Mandatory minimum sentences

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Overview and Introduction: Legislatures and Criminal Activity vs. Judges and Individual Defendants

Judicial criticism of Pennsylvania’s mandatory minimum sentence provisions (“MMS”) tends to focus on the statutes’ removal of judicial discretion in sentencing a defendant who has been convicted of crimes that trigger the obligatory sentencing provisions.¹ The MMS statutes obligate judges to uniformly sentence defendants that have been convicted of particular crimes.² Admittedly, the General Assembly passed the MMS statutes to ”restrict the unfettered discretion

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² Mandatory minimum sentence statutes found in Pennsylvania law and sentencing provisions found in the Sentencing Guidelines need to be distinguished from each other. The Guidelines, which are promulgated by the Pennsylvania Sentencing Commission created in 1978, are not binding on the judge. They provide a matrix judges can use to determine a sentence. The matrix is meant to assist judges in crafting sentences that reflect the particular factors tied to the committing of the crime. See Commonwealth v. Walls, 926 A.2d 957, 964 (Pa. 2007), in which the Court described the Guidelines as “guideposts” rather than requirements. Id. See also Kirk J. Henderson, Mandatory - Minimum Sentences and the Jury: Time Again to Revisit Their Relationship, 33 UNIV. DAYTON L. REV. 37, 54 (2008). Henderson notes, as will be discussed later in this paper, that the constitutionality of the Guidelines is really not in question primarily because the guidelines do not obligate judges to apply a particular sentence. Id. As Henderson also notes, the same can not be said of the statutory mandatory minimum sentence provisions (the focus of this paper) particularly in light of the U.S. Supreme Court’s holdings in Apprendi, Blakely, and Booker. Id. at 55.

The debate over the mandatory nature of the Guidelines does not end here, as many commentators have argued that the Guidelines are in effect mandatory (and potentially unconstitutional in light of the Apprendi line of holdings) since judges must provide adequate justification for any departure from them. See Angelica L. Relevant, Indeterminate ≠ Immunity: A Review of the Pennsylvania Sentencing Guidelines, 110 PENN. ST. L. REV. 187, 188 (2005).
we [the General Assembly] give to sentencing judges." Restrictions on judicial discretion inherent to the MMS statutes are, however, a means to larger legislative ends: the reduction of those criminal activities the legislature specifically targeted in the passing the MMS statutes.

The 1988 MMS statutes were intended to stem the trafficking of illegal drugs. The 1995 'Three Strikes' statutes increased the mandatory minimums sentences for repeat violent offenders and were clearly aimed at reducing the occurrence of violent crimes. The crux of the tension between judicial discretion and legislative intent lay in the difference between the crime and the criminal.

As noted, the General Assembly enacted MMS statutes primarily to lessen the occurrence of certain crimes. The laws they drafted thus target the criminal activities themselves. Lengthy incarceration of the criminal is a by-product of the intent to lessen the occurrence of the criminal activity. Conversely, judges tend to understand their sentencing role in the context of the individual. The source of judicial frustration with MMS provisions might be that the provisions effectively block a judge from tailoring a sentence to the individual defendant, obligating that

4. 18 PA. CONS. STAT. ANN. § 7508 (West 1988). Mandatory minimum sentences for drug trafficking range from 1 to 30 years depending on the type and quantity of the illegal drug being trafficked. Referring to drug trafficking mandatory minimums, Senator Greenleaf noted: In order to deal with this we have to try to provide some deterrents. This bill is more about deterrents than punishment because it establishes that if you do sell to a minor or if you are a big-time dealer -- ... (these are) the kind of people we all want to get off the street and be imprisoned without a chance for probation." LEGISLATIVE JOURNAL, Senate, 1784, February 23, 1988.
5. As Representative Piccola noted: 'Three Strikes' mandatories "carve out 10 very specific areas of violent criminal behavior, and we say to the people of Pennsylvania that if individuals are going to commit these violent offenses repeatedly, that they are going to be subject to mandatory minimums which will lock them up well into their sixties, perhaps into their seventies, and very likely for the rest of their lives." LEGISLATIVE JOURNAL, House, 402, October 3, 1995.
6. Hence the title of the Hon. Charles R. Alexander's report 'We're Supposed to Sentence Individuals, Not Crimes,' which, as he noted, reflects a written comment by a judge who participated in the survey contained in the report. See Alexander, supra note 1, at 15.
judge to apply a sentence based entirely on that defendant's conviction for a particular crime rather than the particularities of the case at hand. 7

Given this conflict between the legislature's desire to reduce particular forms of criminal activity and the judicial view that judge's sentence individuals (not crimes), one might expect that judges have found ways to protect the rights of the individual defendant who is eligible to receive a mandatory minimum sentence. This paper is meant to guide defense attorneys with clients facing mandatory minimum sentences as to the cracks and crevices of MMS laws, i.e., those factual and procedural settings where either the defendant has a broadened right to appeal a mandatory minimum or where the judge is able to find way to refrain from applying the statutory sentence.

Judges avoid applying a mandatory minimum in two broad situations: when the judge believes that the constitutional rights of the individual defendant will be compromised through the application of a mandatory minimum sentence; and when the defendant's criminal activity does not appear to the judge rise to the level of criminal activity the legislature intended to deter through the passage of the MMS provisions.

Judges have found opportunities to protect a defendant's constitutional rights, or prevent the application of a mandatory minimum for criminal activities that are outside the activity targeted by MMS provisions. Judges have read the statutes narrowly, refusing to apply the mandatory minimum to a crime that the statute failed to explicitly attach to it. This trend is particularly relevant to sentencing for conspiracy crimes. Secondly, courts have failed to read the MMS provision as requiring that amounts of drugs sold in separate transactions be

7. See Alexander, supra note 1, at 17, quoting from one of the judges who participated in the survey conducted by Alexander and who noted in reference to mandatory minimum sentences: "Judicial discretion to craft a sentence that meets the needs of both the offender and society can be compromised." Id.
aggregated to trigger a mandatory minimum sentence. Finally, some courts have managed to read a 'recidivist philosophy' into the MMS statutes as a way of preventing the triggering of repeat offender mandatory minimums.\(^8\)

Statutory construction is, however, not the only area where judges have protected defendants facing a mandatory minimum sentence. Procedurally, the courts have been very strict in requiring that a guilty plea be made with the knowledge that rendering the plea will subject the defendant to a mandatory minimum sentence. Less clear, however, is whether an appeal is discretionary or to the legality of a sentence. As will be discussed, the Pennsylvania Supreme Court's soon-to-arrive defining of the appeal as either legal or discretionary will make a significant difference in whether an appeal is in fact preserved.

**Mandatory Minimum Sentence Provisions are Here to Stay**

Under Pennsylvania MMS laws, judges can find facts that capable of triggering a mandatory minimum sentence.\(^9\) The facts found by the judge are gauged by a lower standard (preponderance of the evidence) than they would be by a jury (beyond a reasonable doubt); nonetheless, the judge-found facts can result in the same sentence as jury-found facts might.\(^10\) In the wake of the Court's holdings in *Blakely v. Washington*\(^{11}\) and *Cunningham v. California*,\(^{12}\)

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8. As will be carefully and frequently noted throughout this paper, judges do not act uniformly in all of the areas just mentioned. Perhaps the least settled area with respect to the application of a mandatory minimum concerns the 'Three Strikes' laws, which will be discussed in the final section of this paper. While some judges will count each criminal conviction as a means of applying the enhanced repeat offender sentence, others have read the 'Three Strikes' provisions through a recidivist lens to avoid applying the mandatory minimum if the defendant has not had a chance to reform between her commission of criminal acts because those acts were committed in a short period of time.


10. See Henderson, supra note 2, at 41.

commentators have speculated that the United States Supreme Court might be ready to rule that triggering a mandatory minimum sentence with a judicially found fact is unconstitutional.

Pennsylvania's mandatory minimum sentences were the first to be tested by the Court. In McMillan, the Court considered whether the relevant statute, which authorized judges to find facts and test them by a standard lower than that of the jury, is constitutional if the found-facts trigger a mandatory minimum sentence. McMillan consolidated four cases in which the defendants had been convicted of crimes that included aggravated assault, robbery, and manslaughter. The sentencing judge refused to apply § 9712, deeming it unconstitutional, and prompting the Commonwealth to appeal the cases. In essence, the sentencing judge felt that the lower preponderance of the evidence standard they would use to find the fact that would trigger § 9712 violated the defendants' due process rights. The McMillan court disagreed, holding that the sentencing fact (visible possession of a gun) need not be an element of the crime because the minimum sentence the fact triggered did not increase the statutory maximum number of years the defendant would receive.

14. 42 PA. CONS STAT. ANN. § 9712(b) (1982), provides:

Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth’s intention to proceed under this section shall be provided after conviction and before sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable. Id.

15. McMillan, 477 U.S. at 82 n. 2. Possession of a gun was not an element of any crimes for which the defendants had been convicted.
16. Id. at 83.
17. See Commonwealth v. Wright, 494 A.2d 354, 375 (Pa. 1985) (“The constitutional challenge to § 9712(b)’s provision that the issue of the applicability of the statute, i.e., whether the defendant visibly possessed a firearm during the commission of the offense, is to be determined by a preponderance of the evidence. In the four appeals in which the section was declared constitutionally inform, the trial court concluded that the preponderance of the standard violates due process.’”). Id.
Judicial fact-finding, however, has not fared so well in a slew of subsequent cases, most recently in Cunningham v. California, where the U.S. Supreme Court effectively overrode the Supreme Court of California's support for judicial fact-finding that results in an enhanced sentence. The Supreme Court of California failed to see judicial fact finding that did not result in a term with more years than the statutory maximum for that crime as violating either the 6th Amendment or the Court's holding in Apprendi v. New Jersey. The United States Supreme Court disagreed and held that the middle-term of years represented the statutory maximum and that additional facts found by the judge that triggered an upper-term sentence violated both the Sixth Amendment and the Court's own holding in Apprendi.

The Supreme Court has struck down sentencing schemes in which judges can find facts that will add more years than the statutory maximum. And the Court has also defeated mandatory sentence provisions in which judges can find facts that will 'elevate' the defendant to a new level of crime and thereby to receive more years. One might be tempted to conclude that it is only a matter of time before the Court invalidates judicial fact-finding as capable of triggering a mandatory minimum. After all, and as Justice Thomas noted, the point is that a

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19. 549 U.S. 270 (2007). The Supreme Court of California denied review of Cunningham because nine days prior to the denial they had held that judicial fact-finding which resulted in the defendant receiving an 'upper term' or enhanced sentence did not implicate that defendant's Sixth Amendment rights. See People v. Black, 113 P.3d 534 (Cal. 2005). Under California's sentencing scheme, judges were required to sentence defendants to a 'middle-term' of years unless they found aggravating circumstances to justify an increased 'upper-term' sentence. See Cunningham, 549 U.S. at 275.

20. Black, 113 P.3d at 540.
22. Cunningham, 549 U.S. at 281 ('This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.') Id.
23. See Apprendi, 530 U.S. at 468.
24. See Blakely v. Washington, 549 U.S. 296 (2004). Like it's predecessor Apprendi, Blakely was a 5-4 decision with all nine justices voting exactly as they did in Apprendi. See Henderson, supra note 2, at 41 n. 39.
defendant under the Sixth Amendment should not be able to receive any years, be they above the maximum or not, on facts that a jury has not ruled on and are therefore being gauged by a lower standard than a jury applies.\textsuperscript{25} Certainly, Justice Thomas seems to be suggesting as much. Moreover, in \textit{Apprendi}, Thomas actually pointed to \textit{McMillan} as a sharp break with the status quo Fifth and Sixth Amendment rules, remarking that a fact that increases any punishment is an element of the crime and should be treated as other elements that also contribute to the eventual sentence.\textsuperscript{26}

The fact remains that \textit{Apprendi} and its progeny have set a somewhat lasting bright-line for unconstitutional judicial fact-finding: judge-found facts that add years beyond the statutorily defined maximum or that push the crime into a higher category are unconstitutional. Defense attorneys need be mindful that in Pennsylvania judges can find facts which, while not constitutive of an element of the charged crime, can nonetheless result in a mandatory minimum jail term for which the defendant would not have been eligible by virtue of the conviction alone--and there really is not any reason to believe this will change.

\textbf{Statutory Construction of Mandatory Minimum Sentence Laws}

\textbf{Applying the Sentence to Crime and Only the Crime}

MMS provisions are fairly straightforward. If a defendant is convicted of a crime for which a MMS provision attaches, one would expect that the defendant would receive the mandatory minimum sentence specified by the relevant statute. In the areas that will be

\begin{itemize}
\item \textsuperscript{25} See \textit{Harris}, 536 U.S. at 579 (Thomas, C., dissenting) ("there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum."). \textit{Id.}
\item \textsuperscript{26} See \textit{Apprendi}, 530 U.S. at 518 (Thomas, C., concurring) ("Without belaboring the point any further, I simply note that this traditional understanding--that a "crime" includes every fact that is by law a basis for imposing or increasing punishment--continued well into the 20th century, at least until the middle of the century."). \textit{Id.}
\end{itemize}
addressed below: mandatory minimums and conspiracy crimes; aggregation of drugs; and the "recidivist philosophy," judges have shown a tendency to apply mandatory minimums through a strict and literal reading of the statutes, so much so that facts lingering on the fringe of mandatory minimum eligibility have some chance of escaping that fate.

The Pennsylvania Supreme Court recently held that the mandatory minimum statutes are to be applied narrowly, i.e., to the specific crimes the statutes enumerate. Mandatory minimums are not to be applied to crimes that are not explicitly identified in the relevant sentencing provision statute as requiring a mandatory minimum sentence. In the recently decided Commonwealth v. Hoke, the Pennsylvania Supreme Court emphatically declared that a mandatory minimum sentence can not be applied to an inchoate crime, such as conspiracy to manufacture a controlled substance, unless the legislature explicitly attaches the mandatory minimum to that crime. In Hoke, the Court noted that the legislature had in fact attached mandatory minimum sentences to several inchoate crimes and had they wished to provide a mandatory minimum for inchoate drug crimes, they would have written it into the statute.

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27. 962 A.2d 664 (Pa. 2009).
29. 962 A.2d at 669.
30. See 42 P.A. CONS. STAT. ANN. § 9712(a) (West 1974) which, provides:
any person who is convicted in any court of this Commonwealth of a crime of violence as defined in § 9714(g) (relating to sentences for second and subsequent offenses), shall, if the person visible possessed a firearm or a replica of a firearm, whether or not the firearm was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of the offense, be sentenced to a minimum of sentence of at least five years of total confinement. Id.
31. See 18 P.A. CONS STAT. ANN. § 106 (West 1972), which defines the grades of the underlying crimes. See also 18 P.A. CONS STAT. ANN. § 905(a) which "equates the grades and degrees of inchoate crimes...with the grades and degrees of the respective underlying crimes to which (the) inchoate crimes relate." Hoke, 962 A.2d at 668. Mandatory minimums only attach to inchoate crimes of violence. They do not attach to any inchoate drug offenses, even those that involve a firearm. See 18 P.A. CONS. STAT. ANN. §§ 6121, 6317, and especially 7508.
The Supreme Court's holding in *Hoke* is significant because it stands for the proposition that although the Crimes Code may categorize two distinct crimes as of the same grade, both crimes are not necessarily subject to MMS provisions that explicitly pertain to only one of those crimes. The Superior Court in *Hoke* seemingly worked off the Statutory Construction Act, which requires that different sections (18 Pa. C.S. § 106 and 18 Pa. C.S. § 1932(b) in this case) of the same act be read in *pari materia*, i.e., as a single statute. Per this method of statutory construction, the Superior Court concluded that if a defendant is convicted of two crimes of the same grade and a mandatory minimum sentence provision clearly attaches to one of those crimes, the mandatory minimum also attaches to the other crime. In overturning this holding, the Supreme Court remarked that crimes of the same grade can only be likened through their respective maximum sentences, i.e., crimes of the same grade have the same maximum sentence. Since the Crimes Code does not specify minimum sentences for any crime, the Statutory Construction Act does not require a reading of the Crimes Code in which crimes of the same grade carry the same mandatory minimum sentences.

The Supreme Court in *Hoke* gives the MMS provisions a particularly narrow reading as a means of blocking the application of a mandatory minimum for activities that are not specifically targeted by the MMS provisions. While the Crimes Code may equate distinct criminal activities, such as conspiracy to manufacture illegal drugs and actual manufacture of illegal drugs, judicial construction of MMS provisions limits the application of the mandatory minimum sentences to activities that were explicitly targeted by the legislature.


33. *Hoke*, 962 A.2d at 668.

34. *Id.*
§ 9712, the statute at issue in *McMillan*, has also been subject to some extremely narrow readings recently. In *Commonwealth v. Foster*, the defendant was an accomplice in an armed robbery.\(^{35}\) According to the record, the defendant had not actually possessed the automatic weapon that had been used to force the victim to withdraw money from a bank machine.\(^{36}\) The court noted that prevailing case law suggested sentencing the unarmed conspirator per § 9712's provisions for armed robbery.\(^{37}\) The court then looked to the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Dickson*\(^{38}\) and chose not to apply the § 9712's five to ten year sentence.\(^{39}\)

In *Dickson*, the victim sold a car to a third party who wished to return the car and have her money refunded. When the victim refused to refund the money, the defendant left the scene and returned with an armed accomplice. The defendant restrained the victim while the accomplice placed a gun to the victim's head and demanded the money and the car.\(^{40}\) Having already denied allocator\(^{41}\) to address applying § 9712 to an unarmed conspirator, the *Dickson* Court overturned twenty years of precedent and upheld the narrow construction of § 9712, the very construction that allowed the subsequent unarmed conspirator in *Foster* to escape the

\(^{36}\) *Id.*  
\(^{37}\) *Id.* ("prevailing Superior Court authority provided that unarmed co-conspirators were subject to the provisions of § 9712(a), even when they did not possess the firearm used during the commission of the crime."). *Id.*  
\(^{38}\) 918 A.2d 95 (Pa. 2007).  
\(^{39}\) *Id.* at 97.  
\(^{40}\) *Dickson*, 918 A.2d at 98.  
\(^{41}\) See *Id.* at 111 (Castille, J., dissenting) ("Given the frequency with which § 9712 is applied throughout the Commonwealth, and that application of *Williams* to a § 9712 challenge by an unarmed conspirator would not break new ground, it is safe to estimate that there have been dozens of additional cases where Superior Court panels rejected § 9712 claims in unpublished memorandum decisions applying *Williams*, and where allocator was sought and review denied by this Court."). *Id.* See also *Commonwealth v. Williams*, 509 A.2d 1292 (Pa. Super. Ct. 1986), where the Court upheld the application of § 9712 to an unarmed robbery conspirator on the premise that the defendant-conspirator knew his co-conspirator would be using a weapon to rob a convenience store.
mandatory minimum. As the majority and the dissents note, *Dickson* represents a significant and recent change in the reading that Pennsylvania court gave § 9712 and, consequently, a relatively dramatic pairing down of that law’s application to convicted defendants.

**Time Is Not the Issue, Planning Is**

§ 9712 is not only the MMS provision that has received a narrow reading of late. § 7508 was not understood by the Pennsylvania Supreme Court to authorize aggregating the weight of the heroin the defendant had sold to an undercover officer over a three day period so as to trigger § 7508’s minimum sentencing provisions.\(^{42}\) In *Commonwealth v. Johnson*, the defendant had been convicted of selling heroin on three separate occasions over a three-week period.\(^{43}\) In addition, the defendant was found to have constructively possessed heroin inside his car.\(^{44}\) Aggregating the weight of the drugs sold on the three previous occasions placed the defendant in possession of a sufficient quantity of heroin to trigger § 7508’s mandatory minimum sentence provisions.\(^{45}\) The trial court reason that even if the quantities of the sales could not be aggregated, the weight of drugs sold in the last sale plus the weight of the drugs the defendant constructively possessed would be sufficient for the mandatory minimum.\(^{46}\) The Superior Court looked to the Pennsylvania’s Supreme Court decision in *Commonwealth v. Vasquez*\(^{47}\) to bar the aggregation of the drugs from the sales to trigger the mandatory minimum; the Commonwealth,

\(^ {42}\) 18 PA. CONS. STAT. ANN. § 7508(a)(7)(i) (West 2003) provides: When the aggregate weight of the compound or mixture containing the heroin involved is at least 1.0 grams but less than 5.0 grams the sentence shall be a mandatory minimum term of two years in prison and a fine of $5,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity. *Id.*


\(^ {44}\) *Id.*

\(^ {45}\) *Id.*

\(^ {46}\) *Id.*

\(^ {47}\) 753 A.2d 807, 809 (Pa. 2000).
however, prevailed in aggregating the weight of the heroin constructively possessed with the
weight of the drugs sold in a single transaction and the mandatory minimum was upheld. 48

Although the Commonwealth was still able to show that the defendant was in possession
of the requisite weight of heroin, the Johnson court's reliance on Vasquez is intriguing because in
Vasquez the Supreme Court was determining whether drug transactions that occurred over a ten
day period should be considered distinct transactions as means of classifying the defendant as a
repeat offender. 49 In other words, in Vasquez the defendant was arguing that the transaction
should be considered a single transaction so that he could avoid § 7508(a)(3)'s 50 enhanced
sentence. The Vasquez Court accepted the defendant's argument and held that the transactions
were separate because they required "separate planning and execution." 51 The Johnson court
subsequently applied the Vasquez holding as a means of treating the transactions as distinct so
that the drugs involved could not be aggregated. 52

In applying mandatory minimums that can only be triggered if a specified quantity of
drugs is sold, the courts tie the weight of the drugs to the individual transaction. Individual
transactions are distinguished by planning and execution--the weight of the drugs sold in a
separately planned and executed sale can not be aggregated with the weight of the drugs sold in
another transaction. The amount of time that passes between the transactions; the consistency of
the parties to whom the drugs are sold, etc., do not play in any role in the court's analyses. Quite

48. Johnson, 920 A.2d at 888.
49. Vasquez, 753 A.2d at 809.
50. 18 PA. CONS. STAT. ANN. § 7508a(3) (West 2003) provides:
    if at the time of sentencing the defendant has been convicted of another drug
    offense: seven years in prison and $50,000 or such larger amount as is sufficient to
    exhaust the assets utilized in and the proceeds from the illegal activity. Id.
51. Commonwealth v. Vasquez, 753 A.2d 807, 809 (Pa. 1999). The Court also noted
    that the transactions, "should not be treated as a single criminal act simply because the
    transactions involved sales to the same undercover officer." Id.
52. Johnson, 920 A.2d at 893.
simply, to trigger § 7508 the defendant must possess (which includes constructive possession\textsuperscript{53}) or sell the required amount of drugs at the moment of arrest.

**Reading a "Recidivist Philosophy" into MMS Provisions**

When will the courts treat prior convictions as triggering enhanced mandatory minimum sentences for repeat violent offender and repeat drug offenders?\textsuperscript{54} The answer hinges on whether the court opts to read a “recidivist philosophy” into the MMS provisions. Despite the legislature's primary interest in reducing criminal activity and the accompanying removal of judicial discretion in levying sentences that are inherent to MMS provisions, judges have nonetheless used discretion to prevent the application of both 'Three Strikes' laws and repeat offender drug trafficking MMS provisions when they believe that a defendant has not had any chance to reform between the committing criminal acts. Holdings in these areas can reflect a recidivist philosophy that arguably has little to do with the intent behind MMS provisions.\textsuperscript{55}

Perhaps in no other general factual scenario is there more evidence of the judicial struggle to match the sentence to the particular circumstances of the crime and the criminal. Whether to read a recidivist philosophy into the statute is perhaps the most divisive question facing the Pennsylvania judiciary in their application of a mandatory minimum. As shall be seen, cases seem almost evenly split on whether to use a recidivist philosophy to block the application of a repeat offender mandatory minimum.

To read a recidivist philosophy into a statute that provides an enhanced sentence for repeat offenses is essentially to read a time requirement into the statute, i.e., some amount of

\textsuperscript{53}Id. at 890.
\textsuperscript{54}See PA. CONS. STAT. ANN. § 9714.
\textsuperscript{55}See Commonwealth v. Dickerson, 590 A.2d 766, 771-79 (Pa. Super. Ct. 1993) (provides an insightful discussion on the extent to which judicial upholding of a "recidivist philosophy" can block the application of enhanced mandatory minimums for repeat offenders.)
time must exist between the first and second commissions of the offense. Time is necessary for the defendant to have had a chance to reform under the 'hardeneth his neck' theory undergirding the recidivist reading. The oft-quoted summary of this approach comes from a 1937 robbery case and states:

It was not intended that the heavier penalty prescribed for the commission of a second offense should descend upon anyone, except the incorrigible one, who after being reproved, 'still hardeneth his neck.' the heavier penalty prescribed for the second violation of the law is visited upon the one who has not had the benefit of the reproof of a first conviction, then the purpose of the statute is lost.

In many cases, the court will look to see if the defendant has had enough time to prove that he will persist and continue to 'hardeneth his neck' by committing crimes. If the second offense occurs shortly after the first offense, the court may be inclined to block applying an enhanced sentence for the second offense.

The Pennsylvania Supreme Court in Dickerson upheld the Superior Court's vacating of the trial court's application of then § 9714(b)(2)'s enhanced sentence for a defendant who had more than one rape conviction. The rapes in Dickerson were committed on the same evening, within a few hours of each other. More recently, and more significantly, the Pennsylvania Supreme Court directly addressed the question of whether § 9714 reflects a recidivist philosophy and concluded that it did.

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56. Id. at 771.
58. 42 PA. CONS. STAT. ANN. § 9714(b)(2) is now reflected in § 9714(a), which provides: Any person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a minimum sentence of at least ten years of total confinement. Id.
59. Commonwealth v. Shiffler, 879 A.2d 185, 186 (Pa. 2005) ('the more narrow question upon which we granted review here was:... whether the statute reflects a 'recidivist philosophy' and should be construed to allow for heightened punishment for repeat offenders

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In Commonwealth v. Shiffler, the defendant plead guilty to a burglary committed on December 26, 2001. At the October 2002 sentencing hearing, the Commonwealth noted that the defendant had plead guilty to three burglaries in May of 1997 and that he should therefore be treated as a third-time offender eligible to receive the 25-year mandatory minimum term specified by § 9714(a)(2). Unlike the defendant timeline in Dickerson, several years had passed between the Shiffler defendant's commission of the first three burglary charges and the instant charge. The Supreme Court, however, chafed at the Commonwealth's request and chose to read a recidivist philosophy into § 9714 and count the charges at issue as only a second charge thereby collapsing the first three charges into a single charge.

The Shiffler court, however, did not look to the hardeneth[ing] of the defendant's neck and instead found the recidivist philosophy within the statute itself. The Court noted that § 9714(d) includes a vacation clause which allows the defendant to appeal an enhanced repeat offender sentence if an earlier conviction is vacated. The Supreme Court understood the vacation clause to be a clear indication that the General Assembly only wished to target a certain "level of culpability" and that the statute should therefore be read through the recidivist lens, which understands the defendant needs to have to some to reform before he can be subject to an

60. Id.
61. Id. at 188. See also § 9714(a)(2) which does not recognize anything beyond a third-time offender and attaches the maximum possible sentence to that category of repeat offender.
62. Id. (thereby reducing the defendant's sentence from 25 years to five to ten years).
63. Shiffler, 879 A.2d at 195.
64. Id. ("§ 9714(d) is extraordinary to the extent that it authorizes an offender to petition the sentencing court for reconsideration of his mandatory sentence if, after sentencing, one of his previous convictions (i.e., strikes) has since been vacated and the present mandatory sentence depended upon that conviction. 42 Pa.C.S. § 9714. This provision clearly reflects a recidivist philosophy.") Id.
enhanced sentence for subsequent offenses.\textsuperscript{65} Barring that time to reform, the recidivist approach advocates merging crimes that occur in a short period of time.

\textit{Commonwealth v. Williams} is perhaps the most significant case courts can rely on to avoid a recidivist reading and apply the repeat offender enhanced minimum.\textsuperscript{66} The defendant in Williams had plead guilty to two drug trafficking offenses on the same day. The offenses had been committed in 1988 and 1991. Defendant was sentenced for the two offenses on the same day and the sentencing judge refused to apply § 7508(a)(3)(i)’s repeat offender mandatory minimum on the theory that the defendant had not been convicted of the first offense when he committed the second offense, i.e., at the time of his commission of the second offense, he was not yet a repeat offender having not yet been convicted of the first offense.\textsuperscript{67}

The Williams Court, however, failed to perform a recidivist reading and noted that the approach was not constitutionally mandated, and the General Assembly was therefore free to draft laws that do not reflect it.\textsuperscript{68} There are after all other purposes, "such as protection of society and general deterrence," for writing mandatory minimum statutes.\textsuperscript{69} Moreover, this Supreme Court did not see anything but clarity in the statute.\textsuperscript{70}

\textsuperscript{65.} Id. at 192. The Justice’s language reveals his interest in finding some way to interpret the statute so that it can better account for the individual circumstances of the crime. ("This provision (§9714(d)) clearly reflects a recidivist philosophy approach. Indeed, that an offender may be vindicated by the very court that sentenced him-apparently unrestricted by any time bar or other procedural bar-is further proof that the General Assembly did not intend this statute to operate in an unduly harsh manner. To the contrary, the vacation clause indicates the General Assembly’s intent to be realistic in its assessment of the status of the violent-crime offender, ensuring that his enhanced punishment is consistent with his actual level of repeat culpability.") Earlier in the opinion, the Court suggested that the 25 year sentence was absurd in light of the facts and the General Assembly could not have not intended an absurd result, noting "General Assembly does not intend an absurd result to flow from the construction of any statute. Appellant’s argument highlights the potential for absurdity or unreasonableness here." Id.

\textsuperscript{66.} 652 A.2d 283 (Pa. 1994).

\textsuperscript{67.} Williams, 652 A.2d at 284.

\textsuperscript{68.} Id. at 285.

\textsuperscript{69.} Id. at 285 n. 1.

\textsuperscript{70.} Id., § 7508(a)(3)(i) provides:
Williams is an influential case and the Court has used it to suggest that the recidivist approach is quite simply not the approach the legislature intended in drafting the statutes. In Vasquez, the defendant pled guilty to two drug sales that occurred 10 days apart from each other. As the dissent noted, the defendant could have been arrested after any one of the sales and he was therefore receiving a lengthier sentence because the police had chosen to wait and allow him to perform additional transactions before making arresting him. More recently the Superior Court used Williams to sentence a defendant who had been convicted of selling cocaine on three occasions over a six month period. For the second and third offenses, the defendant was treated as a repeat offender and given an enhanced sentence under § 7508(a)(3)(ii).

Procedural Safeguards and MMS Provisions

Mandatory Minimums and the Knowing Plea

The federal courts, in particular, have provided the least amount of leeway in situations where it is evident that a defendant has plead guilty to a crime without the knowledge that she was potentially eligible to receive a mandatory minimum sentence. The Third Circuit in Jamison v. Klem recently held that a guilty plea by which a defendant becomes eligible for receipt of a mandatory minimum sentence is subject to a Boykin analysis. A Boykin analysis,

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71. See Vasquez, 753 A.2d at 811 (Pa. 1999) (Cappy, R., concurring) ("I am compelled to recognize that the legislature in its infinite wisdom has the authority to enact sentencing schemes that reflect penal philosophies other than the recidivist philosophy."). Id.
72. Id. at 808.
73. Id. at 812. As the dissent further notes, Vasquez can be distinguished from Williams because in Williams two and one-half years had lapsed between his guilty plea to three burglary charges and the instant charge. There, the defendant had a chance to reform; here, the defendant did not. Id.
74. Id. at 810.
75. 544 F.3d 266 (3d Cir. 2008).
under the *Jamison* holding, prompts judges to scrutinize the plea to insure that it was "knowing, voluntary and intelligent" with respect to the defendant’s awareness of the potential for the application of a mandatory minimum sentence.\textsuperscript{78} The *Jamison’s* court holding is a broader application of *Boykin* because *Boykin* did not concern mandatory minimum sentences but rather a guilty plea for common-law robbery.\textsuperscript{79}

The defendant in *Jamison* plead guilty to two charges: possession of cocaine and marijuana with intent to deliver and possession of marijuana.\textsuperscript{80} The amount of cocaine (79.1 grams) the defendant plead guilty of possessing triggered the mandatory minimum sentence provisions for drug trafficking.\textsuperscript{81} The marijuana charge, a second charge, triggered the repeat offender mandatory minimums for drug trafficking. Per the MMS provisions, the state trial court sentenced the defendant to five to 10 years with a $30,000 fine for the cocaine possession and intent-to-deliver convictions as well as the marijuana possession charges.\textsuperscript{82} The defendant challenged that sentence arguing that his guilty plea could not be valid because he made it absent the knowledge that it would subject him to a mandatory minimum sentence of five years.\textsuperscript{83} Relief was denied on the theory that Jamison was aware of the maximum sentence for his crimes and that maximum far exceeded the mandatory minimum sentence he was given.\textsuperscript{84}

The defendant found his way into federal court by filing a *pro se* habeas petition.\textsuperscript{85} The magistrate judge held that Jamison had not been sufficiently informed of his eligibility for a mandatory minimum sentence. The Third Circuit, reversing the district court which had reversed

\begin{itemize}
\item \textsuperscript{77} *Jamison*, 544 F. 3d at 272.
\item \textsuperscript{78} \textit{Id.} at 271.
\item \textsuperscript{79} \textit{Id.} at 272.
\item \textsuperscript{80} \textit{Id.} at 272.
\item \textsuperscript{81} \textit{Id.} at 268.
\item \textsuperscript{82} \textit{Id.} at 269.
\item \textsuperscript{83} *Jamison*, 544 F.3d at 270.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 271.
\end{itemize}
the magistrate's finding, quite clearly held that Boykin, and its progeny Brady v. United States, would be controlling precedent in the case because they stand for the principle that a guilty plea is knowing and voluntary only if the defendant is clearly aware of the direct results of making that plea. 86

The Jamison Court defines a significant procedural safeguard for defendants making guilty pleas for crimes to which mandatory minimum sentences can applied. By rejecting the notion that a defendant need only be aware of the statutory maximum sentence for a given crime and extending ‘knowing’ to include awareness of the mandatory minimum, the Court took a significant step in protecting the constitutional rights of an individual defendant as they are found in the Fifth and Sixth Amendments and, by implication, the 14th Amendment. 87 A guilty plea made absent the knowledge of the relevant mandatory minimum is a plea made without knowledge of the direct effects of that plea 88 and is therefore fundamentally at odds with that defendant's constitutional privilege to avoid self-incrimination, as well as his constitutional right to confront his accusers. 89

Although the Third Circuit in Jamison quite clearly safeguards individual constitutional rights by providing a broader reading of Boykin, other procedural issues, namely the nature of a challenge to the application of a mandatory minimum sentence, continue to remain somewhat murky. As of this writing, Pennsylvania courts remain divided on whether an appeal to the receipt of a mandatory minimum sentence is a discretionary appeal or an appeal to the legality of a sentence. The difference is significant.

86. Id. at 277. See also Brady v. United States, 397 U.S. 742, 755 (1970).
87. See Boykin, 395 U.S. at 743.
88. Jamison, 544 F.3d at 273.
Legal and/or Discretionary Appeals to Mandatory Minimum Sentences

If an appeal to a mandatory minimum sentence is viewed as discretionary, it is much more easily waived. An appeal to the discretionary components of a sentence must be made at trial or it is summarily waived on appeal. An appeal to the legality of a sentence, however, cannot be waived even if relevant objections are foregone at the trial stage.

As noted, the defendant in Commonwealth v. Dickson appealed a mandatory minimum sentence provision for conspiracy to commit robbery. Although the Court found that the defendant's appeal to the imposition of the sentence had been preserved, the Court also noted that whether the appeal challenged the discretionary or legal aspects of the sentence remained entirely unclear.

In, Foster, the Court, after a somewhat tortured analysis, concluded that the defendant's appeal implicated the legality of the sentence and therefore could not be waived. The Foster Court noted that when the Commonwealth appeals the court's failure to apply a mandatory minimum sentence that appeal is viewed as a challenge to the legality of a sentence. Thus, if failure to apply a mandatory minimum challenges the legality of the sentence, then receipt of a mandatory minimum must also pertain to the legality of a sentence. On March 5, 2009, the

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90. See Commonwealth v. Foster, 960 A.2d 160, 163 (Pa. Super. Ct. 2008) (“If the sentencing claim herein is found to relate to the discretionary aspects of his sentence, Appellant’s inclusion of the issue in his Pa.R.A.P. 1925(b) statement will not save it from being waived because Appellant failed to raise it in the court below, as required by Pa.R.A.P. 302(a)”)
91. 918 A.2d 95, 97 (Pa. 2007).
92. Dickson, 918 A.2d at 99. The Court noted, “we continue to wrestle with precisely what trial court rulings implicate sentence legality.” See also McCray v. Pennsylvania Dep’t of Corrs., 872 A.2d 1127, 1138 (Pa. 2005) where the Supreme Court commented upon the uncertain scope of challenges to the legality of a sentence.
93. Foster, 960 A.2d at 168 (Pa. 2008).
94. Id.
95. Id. at 169. ("If, as held by our Supreme Court in Vasquez and Smith, ‘the application of a mandatory minimum sentence’ is a non-waivable challenge to the ‘legality of sentence,’ then this holding, as does all precedent, must apply to all litigants similarly situated.") Id.
Pennsylvania Supreme Court granted a Petition for Allowance of Appeal in the *Foster* case to determine whether the application of a mandatory minimum sentence represents a challenge to the legality of a sentence that cannot be waived.  

Poor drafting lay at the heart of the dilemma. As the *Foster* court remarked, § 9712 states that an appeal to the application of the relevant mandatory minimum concerns the legality of the sentence. Subsection (b) of § 9712 states the opposite by describing the allowance of the appeal as "subject to the discretion of the appellate court."  

While it's difficult to predict how the Court will define the appeal to the application of the mandatory minimum, the Pennsylvania Supreme Court on several occasion has fairly quickly concluded such an appeal is properly understood as a matter of the court's construction of the relevant statute. Moreover, for the Court to cast the appeal as discretionary it would need to overturn the lower Superior Court's analysis which seemed fairly thorough and well-supported. In either case, the Court's decision in *Foster* will have a significant effect as it either bars a good number of appeals or broadens the defendant's ability to appeal a mandatory minimum sentence.

**Conclusion**

It's probably not too much to say that mandatory minimum statutes can confront a judge's understanding of her role in the justice system. The mandatory minimum provisions transform

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97. *Foster*, 960 A.2d at 163.
98. *See Shiffler*, 879 A.2d at 484 ("As a preliminary matter, we note that this appeal does not involve a challenge to the discretionary aspects of appellant's sentence, over which this Court would lack jurisdiction. Rather, as was the case in *Bradley*, appellant's present claim raises a question of statutory construction, which is a pure question of law and which, under the circumstances, implicates the legality of appellant's sentence. This is so because, in the absence of the twenty-five year mandatory minimum sentence provided for in Section 9714(a)(2), appellant would have been exposed to a maximum sentence of only twenty years of imprisonment for the burglary conviction."). *See also* Commonwealth v. Bradley, 834 A.2d 1127, 1131 (Pa. 2003); *See also* Commonwealth v. Mouzon, 812 A.2d 676 (Pa. 2003).
99. *Foster*, 960 A.2d at 165-68.
the judge into something of automatic rubber stamp, obligating him to sentence blindly and as a mere response to the conviction for the offense. Judicial chafing at applying mandatory minimums might find its source at that tension between the legislature's intent to limit a particular activity and judicial intent to sentence a particular defendant.

Judges have certainly staked out a few areas where they will consistently construe the statute narrowly, e.g., in terms of the crimes to which they will apply the sentence, and whether the statute authorizes aggregative quantities of drugs. In addition, judges will scrutinize a guilty plea to insure the plea was made with the knowledge of the mandatory minimum to which would the defendant would be subject as a consequence of making the plea.

Consistency, however, does not define judicial treatment of mandatory minimum provisions. For example, whether to read a recidivist intent and block application of repeat offender enhanced minimums is an undecided question, as is the nature of the appeal to the mandatory minimum. Defense attorneys would do well to track these issues as they linger within the tension between judges and the General Assembly's MMS statutes.