohibited the use or carrying of a “firearm” in relation to a crime of violence; an increased mandatory penalty applied if the weapon used or carried was a “machinegun.”¹⁹ The Court held that whether a machinegun was used was a separate element of the offense. The Court stated that the statute’s structure strongly favored the “new crime” interpretation: the statute seemed to suggest that the difference between the act of using or carrying a firearm and the act of using or carrying a machinegun is both substantive and substantial.²⁰ The Court also determined that the length and severity of the additional mandatory

¹⁴ *Id.* at 85–86.

¹⁵ *Id.* at 86.

¹⁶ *Id.* at 86–90.

¹⁷ *Id.* at 91. The defendants in *McMillan* also challenged the statute on grounds that it violated their Sixth Amendment right to a jury trial. After concluding the statute did not violate due process, the Court quickly rejected the Sixth Amendment argument, stating that the government used visible possession only as a sentencing factor and “there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *Id.* at 93.

¹⁸ 530 U.S. 120 (2000).

¹⁹ *Id.* at 120.

²⁰ *Id.* at 127. The Court examined five factors to determine whether Congress intended the machinegun provision to be an element or a sentencing factor: (1) language and structure; (2) tradition; (3) risk of unfairness; (4) severity of the sentence; and (5) legislative history. *Id.* at 124–31.

sentence dependant on the presence or absence of a machinegun weighed in favor of treating such offense-related words as referring to an element of the statute. The Court concluded that Congress intended the firearm type-related words used in section 924(c)(1) to refer to an element of a separate, aggravated crime.

Two years later, in *Harris v. United States*,²¹ the Supreme Court considered whether and how its intervening decision in *Apprendi v. New Jersey*²² affected *McMillan*. The defendant in *Harris* was convicted of using or carrying a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A). The district court sentenced the defendant to a mandatory minimum seven years' imprisonment under the same statute for having brandished the firearm, a fact the district court found at sentencing by a preponderance of the evidence.²³ The defendant argued that brandishing a firearm was an element of his offense and not merely a sentencing factor, that *Winship* rather than *McMillan* therefore controlled, and that section 924(c) violated due process. Alternatively, the defendant argued that the statute was unconstitutional because *Apprendi* implicitly overruled *McMillan*.

The Court found both arguments unpersuasive. First, construing section 924(c)(1)(A), the Court relied on *Castillo* to conclude that “brandishing” a firearm is a sentencing factor under the statute, and not an element of the offense, because “the required findings constrain, rather than extend, the sentencing judge’s discretion.”²⁴ Stated differently, the sentencing court could have imposed the same seven-year term of imprisonment on the defendant even in the absence of the determination that he brandished a firearm. Second, the Court explained that “*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases.”²⁵ *Apprendi* involved facts that increase “the defendant’s sentence beyond the maximum authorized by the jury’s verdict,” the Court reasoned, whereas *McMillan* involved facts that increase the mandatory minimum but not beyond the authorized statutory maximum.²⁶ In the latter circumstance, “the jury’s verdict has authorized the judge to impose the minimum with or without the finding [and] a statute may reserve this type of factual finding for the judge without violating the Constitution.”²⁷ “Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the political system may channel judicial

²¹ 536 U.S. 545 (2002).

²² 530 U.S. 466 (2000). The Supreme Court held in *Apprendi* that the Sixth Amendment requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

²³ *Id.* at 550–51.

²⁴ *Id.* at 552–54.

²⁵ *Id.* at 557.

²⁶ *Id.*

²⁷ *Id.*

discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.”²⁸

Recently, in *United States v. O’Brien*,²⁹ the Supreme Court once again addressed the mandatory minimum provision of section 924(c) triggered by a defendant using, carrying, or possessing a “machinegun,” this time reconciling congressional amendments to the statute with the *Castillo* and *Harris* decisions. The Court unanimously held that whether a defendant uses a machinegun-type firearm is an element of the offense that must be proved to a jury.³⁰ The Court did not interpret the statute anew; rather, it applied the reasoning of *Castillo* to the amended statute to determine whether Congress intended the machinegun provision to be an offense element or a sentencing factor. The Court held that the principal effect of the statutory changes “was to divide what was once a lengthy principal sentence into separate subparagraphs.”³¹ While, “[t]o be sure, there [were] some arguments in favor of treating the machinegun provision as a sentencing factor,”³² the Court found the changes did not “provide a clear indication that Congress meant to alter its treatment of machineguns as an offense element.”³³

Justice Stevens authored a concurring opinion, in which he wrote that the principles of *Apprendi* should apply with equal force to statutes that trigger mandatory minimums. Stevens contended that a preferable solution to the issue presented “would be to recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense.”³⁴ Justice Stevens recognized that this would mean overruling the Court’s earlier holdings in *McMillan* and *Harris*.

2. *Interaction Between the Guidelines and Mandatory Minimum Sentences*

The Supreme Court has addressed the relationship between mandatory minimum sentences and the sentencing guidelines on several occasions. These decisions have involved two aspects of that relationship: deviations from the minimum sentence based on the defendant’s substantial assistance and the calculation of drug quantity.

A sentencing court may, upon the government’s motion, deviate from the applicable mandatory minimum sentence or depart from the applicable guidelines range, on grounds that the defendant rendered substantial assistance. Section 3553(e) of title 18, United States Code, establishes the court’s power to deviate from the mandatory minimum sentence in such circumstances and to impose a sentence “in accordance with the guidelines and policy statements

²⁸ *Id.* at 567.

²⁹ 130 S. Ct. 2169 (2010).

³⁰ *Id.* at 2180.

³¹ *Id.* at 2176.

³² *Id.* at 2180.

³³ *Id.*

³⁴ *Id.* at 2183 (Stevens, J., concurring).

issued by the Sentencing Commission.”³⁵ The Commission is in turn charged with “assur[ing] that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a statute as a minimum sentence, to take into account a defendant’s substantial assistance” to the government.³⁶ To that end, USSG §5K1.1 provides for departures from the guidelines on a substantial assistance motion by the government, and also provides direction to courts in fashioning sentences that are lower than the applicable statutory mandatory minimum.³⁷ Importantly, both 18 U.S.C. § 3553(e) and USSG §5K1.1 require, in addition to the defendant rendering substantial assistance, that the government move for the reduction as a prerequisite to lowering the sentence.³⁸ The Supreme Court has held that this prerequisite “gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted,” though the government may not base its refusal to do so “on an unconstitutional motive.”³⁹

In *Melendez v. United States*,⁴⁰ the Supreme Court held that section 3553(e) and §5K1.1 do not establish a “unitary” motion system, meaning that the government may move for a sentence below the statutory mandatory minimum or a departure from the guidelines without necessarily moving for both.⁴¹ In so holding, the Court explained the relationship between the various statutes and articulated the Commission’s role in guiding district courts’ determination of sentences below the statutory mandatory minimum. The Court first stated that §5K1.1 does not displace or merge with section 3553(e) because neither the provisions of the Sentencing Reform Act, specifically 28 U.S.C. § 994(n), nor section 3553(e) “suggest that the Commission itself may dispense with § 3553(e)’s motion requirement or, alternatively, ‘deem’ a motion requesting

³⁵ 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by a statute as a minimum sentence as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 998 of title 28, United States Code.”).

³⁶ 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

³⁷ See USSG §5K1.1 (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”). Section 5K1.1(a) provides a list of five non-exhaustive factors for the court to consider in determining the “appropriate reduction” of the defendant’s sentence.

³⁸ *Wade v. United States*, 504 U.S. 181, 185, 187 (1991); see also *Melendez v. United States*, 518 U.S. 120, 126 n.5 (1996) (“Papers simply ‘acknowledging’ substantial assistance are not sufficient if they do not indicate [the government’s] desire for, or consent to, a sentence below the statutory minimum [T]he Government must in some way indicate its desire or consent that the court depart below the statutory minimum before the court may do so.”).

³⁹ *Wade*, 504 U.S. at 185–86.

⁴⁰ 518 U.S. 120 (1996).

⁴¹ See *id.* at 122.

or authorizing a different action – such as a departure below the Guidelines minimum – to be a motion authorizing the district court to depart below the statutory minimum.”⁴² The Court concluded, however, that the statutes do “charge the Commission with constraining the district court’s discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum.”⁴³ Thus, while §5K1.1 does not dispense with the requirement that the government must move for a sentence below the statutory minimum, “[s]ection 5K1.1 may guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range.”⁴⁴

In the controlled substances context, both mandatory minimum statutes and the sentencing guidelines use drug quantity to determine the appropriate sentence. In *Chapman v. United States*,⁴⁵ the Supreme Court addressed how sentencing courts should calculate quantities of LSD for purposes of the statutory mandatory minimum, which required ten years’ imprisonment if the offense involved at least one gram “of a mixture or substance” containing LSD. As the Court explained, LSD is so potent that a single dose has very little weight, and the drug is often distributed using carrier devices, such as blotter paper, gelatin capsules, or sugar cubes.⁴⁶ The defendant challenged the inclusion of those carrier devices in the calculation of LSD quantity for purposes of the mandatory minimum statute. The Court found his argument unpersuasive, concluding that section 841 “requires the weight of the carrier medium to be included when determining the appropriate sentence” because the carrier is itself a “mixture or substance” containing LSD.⁴⁷ Following *Chapman*, the Commission amended the guidelines commentary to provide that, for purposes of calculating quantities of LSD, courts should presume a weight of 0.4 milligrams per dose, thereby tying the calculation of LSD quantities to doses of the drug rather than the weight of any carrier devices.⁴⁸

In *Neal v. United States*,⁴⁹ the Supreme Court held that the Commission’s revised method of calculating LSD quantities for guideline purposes did not also apply to the mandatory minimum statute, a question that had divided the circuit courts of appeals. The Court concluded that the Commission’s change, while wholly applicable for purposes of the guidelines, could not affect calculations under the mandatory minimum statute.⁵⁰ First, the Court found it “doubtful that the Commission intended the constructive-weight method of the Guidelines to

⁴² *Melendez*, 518 U.S. at 126–127.

⁴³ *Id.* at 129.

⁴⁴ *Id.*

⁴⁵ 500 U.S. 453 (1991).

⁴⁶ *Id.* at 458–59.

⁴⁷ *Id.* at 459, 468.

⁴⁸ *See* USSG App. C amend. 502 (eff. Nov. 1, 1993).

⁴⁹ 516 U.S. 284 (1996).

⁵⁰ *Id.* at 285–86.

displace the actual-weight method that *Chapman* requires for statutory minimum sentences.”⁵¹ Indeed, the Court stated that the Commission’s amendments acknowledged that it could not “override” the congressional statute as construed by the Supreme Court.⁵² In any event, the Court held, the Commission’s method of calculating quantity was inconsistent with *Chapman*’s interpretation of the mandatory minimum statute and could not alter the statute. The Court reasoned that the Commission is entitled to “abandon its old methods in favor of what it has deemed a more desirable ‘approach’” within “its sphere to make policy judgments,” but lacks the power to construe a congressional statute in a manner contrary to the Supreme Court’s interpretation.⁵³

Similarly, disagreement has arisen among the circuits, and between some circuits and the Commission, concerning the definition of “cocaine base” for purposes of controlled substance crimes and sentencing. The mandatory minimum penalties applicable to drug trafficking offenses largely turn on the type and quantity of the narcotics involved, and the statutes (namely, 21 U.S.C. §§ 841(b) and 960) establish differing penalties depending on whether the offense involved cocaine or cocaine base. However, Congress had not specifically defined “cocaine base,” resulting in a circuit split over the definition of the term in the statutes and related guidelines, particularly that term’s relationship to “crack” cocaine. Some circuits embraced a broad interpretation of the term that included more than just crack cocaine, adopting the term’s scientific meaning.⁵⁴ Other circuits concluded that the term included only cocaine base that can be smoked, thereby narrowing its application to crack cocaine.⁵⁵

In 1993, the Commission expressly defined cocaine base for purposes of the guidelines as synonymous with “crack” cocaine, thereby adopting the narrower interpretation of the term and treating all forms of cocaine base other than crack as cocaine.⁵⁶ Subsequently, the circuit split deepened to include the effect of the guidelines change.⁵⁷ The Supreme Court resolved the issue

⁵¹ *Id.* at 293.

⁵² *Id.* at 294.

⁵³ *Id.* at 295–96.

⁵⁴ *See* *United States v. Ramos*, 462 F.3d 329, 333–34 (4th Cir. 2006); *United States v. Medina*, 427 F.3d 88, 92 (1st Cir. 2005); *United States v. Barbosa*, 271 F.3d 438, 467 (3d Cir. 2001); *United States v. Butler*, 988 F.2d 357, 542–43 (5th Cir. 1993); *United States v. Easter*, 981 F.2d 1549, 1558 & n.7 (10th Cir. 1992); *United States v. Jackson*, 968 F.2d 158, 162–63 (2d Cir. 1992).

⁵⁵ *See* *United States v. Higgins*, 557 F.3d 381, 395 (6th Cir. 2009); *United States v. Edwards*, 397 F.3d 680, 576 (7th Cir. 2005); *United States v. Munoz-Realpe*, 21 F.3d 375, 377–78 (11th Cir. 1994); *United States v. Shaw*, 936 F.2d 412 (9th Cir. 1991).

⁵⁶ USSG §2D1.1(c) (Notes to the Drug Quantity Table); USSG App. C, amend. 487 (eff. Nov. 1, 1993).

⁵⁷ For example, the Eleventh Circuit, which had initially adopted the broad interpretation of cocaine base, looked to the Commission’s narrower definition and Congress’s approval of the amendment to reverse course and hold that the statutes’ mandatory minimum penalties applied only to crack cocaine. *See Munoz-Realpe*, 21 F.3d at 377 (“By allowing the amendment to take effect, Congress has given its imprimatur to the new definition of ‘cocaine base’; Congress indicated that it intends the term ‘cocaine base’ to include only crack cocaine.”). Other circuits disagreed that the Commission’s definition affected the statutory definition, resulting in inconsistency between the statutory

in *DiPierre v. United States*⁵⁸ by holding that the term “cocaine base” in 21 U.S.C. § 841(b)(1)(A)(iii) applies to all forms of cocaine base and is not limited to crack cocaine. The Court observed that, because of the significant difference in penalties, Congress intended to distinguish between powder cocaine and cocaine base products; thus, this reading of the term “cocaine base” was consistent with the structure of section 841(b)(1).⁵⁹

3. *Advisory Guidelines and Mandatory Minimums*

Beginning in *Apprendi*,⁶⁰ the Supreme Court held that, under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁶¹ In *Blakely v. Washington*,⁶² the Supreme Court applied *Apprendi* to a state sentencing procedure that, like the federal sentencing guidelines, called for judges to find certain facts and, based on those judge-found facts, to impose a sentence within a prescribed mandatory range.⁶³ As the Court explained, “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. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”⁶⁴ The Court held that the state sentencing procedure violated the Sixth Amendment because it required the sentencing court to impose a sentence that it could not have imposed based on the jury’s findings alone.⁶⁵

and guidelines definition of cocaine base. See *Barbosa*, 271 F.3d at 466 (“[S]entences imposed under the sentencing provisions of criminal statutes, specifically the mandatory minimum sentences, cannot be . . . affected simply because of Congress’ silent approval of the Commission’s amendment.”); *United States v. Palacio*, 4 F.3d 150, 154 (2d Cir. 1993) (“Although the Commission’s interpretation of section 2D1.1 in the amended commentary will be authoritative with respect to the Guidelines, the amendment cannot revise the statutory interpretation we have already made . . .”). Therefore, in circuits that had adopted a broad interpretation of cocaine base under the statutes, the Commission’s narrower definition applied only to sentences imposed under the guidelines. See *Barbosa*, 271 F.3d at 467 (“[W]e hold that, while the term ‘cocaine base’ means only crack when a sentence is imposed under the Sentencing Guidelines, ‘cocaine base’ encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated.”).

⁵⁸ 131 S. Ct. 2225 (2011).

⁵⁹ *Id.* at 2232, 2237.

⁶⁰ 530 U.S. 466 (2000).

⁶¹ *Id.* at 490.

⁶² 542 U.S. 296 (2004).

⁶³ *See id.* at 300.

⁶⁴ *Id.* at 303.

⁶⁵ *See id.* at 303–04.

Booker applied the principles of *Apprendi* and *Blakely* to the federal sentencing guidelines. The Court saw no material distinction between the guidelines and the sentencing procedure at issue in *Blakely* because both relied on judge-found facts to increase the statutory maximum sentence.⁶⁶ The Court viewed the guidelines' mandatory nature as dispositive: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."⁶⁷ Because the sentencing guidelines required the imposition of a particular sentence, they went beyond the well-established principle that a sentencing judge may, consistent with the Constitution, "impose a sentence within a statutory range" because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."⁶⁸ The *Booker* Court held that the sentencing guidelines, applied in a mandatory fashion, did not allow for this constitutionally acceptable judicial discretion, and thus violated the Sixth Amendment.⁶⁹

To remedy this defect, the Court excised the statutory provisions that made the sentencing guidelines mandatory, rather than invalidating the entire Sentencing Reform Act or grafting unwritten requirements into the Act.⁷⁰ The government had advocated for a remedy whereby the guidelines would be mandatory in some sentencings, but not in others.⁷¹ The Court chose not to adopt this suggestion because it reasoned that such a remedy was contrary to congressional intent: "For one thing, the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to reduce sentences, but it would not impose those limits upon a judge's ability to increase sentences. We do not believe that such 'one-way lever[s]' are compatible with Congress's intent."⁷² The Court also noted that the "administrative complexities" created by such a system would run afoul of Congress's desire to "promot[e] uniformity in sentencing."⁷³ Thus, the Court chose to excise the portions of the Sentencing Reform Act making the guidelines mandatory and stated that, with these sections excised, "the remainder of the Act satisfies the Court's constitutional requirements."⁷⁴

⁶⁶ See *Booker*, 543 U.S. at 243–44.

⁶⁷ *Id.* at 233.

⁶⁸ *Id.*

⁶⁹ See *id.* at 233–34.

⁷⁰ See *id.* at 259.

⁷¹ See *id.* at 266.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 259 (the Court excised sections 3553(b)(1) (requiring sentencing courts to impose a sentence within the applicable guidelines range) and 3742(e) (setting forth standards of review on appeal, including *de novo* review of departures from the applicable guidelines range). Section 3742(g), which prohibited a district court at resentencing from imposing an outside the guidelines range sentence except on a ground relied upon at the prior sentencing, was later excised in *Pepper v. United States*, 131 S. Ct. 1229, 1236 (2011).

Accordingly, after *Booker*, while district courts must properly calculate the defendant's guidelines range, that range is "effectively advisory" and district judges have discretion to impose a sentence within, above, or below the advisory guidelines range.⁷⁵ "[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."⁷⁶ A district court's sentencing discretion is, however, subject to reasonableness review.⁷⁷

4. *The Eighth Amendment*

Defendants have also challenged mandatory minimum sentences as violating the Eighth Amendment's protection against cruel and unusual punishment. The Supreme Court in *Solem v. Helm*⁷⁸ held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted."⁷⁹ The defendant in *Solem* was sentenced to life imprisonment without parole for passing a bad check after having been convicted of three non-violent prior offenses, a sentence permitted by a North Dakota recidivism sentencing statute. The Court held the sentence was unconstitutionally disproportionate to the gravity of the offense.⁸⁰ In so holding, *Solem* established a three-part proportionality analysis for determining whether a sentence is cruel and unusual: the court must (1) consider "the gravity of the offense and harshness of the penalty"; (2) "compare the sentences imposed on other criminals in the same jurisdiction" to determine if more serious crimes are subject to the same or lesser penalties; and (3) "compare the sentences imposed for commission of the same crime in other jurisdictions."⁸¹

In *Harmelin v. Michigan*,⁸² the defendant argued that his mandatory life sentence for a first offense of possessing crack cocaine was cruel and unusual. A majority of the Supreme Court agreed that the sentence's mandatory nature did not render it unconstitutional and that it was not unconstitutionally disproportionate.⁸³ The Court fractured, however, in its treatment and application of *Solem*. Justice Scalia, joined by Chief Justice Rehnquist, concluded that the Eighth Amendment's prohibition of cruel and unusual punishments addressed only the form and

⁷⁵ *See id.* at 245.

⁷⁶ *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007) (citing 18 U.S.C. § 3553(a)).

⁷⁷ *See Gall v. United States*, 552 U.S. 38, 41 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007).

⁷⁸ 463 U.S. 277 (1983).

⁷⁹ *Id.* at 290.

⁸⁰ *Id.* at 303.

⁸¹ *Id.* at 290–92.

⁸² 501 U.S. 957 (1991).

⁸³ *Id.* at 994–96.

not the severity of the penalty imposed, and therefore would have overruled *Solem*.⁸⁴ Justice Kennedy, joined by Justices O'Connor and Souter, disagreed that *Solem* should be overruled, but narrowly interpreted *Solem* to deemphasize the role of comparative analyses:

[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality The proper role for comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to the crime.⁸⁵

In so holding, Justice Kennedy explained that “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”⁸⁶ The remaining Justices would have held that the life sentence was unconstitutionally disproportionate under any interpretation of *Solem*.

Following *Harmelin*, a plurality of the Court in *Ewing v. California*,⁸⁷ applied Justice Kennedy’s narrow proportionality interpretation to uphold California’s “three strikes” law.⁸⁸ The plurality held that the defendant’s mandatory term of 25 years-to-life imprisonment after his conviction of grand theft did not violate the Eighth Amendment, because the sentence was not grossly disproportionate to the crime he committed and “his long history of felony recidivism.”⁸⁹ Justices Scalia and Thomas would have overruled *Solem* and held that the Eighth Amendment does not guarantee proportionality.⁹⁰ Justices Stevens, Souter, Ginsburg, and Breyer would have held that the sentence violated the Eighth Amendment, even under Justice Kennedy’s narrow proportionality interpretation (but reserved the question of whether that narrow proportionality standard is correct).⁹¹ Thus, although a majority of the Court in *Harmelin* viewed the Eighth Amendment as establishing a proportionality requirement in mandatory sentencing and a plurality of the Court in *Ewing* analyzed a challenge to the mandatory minimum statute using Justice Kennedy’s concurring opinion in *Harmelin*, the Court has not yet definitively ruled on whether his narrow proportionality interpretation of *Solem* is the correct standard.⁹²

⁸⁴ *Id.* at 965, 985–86.

⁸⁵ *Id.* at 1005.

⁸⁶ *Id.* at 1001.

⁸⁷ 538 U.S. 11 (2003).

⁸⁸ *Id.* at 23–23 (“The proportionality principles in our cases distilled in Justice Kennedy’s concurrence guide our application the Eighth Amendment in the next context that we are called upon to consider.”).

⁸⁹ *Id.* at 29–30 (plurality opinion).

⁹⁰ *Id.* at 31–32 (Scalia, J., dissenting); *id.* at 32 (Thomas, J., dissenting).

⁹¹ *Id.* at 32–33 & n.1 (Stevens, J., dissenting); *id.* at 35 (Breyer, J., dissenting).

⁹² The Court’s decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), may demonstrate a shift away from proportionality review when the defendant challenges, on Eighth Amendment grounds, a “sentencing practice,” as opposed to his or her individual sentence. The issue in *Graham* was whether a Florida statute that permitted (but did

B. CIRCUIT COURT DECISIONS

Mandatory minimum penalties have been the subject of extensive litigation in the circuit courts of appeals. These cases have involved the application and interpretation of Supreme Court decisions addressing mandatory minimum penalties, as well as issues that the Court has not yet considered.

1. *Judicial Factfinding After Booker*

The circuits have uniformly concluded that, after *Booker*, courts may continue to use judicially determined facts when applying mandatory minimum sentences. Defendants have unsuccessfully challenged mandatory minimum sentences by arguing that *Booker* overruled prior precedent, namely *Harris*, and that any fact used to apply a mandatory minimum sentence must be submitted to a jury. As the Seventh Circuit held, “Although *Booker* invalidated the mandatory application of the sentencing guidelines, the decision did not disturb the Supreme Court’s recent precedent regarding the constitutionality of statutory mandatory minimum penalties.”⁹³ These courts have reasoned that *Booker* neither expressly nor implicitly upset *Harris*’s holding that the Sixth Amendment permits using judge-found facts to apply mandatory minimums within the range of imprisonment authorized by the jury’s verdict.⁹⁴ Similarly, the circuit courts have rejected arguments that *Booker*’s remedial opinion rendered mandatory minimum penalties advisory.⁹⁵

not require) a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime violated the Eighth Amendment. *See id.* at 2018. The Court characterized the defendant’s challenge as “implicat[ing] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes” and, “[a]s a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis.” *Id.* at 2022–23. In lieu of conducting a proportionality review, the Court applied its precedents involving similar categorical challenges (though involving capital punishment), including *Atkins*, *Roper*, and *Kennedy*, to conclude that the government may imprison a juvenile offender for life for committing a nonhomicide crime, but it “must provide him or her with some realistic opportunity to obtain release before the end of that term.” *Id.* at 2034. Accordingly, “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” *Id.*

⁹³ *United States v. Jones*, 418 F.3d 726, 731 (7th Cir. 2005); *accord, e.g., United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006); *United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005); *United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005).

⁹⁴ *See Jones*, 418 F.3d at 732 (“The distinction drawn by the Court in *Harris* appears to have survived – that is, that judicially found facts used to set minimum sentences are not properly deemed ‘elements’ of the offense for Sixth Amendment purposes because the jury’s verdict authorized the judge to impose the minimum sentence with or without the judicial fact-finding.”); *Williams*, 464 F.3d at 449 (“*Harris* remains binding law in the wake of the *Booker* decision. *Booker* did not explicitly overrule *Harris*, and the reasoning in *Booker* does not mandate reversal of *Harris*.”).

⁹⁵ *See United States v. Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007) (concluding that *Booker*’s “remedial holding provided that to cure the constitutional infirmity of the mandatory guidelines system, a district court is authorized to consider the facts set forth in § 3553(a), and to vary from the sentence otherwise indicated by the sentencing guidelines,” not statutory mandatory minimum sentences); *United States v. Castaing-Sosa*, 530 F.3d 1358, 1362 (11th Cir. 2008) (“To avoid infringing on the defendant’s Sixth Amendment right to a jury trial, *Booker* made

The circuits have also held that under *Apprendi* and *Harris*, a judge may not determine any facts that trigger a mandatory minimum penalty in excess of the otherwise applicable sentence.⁹⁶ Accordingly, if the application of a mandatory minimum turns on a particular fact, such as drug quantity, and the mandatory minimum sentence exceeds the sentence supported by the jury’s verdict or the facts admitted by the defendant, that fact is an element of the offense and cannot be judicially determined.⁹⁷ Under this principle, however, courts have concluded that a judge may find facts that trigger a mandatory minimum that is also at the statutory maximum penalty, even though doing so deprives the sentencing court of all discretion to fashion the defendant’s sentence.⁹⁸

Despite uniformity on basic principles, the circuits have disagreed as to the division of factfinding responsibilities for purposes of applying the mandatory minimums related to drug quantities established at 21 U.S.C. § 841(b). Section 841(a) of title 21, United States Code, proscribes the manufacture or possession of controlled substances. Section 841(b) establishes the penalties for committing that offense, beginning with a “default” sentence of up to twenty years’ imprisonment.⁹⁹ The statute also provides for increasingly severe sentencing ranges and mandatory minimums if the offense involved certain quantities of specific drug types.¹⁰⁰ For example, while the default sentence for possessing methamphetamine is up to twenty years’ imprisonment, the defendant is subject to a mandatory five years’ imprisonment and up to forty years’ if the offense involved at least 5 grams of methamphetamine; the defendant faces a mandatory ten years’ and up to life imprisonment if the offense involved at least 50 grams of methamphetamine.¹⁰¹ Thus, section 841(b) uses drug type and quantity findings both to increase the statutory maximum penalty and to trigger mandatory minimum penalties.

advisory the Sentencing Guidelines, not statutory mandatory minimums enacted by Congress. Thus, *Booker*’s instruction to district court to consider the § 3553(a) factors in fashioning a reasonable sentence cannot be read to authorize using the § 3553(a) factors to impose a sentence below the applicable statutory mandatory minimum.”).

⁹⁶ See *United States v. Promise*, 255 F.3d 150, 157 (4th Cir. 2001) (collecting cases).

⁹⁷ See *id.*

⁹⁸ See *United States v. Estrada*, 428 F.3d 387, 390 (2d Cir. 2005) (“While this circumstance [where the mandatory minimum is also the statutory maximum penalty] deprives the judge of sentencing discretion, the finding nonetheless restrains the judge’s power within the outer limits set by the applicable statutory maximum, and the finding thus does not increase the penalty *beyond* the prescribed statutory maximum.” (quotation marks omitted)); *Spero v. United States*, 375 F.3d 1285, 1287 (11th Cir. 2004) (“[T]he amount of the enhancement does not matter, so long as the enhanced minimum does not exceed the pre-enhanced maximum.”).

⁹⁹ See 21 U.S.C. § 841(b)(1)(C).

¹⁰⁰ See *id.* §§ 841(b)(1)(A) & (b)(1)(B).

¹⁰¹ *Id.*

The circuits agree that any finding under section 841(b) that increases the statutory maximum penalty, even if it also triggers a mandatory minimum, must be submitted to a jury consistent with *Apprendi*. However, where the drug quantity or type findings trigger a mandatory minimum penalty within the sentencing range that may be imposed without further judicial factfinding, the circuits are split on whether such findings are elements of the offense that must be submitted to a jury or whether they are sentencing factors that may be judicially determined. On one side, several circuits have concluded that drug quantity and type must be alleged in the indictment and submitted to the jury or admitted by the defendant in all instances – even to impose a mandatory minimum sentence that is within the “default” sentencing range.¹⁰² Conversely, other circuits have held that drug type and quantity are only sentencing factors under section 841(b) that may be judicially determined, unless the fact is also used to increase the statutory maximum penalty.¹⁰³

2. “Stacking” Mandatory Minimum Sentences Under 18 U.S.C. § 924(c)

Section 924(c), of title 21, United States Code, establishes mandatory minimum penalties for committing the offense of using or carrying a firearm during, or possessing a firearm in furtherance of, a crime of violence or a drug trafficking crime.¹⁰⁴ The offense carries a mandatory minimum of five years’ imprisonment, and the statute prescribes increasingly severe mandatory minimums based on the how the firearm was used (seven and ten years), the type of firearm involved (ten and thirty years), and the defendant’s recidivism (twenty-five years and

¹⁰² See, e.g., *United States v. Gonzales*, 420 F.3d 111, 133–34 (2d Cir. 2005) (“The drug quantities specified in 21 U.S.C. § 841 are elements that must be pleaded and proved to a jury or admitted by a defendant to support any conviction on an aggravated drug offense, not simply those result in sentences that exceed the maximum otherwise applicable for an identical unquantified drug crime. . . . [W]here a drug quantity specified in § 814(b)(1)(A) or (b)(1)(B) is neither proved to a jury nor admitted by a defendant, a district court is not *required* to impose the minimum sentence mandated by those sections.”); *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc) (“We honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury subject to the rules of evidence, and proved beyond a reasonable doubt.”). *But see Estrada*, 428 F.3d at 388 (“[P]rior convictions that trigger a mandatory minimum life sentence under § 841(b)(1)(A), but which do not affect the statutory maximum sentence, need not be charged in the indictment or proved to a jury beyond a reasonable doubt.” (emphasis added)).

¹⁰³ See, e.g., *United States v. Goodine*, 326 F.3d 26, 32 (1st Cir. 2003) (“We . . . find that drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence.”); *United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001) (concluding, in a section 841(b) case, that “if a defendant is sentenced under the statutory maximum, his sentence is not violative of *Apprendi*, regardless of the district court’s consideration of a mandatory minimum sentence”); *United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000) (affirming conviction based on judge-found drug quantities because the defendant’s “sentence was not enhanced beyond the statutory maximum by a factor not contained in the indictment or submitted to the jury.”).

¹⁰⁴ Section 924(c), enacted as part of the Armed Career Criminal Act of 1984 (ACCA), has produced extensive litigation concerning the definitions of “crime of violence” and “drug trafficking crime,” as have other portions of ACCA that impose a mandatory minimum penalty for prior convictions. See 18 U.S.C. § 924(e) (requiring fifteen years’ imprisonment for a defendant with three prior convictions “for a violent felony or a serious drug offense” and who violates 18 U.S.C. § 922(g)); *United States v. Rodriguez*, 553 U.S. 377, 388 (2008) (interpreting “serious drug offense”); *Begay v. United States*, 553 U.S. 137, 148 (2008) (interpreting “violent felony”).

life).¹⁰⁵ Section 924(c) further provides that those mandatory minimum penalties are to be imposed in addition and must run consecutively to “any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate] crime of violence or drug trafficking crime”¹⁰⁶

The circuits have consistently upheld the constitutionality of “stacking”¹⁰⁷ consecutive mandatory minimum sentences under section 924(c). Defendants have unsuccessfully argued, for example, that stacking sentences under section 924(c) violates the protection against double jeopardy,¹⁰⁸ deprives them of equal protection,¹⁰⁹ and results in cruel and unusual punishment.¹¹⁰ The circuits had previously disagreed in their interpretation of 18 U.S.C. § 924(c)’s “except clause,” which provides that the subsection’s mandatory minimums apply “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law.”¹¹¹ A minority of circuits concluded that the “except” clause made section 924(c)’s mandatory minimums inapplicable where the predicate crime of violence or drug trafficking crime carried a greater mandatory minimum than the mandatory minimum established

¹⁰⁵ See 18 U.S.C. § 924(c)(1)(A)–(C).

¹⁰⁶ *Id.* § 924(c)(1)(A) & (c)(1)(D).

¹⁰⁷ “Stacking” generally refers to the charging of multiple § 924(c) counts within the same indictment and the resulting accumulation of mandatory minimum sentences. Section 924(c) prescribes mandatory minimum penalties for employing firearms in furtherance of a crime of violence or drug trafficking crime, with lengths varying based on whether the defendant used (five years), brandished (seven years), or discharged the firearm (ten years), and certain longer penalties for using specific types of firearms. See 18 U.S.C. § 924(c)(1)(A) & (B). The statute also establishes much more severe mandatory penalties upon a “second or subsequent conviction” under section 924(c), which in most cases results in a twenty-five year mandatory minimum sentence. *Id.* § 924(c)(1)(C). In *Deal v. United States*, the Supreme Court interpreted “second or subsequent convictions” to include other section 924(c) counts charged in the same indictment. 508 U.S. 129, 133–34 (1993). Because section 924(c) requires that its mandatory minimum penalties run consecutively to “any other term of imprisonment imposed on the person,” these terms must be served in addition to any sentence for the underlying offenses *and* other § 924(c) offenses. § 924(c)(1)(D). As a result, an indictment can “stack” mandatory minimum penalties, for example, by charging multiple violations of § 924(c) where the defendant used a firearm in furtherance of multiple predicate offenses – even if those predicate offenses formed part of the same course of criminal conduct. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1249 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006), discussed further in Chapter 12 n.78, *supra*.

¹⁰⁸ See, e.g., *United States v. Mohammed*, 27 F.3d 815, 819–20 (2d Cir. 1994); *United States v. Singleton*, 16 F.3d 1419, 1429 (5th Cir. 1994); *United States v. Overstreet*, 40 F.3d 1090, 1094 (10th Cir. 1994).

¹⁰⁹ See, e.g., *United States v. Walker*, 473 F.3d 71, 76–79 (3d Cir. 2007); *United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006); *Angelos*, 433 F.3d at 754.

¹¹⁰ See, e.g., *United States v. Wiest*, 596 F.3d 906, 911–12 (8th Cir. 2010); *Walker*, 473 F.3d at 79–84; *United States v. Beverly*, 369 F.3d 516, 536–37 (6th Cir. 2004).

¹¹¹ See e.g., *United States v. Parker*, 549 F.3d 5 (1st Cir. 2008); *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009); *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. London*, 568 F.3d 553 (5th Cir. 2009); *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000); *United States v. Villa*, 589 F.3d 1334 (10th Cir. 2009); *United States v. Tate*, 586 F.3d 936 (11th Cir. 2009).

for the section 924(c) offense.¹¹² But in *Abbott v. United States*,¹¹³ the Supreme Court agreed with the majority of circuits, holding that a defendant is subject to consecutive mandatory minimum sentences for both the predicate offense and the section 924(c) offense, even if the predicate offense carries a greater mandatory minimum than the section 924(c) offense.¹¹⁴ Thus, the “except” clause operates only to ensure that “a § 924(c) offender is not subject to stacked sentences for violating § 924(c),” though a defendant is “subject to the highest mandatory minimum specified for his conduct in § 924(c).”¹¹⁵

3. *Safety Valve*

The circuit courts of appeal have developed a substantial jurisprudence concerning the “safety valve,” 18 U.S.C. § 3553(f) and §5C1.2, which provides that defendants convicted of specific controlled substance offenses and who meet certain criteria may receive a sentence under the guidelines instead of a mandatory minimum sentence.¹¹⁶ Although neither section 3553(f) nor §5C1.2 expressly allocate the burden of proving (or disproving) a defendant’s safety-valve eligibility, the circuits have held that the defendant bears the burden of proving his or her eligibility by a preponderance of the evidence.¹¹⁷ Similarly, the burden falls on the defendant to seek the district court’s application of the safety valve and, when necessary, to take the affirmative steps necessary to obtain eligibility, including the initiation of debriefing sessions with the government.¹¹⁸

¹¹² See e.g., *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010).

¹¹³ 131 S. Ct. 18 (2010).

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.*

¹¹⁶ A defendant is eligible for the safety valve if the district court finds: “(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan” 18 U.S.C. § 3553(f). As for the last requirement, “the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude” his or her eligibility. § 3553(f)(5).

¹¹⁷ See *United States v. Montes*, 381 F.3d 631, 634 (7th Cir. 2004); *United States v. Mathis*, 216 F.3d 18, 29 (D.C. Cir. 2000); *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996).

¹¹⁸ See *United States v. Ivester*, 75 F.3d 182, 185 (4th Cir. 1996) (“[D]efendants seeking to avail themselves of downward departures under § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.”); accord *United States v. Ortiz*, 136 F.3d 882, 884 (2d Cir. 1997); *United States v. Flanagan*, 80 F.3d 143, 146 (5th Cir. 1996).

It is well-established that judicial factfinding for purposes of determining safety valve eligibility complies with the Constitution. As the circuits have reasoned, application of the safety valve cannot increase the defendant’s sentence, nor is the court’s refusal to reduce a sentence tantamount to a sentence increase. Accordingly, judicial determination of the defendant’s safety valve eligibility is not a violation of the Sixth Amendment.¹¹⁹ However, a sentencing court’s authority to determine facts relevant to the defendant’s safety valve eligibility is not unlimited. Several circuits have held that a district court lacks discretion to deviate from the criminal history score required by the guidelines.¹²⁰ This result follows from the conclusion that *Booker* and other cases “did not alter the requirement that the Guidelines results be determined according to the Guidelines,”¹²¹ nor did they “invalidate the criteria established by Congress for sentencing a defendant below the statutory mandatory minimum sentence.”¹²² Similarly, the Ninth Circuit has held that even though the guidelines, including §5C1.2, are advisory after *Booker*, section 3553(f) requires the district court to apply the safety valve when the defendant demonstrates his or her eligibility.¹²³

Upon concluding that the defendant is safety-valve eligible, however, the district court may impose a sentence within, below, or above the advisory guidelines range.¹²⁴ Thus, the district judge “is to treat the guidelines as only advisory even in a safety-valve case,” even though he or she “cannot treat as advisory the guideline provisions that are preconditions for safety-valve relief.”¹²⁵ As the Eleventh Circuit has explained regarding upward variances, “the guidelines are advisory only, and a court compelled to disregard a mandatory minimum sentence in favor of the guidelines range at the advice-determining stage may vary upward to and even past the mandatory minimum point after considering the § 3553(a) factors – so long as the final sentence is reasonable.”¹²⁶ Nonetheless, in determining the appropriate sentence for a safety

¹¹⁹ See *United States v. Bermudez*, 407 F.3d 536, 544–45 (1st Cir. 2005) (“[A] factual finding resulting in the denial of a sentencing reduction, as in the present case, is scarcely an ‘enhancement. Moreover, it is clear from the Supreme Court’s case law that refusal to reduce a statutory sentence based on judicial factfinding do not violate the defendant’s Sixth Amendment rights.” (citations omitted)); see also, e.g., *United States v. Holguin*, 436 F.3d 111, 117–18 (2d Cir. 2006); *United States v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005).

¹²⁰ *United States v. Branch*, 537 F.3d 582, 594–95 (6th Cir. 2008) (collecting cases).

¹²¹ *United States v. Hunt*, 503 F.3d 34, 35 (1st Cir. 2007).

¹²² *Branch*, 537 F.3d at 595; see also *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006) (“*Booker* does not render application of individual guideline provisions advisory because the district court remains obligated correctly to calculate the Guidelines range pursuant to 18 U.S.C. § 3553(f)(1) Further, we agree that to treat calculation of the safety-valve eligibility as advisory would, in effect, excise 18 U.S.C. § 3553(f)(1).”).

¹²³ *United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334–35 (9th Cir. 2006).

¹²⁴ *United States v. Tanner*, 544 F.3d 793, 795 (7th Cir. 2008); *United States v. Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007); *Cardenas-Juarez*, 469 F.3d at 1334.

¹²⁵ *Tanner*, 544 F.3d at 795.

¹²⁶ *Quirante*, 486 F.3d at 1276.

valve-eligible defendant under the advisory guidelines, the district court may not consider the mandatory minimum that would have applied in the safety valve's absence.¹²⁷

4. *Substantial Assistance*

The circuits have considered *Booker*'s effect on reducing sentences based on the defendant's substantial assistance. *Booker*'s effect on substantial assistance motions depends, in part, on whether the court is considering a sentence below the statutory mandatory minimum pursuant to 18 U.S.C. § 3553(e) or a departure from the advisory guidelines pursuant to §5K1.1. In either case, it remains clear even after *Booker* that the district court may not impose a sentence below the mandatory minimum without a government motion.¹²⁸ Moreover, under either mechanism, *Booker* does not permit a district court to consider facts that are unrelated to the defendant's assistance in deciding whether and to what extent it should deviate from a mandatory minimum or depart from the guidelines.¹²⁹

However, the applicability of a mandatory minimum determines what factors a court may consider in fashioning the final sentence of a defendant who has rendered substantial assistance. If the defendant is subject to a mandatory minimum, the district court may consider only assistance-related factors in deciding whether and to what extent it should deviate from that mandatory minimum sentence.¹³⁰ By contrast, if the defendant is not subject to a mandatory minimum, the district court may still only consider only assistance-related factors in deciding whether and to what extent it should depart from the guidelines,¹³¹ but in those circumstances, a district court may then proceed to consider the full range of factors provided at section 3553(a) to

¹²⁷ *United States v. Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007) (“[T]he fact that a district court used a mandatory minimum as a reference point requires resentencing if the defendant was in fact safety valve eligible.”); *Quirante*, 486 U.S. at 1276 (“Because a mandatory minimum sentence that must be disregarded under § 3553(f) is not a § 3553(a) factor, it cannot be considered in any part of the sentencing decision when the safety valve applies.”).

¹²⁸ *See United States v. Rivera*, 170 F. App'x 209, 211 (2d Cir. 2006).

¹²⁹ *See United States v. Desselle*, 450 F.3d 179, 182–83 & n.1 (5th Cir. 2006) (collecting cases); *see also United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008) (“When . . . the Guidelines sentence ends up as the statutory minimum, both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations.”); *Williams*, 474 F.3d at 1130–31 (“Where a court has authority to sentence below a statutory minimum only by virtue of a government motion under § 3553(e), the reduction below the statutory minimum must be based exclusively on assistance-related considerations.”); *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005) (“While the sentencing court had discretion under § 5K1.1 in deciding whether to depart from the guidelines and the extent of that departure, it did not have discretion to consider factors unrelated to the nature and type of Davis's assistance. Importantly, the sentencing court could not permissibly consider the sentencing factors announced in 18 U.S.C. § 3553(a) when exercising its discretion in deciding whether and how much to depart.”).

¹³⁰ *United States v. Johnson*, 580 F.3d 666, 673 (7th Cir. 2009); *Richardson*, 521 F.3d at 159; *Williams*, 474 F.3d at 1132; *United States v. A.B.*, 529 F.3d 1275, 1285 (10th Cir. 2008).

¹³¹ *See Desselle*, 450 F.3d at 183; *Davis*, 407 F.3d at 1271.

fashion a reasonable sentence.¹³² Indeed, the district court (in the absence of a mandatory minimum) may consider the defendant’s cooperation and assistance pursuant to section 3553(a) even in the absence of a government motion or if the defendant’s assistance was not sufficiently valuable to justify a departure from the guidelines.¹³³

Despite those principles, a district court possesses only narrow authority to reduce a sentence pursuant to Federal Rule of Criminal Procedure 35(b), regardless of whether a mandatory minimum applies. In *United States v. Shelby*,¹³⁴ the Seventh Circuit held that a district judge may not consider the “full range” of section 3553(a) factors when presented with a Rule 35(b) motion, because the rule “contains no suggestion that the filing of the motion allows the defendant to argue for resentencing on the basis of something other than the assistance he gave the government.”¹³⁵ The First and Sixth Circuits have adopted similar readings of Rule 35(b) as permitting “reductions based on substantial assistance rather than other factors.”¹³⁶ The applicability (or absence) of a mandatory minimum penalty does not appear to affect the district court’s discretion under Rule 35(b). The First Circuit in *Poland* explained that, even though the district court could deviate from the applicable mandatory minimum based on the defendant’s assistance, “[i]t could not . . . provide a greater reduction below the mandatory minimum for any other reason.”¹³⁷ And the Seventh Circuit in *Shelby* vacated the new sentence imposed by the district court, which the court fashioned using a base of factors unrelated to the defendant’s assistance, even though the new sentence was higher than the mandatory minimum.¹³⁸

5. *Mandatory Consecutive Sentences as Grounds for Variance*

Finally, following *Booker*, the circuit courts of appeals have considered whether and to what extent a district court may consider any mandatory consecutive sentences in fashioning a sentence for counts to which no mandatory penalty applies. This issue arises when a defendant

¹³² See *United States v. Moore*, 581 F.3d 681, 683 (8th Cir. 2009) (“The district court . . . had authority under *Gall* to vary downward from the advisory guidelines range . . . , as adjusted by the § 5K1.1 departure. We review the resulting sentence, with or without such a variance, for substantive reasonableness.”).

¹³³ *United States v. Blue*, 557 F.3d 682, 686–87 (6th Cir. 2009) (“Because the Guidelines are advisory, even absent a Section 5K1.1 motion the court might have considered Blue’s allegedly substantial assistance in the context of the Section 3553(a) factors.”); *United States v. Fernandez*, 443 F.3d 19, 34 (2d Cir. 2006) (“We agree that in formulating a reasonable sentence a sentencing judge must consider ‘the history and characteristics of the defendant’ within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that the defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1.”).

¹³⁴ 584 F.3d 743 (7th Cir. 2009).

¹³⁵ *Id.* at 745, 748–49.

¹³⁶ *United States v. Poland*, 562 F.3d 35, 41 (1st Cir. 2009); *United States v. Grant*, 636 F.3d 803, 815–16 (6th Cir. 2011);

¹³⁷ *Poland*, 562 F.3d at 41.

¹³⁸ See *Shelby*, 584 F.3d at 744–45.

has been convicted of multiple offenses, at least one of which carries a consecutive mandatory minimum penalty. For example, under 18 U.S.C. § 924(c) (using a firearm in relation to a crime of violence) and 18 U.S.C. § 1028A(b)(2) (aggravated identity theft), a defendant is subject to additional mandatory terms of imprisonment for certain acts in addition to the predicate offense, which carries its own sentence that may not be subject to a mandatory penalty. In some cases, district judges have concluded that the mandatory “add on” sentence adequately punishes the offender pursuant to 18 U.S.C. § 3553(a), and thus give a more lenient sentence – sometimes varying from the guidelines range substantially – on other counts for which there is no mandatory penalty.

The courts of appeals have generally held that district courts may not construct sentences in that fashion. In *United States v. Worman*,¹³⁹ the district court had sentenced the defendant to only one month imprisonment for mailing, possessing, and transporting a pipe bomb (guidelines range of 168–210 months) and a consecutive, mandatory 360 months’ imprisonment under section 924(c) for possessing a pipe bomb in furtherance of a crime of violence.¹⁴⁰ The district court reasoned that a total sentence of 361 months’ imprisonment was appropriate under section 3553(a). The Eighth Circuit vacated the sentence as substantively unreasonable, concluding that “[m]andatory consecutive sentences are to be imposed independently of sentences for other counts.”¹⁴¹ The court stated that “[t]he severity of a mandatory consecutive sentence is an improper factor that a district court may not consider when sentencing a defendant on related crimes.”¹⁴² Similarly, in *United States v. Franklin*,¹⁴³ the Sixth Circuit held that a district court may not impose lower sentences on counts to which the guidelines apply to circumvent the application of consecutive section 924(c) mandatory minimum on other counts, reasoning that “[a]lthough *Booker* gave substantial discretion to the sentencing court to impose sentences below a mandatory maximum, nothing in *Booker* allows the court to negate the imposition of a mandatory minimum sentence.”¹⁴⁴ The Seventh Circuit also took the approach in *United States v. Roberson*,¹⁴⁵ concluding that the district court improperly gave the defendant only one month imprisonment for committing bank robbery because of the seven-year consecutive section 924(c) mandatory minimum penalty he also faced for brandishing a firearm during that offense.¹⁴⁶ This sentence was substantively unreasonable, the Seventh Circuit concluded, because it was inconsistent with “Congress’s determination to fix a minimum sentence for using a firearm in a

¹³⁹ 622 F.3d 969 (8th Cir. 2010).

¹⁴⁰ *Id.* at 978.

¹⁴¹ *Id.* (citing *United States v. Guthrie*, 557 F.3d 243, 255 (6th Cir. 2009)).

¹⁴² *Id.* (citing *United States v. Williams*, 599 F.3d 831, 834 (8th Cir. 2010)).

¹⁴³ 499 F.3d 578 (6th Cir. 2007).

¹⁴⁴ *Id.* at 586 (“The sentencing court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence.”).

¹⁴⁵ 474 F.3d 432 (7th Cir. 2007).

¹⁴⁶ *Id.* at 433–34.

crime of violence,” and the district court was “required to determine the proper sentence for the bank robbery entirely independently of the section 924(c)(1) add-on.”¹⁴⁷

The First Circuit, however, has taken a broader view of district courts’ discretion to account for mandatory consecutive penalties when sentencing defendants convicted of multiple offenses. The defendant in *United States v. Vidal-Reyes*,¹⁴⁸ pleaded guilty to misrepresentation of a social security account, false representation of citizenship, false statements in a passport application, and aggravated identity theft. The identity theft conviction carried a mandatory consecutive two-year term of imprisonment pursuant to 18 U.S.C. § 1028A. The district court declined to vary from the guidelines range of 15–21 months on the three counts to which no mandatory minimum applied, believing that it lacked authority to depart solely because a within-guidelines range sentence would be too severe when combined with the mandatory consecutive two-year term of imprisonment.¹⁴⁹ The First Circuit initially stated that “to the extent that a mandatory term of imprisonment reasonably bears on [the § 3553(a)] factors, it remains, absent legislation to the contrary, within the sentencing court’s discretion to take it into account.”¹⁵⁰ The court also noted that a mandatory term of imprisonment “certainly bears upon the § 3553(a) factors to a certain extent,” particularly because “the total amount of time a defendant will spend incarcerated . . . implicates the goal of incapacitation.”¹⁵¹ The First Circuit then concluded that nothing in section 1028A prevents the district court from considering the mandatory sentence when fashioning a sentence on other counts, at least to the extent those other counts are not predicate offenses for the add-on mandatory sentence.¹⁵² Because the defendant did not plead guilty to any of section 1028A’s predicate offenses,¹⁵³ the district court could exercise its discretion to consider the mandatory minimum penalty. Finally, the First Circuit concluded that USSG §5G1.2, which requires that consecutive mandatory penalties be “imposed independently” of other counts, means only that counts for which a consecutive mandatory penalty applies should not be grouped together with other counts.¹⁵⁴ The First Circuit thus reversed and remanded for resentencing.¹⁵⁵

¹⁴⁷ *Id.* at 436–37.

¹⁴⁸ 562 F.3d 43 (1st Cir. 2009).

¹⁴⁹ *Id.* at 46–47.

¹⁵⁰ *Id.* at 49.

¹⁵¹ *Id.* at 49 n.4.

¹⁵² *Id.* at 51.

¹⁵³ The defendant did not raise on appeal whether § 1028A required the government to also charge him with a predicate offense, and the First Circuit did not take up that question. *See id.* at 55 n.9.

¹⁵⁴ *Id.* at 55.

¹⁵⁵ *Id.* at 56.