

**Apprendi's effect on the application  
of a mandatory minimum drug sentence**

No statutorily-enhanced sentencing range, including the mandatory minimum provisions of 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) and 960(b)(1) and (b)(2), may be applied to the defendant in this case where the factor triggering the mandatory minimums – drug quantity – was wholly omitted from the indictment. Notwithstanding any claim by the government that it may seek application of the minimum mandatory penalties in §§ 841(b)(1)(A) and (b)(1)(B) and 960(b)(1) and (b)(2) so long as the minimum mandatory sentence is less than the 20-year statutory maximum set forth in 21 U.S.C. § 841(b)(1)(C) and § 960(b)(3), the Supreme Court's decision in Apprendi v. New Jersey, \_\_\_ U.S. \_\_\_, 120 S.Ct. 2348 (June 26, 2000), actually precludes such an approach.

Admittedly, the defendant does not contest the settled rule that factual findings relevant to determining an appropriate sentence or sentencing guideline within the statutory imprisonment range must be supported merely by a preponderance of the evidence. See Patterson v. New York, 432 U.S. 197, 214 (1977); McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986). Nevertheless, after Apprendi, the enhanced statutory sentencing range itself must be established in the indictment as of the time the defendant enters a guilty plea or goes to trial, or the defendant cannot be sentenced to the mandatory minimum sentences set forth in § 841(b)(1)(A) and

(b)(1)(B) and § 960(b)(1) and (b)(2).

Although the Court had held in McMillan that for purposes of a Pennsylvania mandatory minimum statute, “visible possession” of a firearm was merely a “sentencing factor” not an “element” of the offense – despite the fact that this factor called into play a 5-year minimum mandatory sentence – McMillan does not govern this case. Notably, Justices O’Connor, Rehnquist, Kennedy, and Breyer, who dissented in Apprendi, read the majority decision in Apprendi to overrule McMillan. See 120 S.Ct. at 2385 (O’Connor, J., dissenting). Justices Thomas and Scalia, who concurred in the majority opinion, view McMillan as incorrectly decided and would overrule it. They point out that under the common law, allegations as to **any** fact increasing the “overall” punishment, must be alleged in the indictment, and proved to the jury at trial. See 120 S.Ct. at 2379-2380 (Thomas, J., concurring). Even if – despite the views expressed by these six justices – McMillan still, for the time being, remains good law, the Apprendi majority has indicated that McMillan must be limited to its facts.

**1. The *McMillan* indictment set forth an offense with a determinate sentencing range; an indictment under § 841(a) or § 960(a) does not.** McMillan involved a statute which permitted the judge to impose a 5 year minimum mandatory sentence, within a sentencing range for the offense set forth in the indictment. Here, by contrast to McMillan, the indictment did not set forth a sentencing range, because

21 U.S.C. § 841(a) and § 960(a) do not set penalty ranges, but are intended merely to establish offense elements. The penalty ranges are set separately in §§ 841(b) and 960(b) and are based solely on quantity and other unindicted factors. So, here there was no mere limitation of discretion within a fixed sentencing range; under pre-Apprendi law, there was instead a myriad of possible sentencing ranges implicated by the indictment, none of which was specified or settled by anything in the indictment itself.

**2. The statute at issue in *McMillan* merely set a minimum, and narrowed the court’s discretion, within an existing range; by contrast, §§ 841(b)(1)(A), (b)(1)(B), 960(b)(1), and (b)(2) raise the statutory maximum as well, and not only expand the court’s sentencing discretion, but also create other collateral consequences.** Even if the drug statutes (and hence bare-bones indictments) were somehow viewed as establishing a base-level or default sentencing range – which, as noted, would conflict with the structure of the statute because absent specification of drug type and quantity, no sentencing range is fixed by the indictment – the fact remains that the purported “enhancements” do not merely set minimums within the existing range, but create separate sentencing ranges with other collateral consequences under the federal sentencing guidelines and Title 18 penalty schemes. See, e.g., 18 U.S.C. § 3559 (offense classifications premised on statutory sentencing ranges); 18 U.S.C. § 3561 (eligibility for probation premised on statutory sentencing

ranges); U.S.S.G. § 4B1.1 (establishing career offender enhancements based on statutory sentencing ranges).

Moreover, while the federal mandatory minimum may, in some instances, not exceed the lowest statutory maximum, it is not available without the simultaneous availability of the increased maximum. Thus, the “enhancement” factor becomes, in McMillan’s terminology, a “tail that wags the dog.” 477 U.S. at 88. As the Supreme Court in McMillan pointed out, the upping of a statutory maximum is a telling indication that the supposed enhancement factor should be viewed as an actual “element.” See id. (petitioner’s claim that sentencing factor was “really” an “element” of the offense, “would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment”). While application of the mandatory minimum in McMillan “incidentally serve[d] to restrict the sentencing court’s discretion in setting a maximum sentence” due to a peculiarity of the Pennsylvania statute, 477 U.S. at 99 n. 4, here, application of the minimum mandatory in §§ 841(b)(1)(A) and 960(b)(1) deprive the sentencing court of any sentencing discretion it had under § 841(b)(1)(C) and 960(3) (setting a 0-20 year range), and, at the same time, grant the sentencing court’s additional “discretion” to impose a sentence anywhere from 20 years to **life** imprisonment.

\_\_\_\_\_ Apprendi thus clearly forecloses any expansion of McMillan beyond its unique facts. Indeed, the Apprendi majority emphasized that in McMillan,

We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, [McMillan, 477 U.S. at 85-88], and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment," [McMillan, 477 U.S. at 88] may raise serious constitutional concern.

120 S.Ct. at 2360. Due to the distinguishing factors noted above, this case raises the "serious constitutional concern" that McMillan did not. Here, given the necessity of the drug quantity factor in order to determine **any** penalty scheme, it cannot be disputed, after Apprendi, that quantity is an actual "element" of the drug statutes and thus the McMillan exception does not apply. Indeed, the Supreme Court has indicated as much, in Carless Jones v. United States, \_\_\_ U.S. \_\_\_, 120 S.Ct. 2739 (June 29, 2000), a crack cocaine case, by vacating the judgment and remanding for further consideration in light of Apprendi. In Carless Jones, the Tenth Circuit had held that § 841(b)(1) was "a sentencing provision independent of the substantive charges to which it applies."

Reading Apprendi in tandem with both Carless Jones and McMillan, it is clear that the fact of "drug quantity" must be alleged in the indictment, and proved to a jury at trial in an § 841(b)(1)(A), (b)(1)(B), § 960(b)(1), or (b)(2) case, for the defendant to be sentenced to any mandatory minimum sentence authorized by these statutes.