

The Adam Walsh Child Protection and Safety Act of 2006 – Part I (2006)
Challenging Mandatory Minimums Excerpt

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Given the courts' growing discomfort with existing mandatory minimums (and negative attention in the press), defense counsel should raise constitutional challenges to the new and increased mandatory minimums contained in the Adam Walsh Act. Obviously, these arguments are not slam dunk winners, but you should raise and preserve them (or others that come to mind) nonetheless. The following arguments are for offense-based mandatory minimums, i.e., where the mandatory minimum is based on jury-found facts or the defendant's guilty plea. Mandatory minimums based on judicial factfinding (which the Adam Walsh Act does not contain) should be challenged on the basis that *Harris v. United States*, 536 U.S. 545 (2002) is no longer good law. See Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4, 2006 WL 2433749 (April 2006).

Eighth Amendment -- Mandatory minimums *should* violate the Eighth Amendment where the harshness of the penalty is grossly disproportionate to the gravity of the offense. See *Ewing v. California*, 538 U.S. 11, 20 (2003) (O'Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (Kennedy, J., concurring in part and concurring in the judgment)). District courts and individual appeals court judges have increasingly expressed impassioned disgust over the irrational, inhumane and absurd results wrought by mandatory minimum and consecutive mandatory minimum sentences, though no federal court has yet refused to impose or uphold them. See *United States v. Hungerford*, ___ F.3d ___, 2006 2923703 ** 5-9 (9th Cir. Oct. 13, 2006) (Reinhardt, J., concurring in the judgment) (concurring in the judgment affirming 159-year sentence under 924(c) for mentally ill 52-year-old woman with no record who never touched a gun because precedent required it, but the sentence is cruel, unjust, irrational and shocks the conscience); *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah Nov. 16, 2004) (sentence for twenty-four-year-old first offender to a consecutive mandatory minimum term of 55 years based on three convictions in the same trial for possessing a firearm was "grossly disproportionate . . . unjust, cruel, and even irrational" but court nevertheless imposed sentence), *aff'd* 433 F.3d 738 (10th Cir. Jan. 9, 2006); *United States v. Ezell*, 417 F.Supp.2d 667, 672-73 (E.D. Penn. 2006) (sentence of 125 years for six armed robbery convictions was "unduly harsh" where guideline range would be between 168 and 210 months but court nevertheless imposed sentence); *United States v. Ciskowski*, 430 F.Supp.2d 1283 (M.D. Fla. 2006)(similar concerns, same result).

In what may be a harbinger of federal constitutional jurisprudence to come, however, the Arizona Supreme Court held in 2003 that the state's mandatory consecutive minimum law subjected the defendant to grossly disproportionate punishment and was unconstitutional as applied. See *State v. Davis*, 79 P.3d 64 (Ariz. 2003) (vacating 52-year mandatory sentence for engaging in sexual intercourse with two different pre-pubescent girls based on underlying facts),

cert. denied, Arizona v. Davis, 541 U.S. 1037 (2004); *but see State v. Berger*, 134 P.3d 378, 385 (Ariz. 2006) (upholding 200-year sentence resulting from mandatory 10-year consecutive sentences imposed for twenty counts of possession of child pornography where defendant's conduct manifested a long-term interest in gruesome exploitation of children). *Davis* and *Berger* together demonstrate that the underlying facts are *critical* when considering a fair and appropriate sentence for a sex crime. It is easy to imagine, for example, a defendant who on several occasions viewed child pornography, but did not purposefully target (through search terminology or otherwise) or actively download it, being subjected to a child exploitation enterprise charge under section 2252A(g) by an over-zealous prosecutor eager to try out the new law (and its accompanying mandatory minimum of 20 years for a first-time offender). In such a case, where the defendant lacks virtually all of the characteristics of a child predator (at which Adam Walsh is purportedly aimed), there may be some room to successfully argue that the Act imposes a "grossly unfair" sentence as applied to his particular case.

Equal Protection -- Congress has been informed for years that mandatory minimums are costly, have little effect on crime control, and have a disparate impact on minorities.¹ Justice Kennedy recently spoke out against mandatory minimums as unjust and unwise.² Even the Director of the Office of National Drug Control Policy told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.³

¹See Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 21-22 (2004); U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

²Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

³Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

The evidence is clear that federal sexual abuse prosecutions have a disproportionate impact on Native Americans, who comprise only 4.5 percent of all federal defendants but 56 percent of those sentenced for sexual abuse.⁴ Between October 2005 and June 2006, the average sentence for sexual abuse was 102.3 months, the third highest of all, with only murder and kidnapping higher.⁵ The vast majority of non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court, where they are subject to significantly lower sentences. In November 2003, the Native American Advisory Group reported (based on data obtained by the Sentencing Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months.⁶ The Adam Walsh Act's 30-year mandatory minimum for § 2241(c) (and any increases the Sentencing Commission adopts for sexual abuse crimes in response to Adam Walsh) will exacerbate the disparate impact on this group. Given the mounting evidence against mandatory minimums in general, and the well documented disparate impact on Indians of federal abuse prosecutions in particular, mandatory minimums should be challenged as failing even the rational basis test under the Equal Protection Clause.

Due Process Right to Individualized Sentencing – The death penalty is prohibited as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and the sentencer in a capital case must be able to give effect to all mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 602-04 (1978). These principles may be able to be extended to mandatory minimum sentencing, at least where the result is mandatory life, or effectively mandatory life.

Separation of Powers – The prosecutor has sole power to charge an offense that carries a mandatory minimum sentence and sole power to lower that sentence. Offense-based mandatory minimums therefore unite the power to prosecute and the power to sentence within the Executive Branch, aggrandizing the power of the Executive and encroaching upon the Judiciary's constitutionally assigned sentencing function. *See Mistretta v. United States*, 488 U.S. 361, 382, 391 n.17 (1989). (In enticement and certain child pornography cases, the government also *creates* the offense. AFPDs Dennis Terez and Vanessa Malone recently argued to the Sixth Circuit that the vast majority of these cases are government stings in which no actual minor is involved. It may be wise for Defender Offices to start keeping track of the number of sting v. real minor cases, as it is not a statistic that the government is likely to reveal.)

An article by Professor Rachel Barkow argues, *inter alia*, that “the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a

⁴U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2005), available at <http://www.ussc.gov/ANNRPT/2005/table4.pdf>.

⁵Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through June30, 2006), http://www.ussc.gov/Blakely/Quarter_Report_3Qrt_06.pdf.

⁶See Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003).

sufficient judicial check. That is, . . . the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling. Thus, under a formalist analysis that looked to the criminal jury's role in the separation of powers [which Prof. Barkow encourages], the Court would reject not only those laws that require judges (not juries) to increase a defendant's maximum sentence but also those laws that require judges (not juries) to set a minimum sentence."⁷

⁷Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1043 (Feb. 2006).