

No. _____

In the Supreme Court of the United States

October Term, 2018

CAIRO LOPEZ, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. This Court should consider whether combining in the Executive Branch the power to charge and the power to control sentences in statutory mandatory minimum cases violates the Fifth Amendment's Due Process Clause, the Eighth Amendment's prohibition of Cruel and Unusual Punishment, and the doctrine of Separation of Powers.
2. This Court should consider whether statutory mandatory minimum sentences should be advisory and the sentence imposed reviewable for reasonableness.

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Petitioner, Cairo Lopez, Jr. asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 13, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Petitioner’s case on May 13, 2019. This petition is filed within 90 days after entry of the judgment. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”

The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.”

FEDERAL STATUTE INVOLVED

The text of Title 18 U.S.C. § 3553(a) is reproduced in Appendix B. The text of § 3553(a) specifically states, “The court *shall* impose a sentence sufficient, but not greater than necessary[.]”.

STATEMENT

Mr. Lopez was indicted on three counts—count one charged him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g); count two charged him with possessing a firearm

in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c); count three charged him with possession of 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Mr. Lopez pleaded guilty with a plea agreement to three counts, two of which had mandatory minimum sentences. Count two, possessing a firearm in furtherance of a drug trafficking offense, had a five-year mandatory consecutive sentence, and count three, possessing a mixture of methamphetamine, had a mandatory minimum of five years..

At Mr. Lopez's first sentencing hearing, the Government requested the district court impose a sentence of 70 months on counts one and three to run concurrent, and 60 months on count two to run consecutive, for a total of 130 months' imprisonment.

Mr. Lopez requested a sentence of 72 months' imprisonment—60 months on count two and 12 months and a day on counts one and three.

In sentencing Mr. Lopez, the district court expressed concern that “these drug sentences when they’re piled on top of five-year mandatory or ten-year mandatory minimums can be draconian.” The court explained that the United States Supreme Court had recently held that a court could consider the effect of a mandatory

minimum when sentencing a drug offender. *See Dean v. United States*, 137 S. Ct. 1170 (2017). The court announced that it was going to take into consideration the mandatory minimum sentences in sentencing Mr. Lopez. After also considering significant mitigating factors and the factors under 18 U.S.C. § 3553(a), the court imposed a sentence of 90 months' imprisonment—30 months concurrent on counts one and three and 60 months consecutive on count two.

The district court believed that it could impose a sentence below the mandatory minimum and that 120 months was an unreasonably high sentence for Mr. Lopez's offenses. The court emphasized that "120 months is a long time and 90 is a long time too," but 120 months was "too long," while 90 months was "long enough."

When the Government objected to the sentences being below the statutory mandatory minimums, the district court continued the sentencing hearing to determine whether a 90-month sentence could be imposed. In his sentencing brief, Mr. Lopez's argued in support of a sentence below the mandatory minimum: (1) mandatory minimums are unconstitutional because they violate the Fifth Amendment, Eighth Amendment, and the Separation of Powers

Doctrine; and that (2) *United States v. Booker*, 543 U.S. 200 (2005), reemphasized that only the sentencing judge, not the legislature or the executive branch, has the discretion to sentence an individual defendant.

At Mr. Lopez’s second sentencing hearing, the district court explained that “[t]he bad news is that we have two mandatory minimums and there’s nothing I can do to get around it.” The court reversed its earlier ruling and sentenced Mr. Lopez to 120 months’ imprisonment—60 months on count two to run consecutively to 60 months on counts one and three.

Mr. Lopez appealed, arguing that mandatory minimum sentences violated the Fifth Amendment’s due process clause and Eighth Amendment’s prohibition of cruel and unusual punishment, as well as, the separation of powers doctrine. Mr. Lopez acknowledged that the argument was foreclosed by Fifth Circuit and Supreme Court precedent, but preserved the issue for this Court to reconsider its precedent in *Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991). The court of appeals, finding itself bound by *Harmelin*, affirmed the sentence. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

Mandatory minimum sentences violate the Fifth Amendment's Due Process Clause, the Eighth Amendment's prohibition of cruel and unusual punishment, and the separation of powers doctrine.

Statutory mandatory minimum sentences, such as those under 21 U.S.C. § 841(b) and 18 U.S.C. § 924(c), do not allow Article III district judges to impose an individualized sentence as required under 18 U.S.C. § 3553(a) and the advisory Sentencing Guidelines. Thus, those statutes violate the Due Process Clause. The mandatory minimum sentences also violate the Eighth Amendment's prohibition of cruel and unusual punishment and the requirement that a defendant's sentence be proportional to the offense, the defendant's role, and similarly-situated defendants. Lastly, mandatory minimum sentences violate the Separation of Powers doctrine because the Government is given more authority to sentence an individual defendant than the district court. Because statutory mandatory minimum statutes violate important constitutional provisions and doctrines, and result in vast numbers of criminal defendants serving sentences that are greater than necessary, this Court should grant certiorari to address this pressing issue.

A. Mandatory minimum sentences violate the Fifth Amendment's Due Process Clause.

Mandatory minimum sentences violate due process because they eliminate the sentencing court's ability to sentence a defendant as an individual. A federal district court has inherent power, under Article III of the Constitution, to fashion individual sentences for defendants. Mandatory minimum sentences with no avenue for a court's exercise of discretion in sentencing violate a defendant's due process right to an individualized sentence.

Individualized sentencing is also required by 18 U.S.C. § 3553(a) and the Sentencing Guidelines. The text of § 3553(a) specifically states, "The court shall impose a sentence sufficient, but not greater than necessary[.]" But mandatory minimum sentences, established by Congress and chosen by government prosecutors, deprive the court of its authority to impose a sentence that is sufficient but not greater than necessary. Many Article III judges—including the judge in Mr. Lopez's case—have lamented the mandatory minimum sentences they are required to impose even when they consider those sentences to be greater than necessary. *See, e.g., United States v. Wills*, 967 F.2d 1220, 1226 (8th Cir. 1992) (concurrence); *United States v. Patillo*, 817 F. Supp. 839, 841–42 (C.D. Cal. 1993); United States Sentencing Commission, *Results of Survey of United States District Judges January 2010 through*

March 2010 (2010); Lori Pilger, *Judge: 10-year sentence is ‘absolutely ridiculous’*, Lincoln Journal Star (Feb. 22, 2016), https://journalstar.com/news/local/judge--year-sentence-is-absolutely-ridiculous-/article_c*17c5fc-301c-5bec-bcde-c5c789ad81b2.html.

In Lopez’s case, the legislative branch and the executive branch decided that the appropriate minimum sentence for any criminal defendant convicted under 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 924(c), was 120 months. This was so even though the district court believed a 120-month sentence was “an unreasonably high sentence” in Lopez’s case. The court did not “want to impose a sentence higher than 90 months.” In coming to that conclusion, the court considered the § 3553(a) factors and the mitigating facts in Lopez’s case.

In mandatory minimum sentence cases, not only are district courts unable to follow the dictates of § 3553(a) and the Guidelines, they are also prevented from exercising their Article III authority to sentence a criminal defendant as an individual. Accordingly, these mandatory minimum sentences are unconstitutional. *Cf. United States v. Booker*, 543 U.S. 200 (2005) (holding mandatory sentencing guidelines unconstitutional, rendering them advisory and subject to review for unreasonableness).

B. Mandatory minimum sentences violate the Eighth Amendment's cruel and unusual punishment prohibition.

A mandatory minimum sentence, required to be imposed even when the Article III judge finds it to be greater than necessary for the individual being sentenced, constitutes cruel and unusual punishment in violation of the Eighth Amendment. In *Harmelin v. Michigan*, this Court upheld lengthy mandatory minimum sentences against attack under the Eighth Amendment's proportionality analysis. 501 U.S. 597 (1991). The proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

In Mr. Lopez's case, the district court found that the gravity of the offense, after considering § 3553(a) factors and mitigating evidence, did not justify the harsh 10-year mandatory minimum sentence. The court stated, "I don't want to impose 120-[month]-sentence, I just think it's too long."

Indeed, a mandatory minimum sentence of 10 years for having drugs and carrying (not using) a firearm is far too harsh a penalty when compared to more serious crimes and their punishments. For example, a defendant who commits genocide, in violation of 18

U.S.C. § 1091, would not face a mandatory minimum sentence. Instead, § 1091 caps punishment at 20 years. *See* 18 U.S.C. § 1091. This means, Mr. Lopez received for his drug and gun offense half the maximum punishment for genocide, even though his offense did not involve violence or torture.

Mr. Lopez’s consecutive mandatory minimum sentences in this case are not proportional to other defendants in the Western District of Texas or in any other district. This is because prosecutors retain broad discretion to determine when, if at all, to charge a defendant under mandatory minimum sentencing provisions. Some prosecutors “routinely charge offenses that carry mandatory minimum sentences and use enhancements” to prevent judges from imposing below-Guidelines sentences. *See* Michael A. Simons, *Prosecutorial Discretion in the Shadows of Advisory Guidelines and Mandatory Minimums*, 19 Temp. Pol. & Civ. Rts. L. Rev. 377, 385–86 (2010).

Mr. Lopez’s mandatory minimum charges were not only driven by the current political climate, but also the political climate of each individual U.S. Attorney’s Office. In other parts of the Western District of Texas and the United States as a whole, defendants comparable to Mr. Lopez have been charged differently solely be-

cause those United States Attorney's Offices or individual prosecutors did not believe conduct similar to Mr. Lopez's conduct warranted a mandatory minimum sentence of 120 months. *See, e.g., Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them?*, 6 Fed. Sent. 74, 75 (Sept. 1, 1993) (statement of Henry R. Wray Director, Administration of Justice Issues United States General Accounting Office).

Mr. Lopez's sentence of 120 months is disproportionate when compared to his codefendant. Mr. Lopez's codefendant received a sentence of 12 months and 1 day. His sentence is 10 times longer than his codefendant's sentence. Based on the severity and disproportionality of Mr. Lopez's mandatory minimum sentence as compared to more severe offenses, similarly-situated defendants around the United States, and his codefendant's sentence and the lack of uniformity in the executive branch's charging discretion, Mr. Lopez's mandatory minimum sentence of 120 months is cruel and unusual punishment in violation of the Eighth Amendment.

But even if statutory mandatory minimum sentences of the type in Mr. Lopez's case can survive the proportionality analysis, this Court should reconsider its holding in *Harmelin v. Michigan*. That is so because mandatory minimum sentences that require a sentence above that which the Article III judge deems sufficient,

but not greater than necessary, remove sentencing discretion from the judicial branch and grant it to the executive branch.

C. Mr. Lopez’s mandatory minimum sentences violate the Separation of Powers doctrine.

The law is well-established that only a neutral, detached decision-maker may impose a federal criminal sentence. When a sentence is the result of a prosecutor’s decision to charge an offense with a mandatory minimum, that sentence is not imposed by a neutral decision-maker. Such prosecutorial discretion over sentencing violates the doctrine of Separation of Powers.

Under the Constitution, the judicial branch is “[t]he branch of government consisting of the courts, whose function is to interpret, apply, and generally administer and ensure justice.” *Judicial Branch*, Black’s Law Dictionary (10th ed. 2014). The executive branch is “[t]he division of government charged with administering and carrying out the law[.]” *Id.* (“executive branch”). And, the legislative branch is “[t]he division of government responsible for enacting laws.” *Id.* (“legislative branch”). In the mandatory minimum sentencing context, these roles have been dramatically altered.

The legislative branch enacted the minimum sentence for a crime without any consideration for the individual defendant or

the unique facts of the offense. The legislature then gave the executive branch the power to interpret, apply, and administer that law. This is evidenced by the discretion and power given to the prosecution. Ultimately, the prosecutor decides how a person is charged and whether that mandatory minimum is enforced or waived under 18 U.S.C. § 3553(e). *See, e.g.,* Jeffrey T. Ulmer, Megan C. Kurlychek, & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. Res. Crim. & Delinq. 427, 451 (2007) (“Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.”); DOJ Charging and Sentencing Policies: From Civiletti to Sessions, 30 Fed.Sent.R. 3, 2017 WL 6495475 (2017) (analyzing DOJ charging practices for the past 40 years). As a result, the judicial branch is left with administering the law as written by the legislative branch, but the legislature set mandatory minimum sentences, which eliminate judicial discretion, and delegated the judiciary’s role to the executive branch. This scenario results in a violation of the separation of powers doctrine. Consequently, the mandatory minimum sentencing scheme is unconstitutional. *See, e.g.,* Donald A. Dripps, *Charging As Sentencing*, University of San

Diego School of Law (Aug 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427333.

Mr. Lopez’s case exemplifies the violation of the separation of powers doctrine. The district court explicitly stated that, after considering the § 3553(a) factors, it did not “want to impose a sentence higher than 90 months.” Nevertheless, Mr. Lopez received a total sentence of 120 months. He was sentenced to 30 more months than the judge thought appropriate because the legislature arbitrarily set mandatory minimum punishment for the offenses, and the prosecutor chose to charge offenses with those mandatory minimum sentences. The judicial branch was left with no power to individually sentence Mr. Lopez.

D. *Booker*, and its progeny, emphasize that the sentencing judge, not the legislature or the executive branch, has the discretion to sentence an individual defendant.

In *United States v. Booker*, this Court held that the mandatory federal Sentencing Guidelines scheme was unconstitutional. 543 U.S. 220, 221, 226, 260, 265 (2005). To maintain the use of the Guidelines, this Court rendered them advisory. *Id.* at 258–59. Although this Court based the holding in *Booker* on the Sixth Amendment right to jury trial, “there is a strong implication that the separation of powers doctrine was also at work in that case and that

the real concern was the need for judicial discretion in sentencing.” Kieran Riley, *Trial By Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. Pub. Int. L.J. 285, 303 (2010). “[O]ne similarity between all sentencing systems that the [Supreme] Court has deemed unconstitutional is their lack of judicial discretion.” *Id.* “Likewise, sentencing systems deemed valid by the Court have allowed judges to use their discretion and rely on sentencing factors to make their decisions.” *Id.* Laws imposing mandatory minimums without any judicial discretion are unconstitutional because they entirely eliminate judicial discretion.

In Mr. Lopez’s case, the prosecutor decided to charge him with two mandatory minimum offenses. The legislature armed the executive branch with the power not only to charge a defendant with a mandatory minimum offense, but also to determine whether the defendant is worthy of a sentence below the mandatory minimum. Ultimately, the district court was left with no judicial discretion. If the court was not stripped of judicial discretion, it would have imposed a sentence of 90 months.

The full *Booker* analysis should apply to statutory mandatory minimums. The mandatory Guidelines the Court held unconstitutional in *Booker* had the full statutory authority of the United

States Code. See *Mistretta v. United States*, 488 U.S. 361, 371–73 (1989). The *Mistretta* Court held that Congress could validly delegate its statutory authority to the Sentencing Commission. If the mandatory Guideline sentencing provisions had to be turned advisory to preserve the separation of powers, then so too must the mandatory sentencing provisions found in Title 18.

Booker is fundamentally about defending the constitutional terrain of the district court judges. See, e.g., Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 388 (2006) (“*Booker*’s conceptual core—what we might call the Tao of *Booker*—is best understood not in terms of vindicating the role of juries and the meaning of the Sixth Amendment’s jury trial right, but rather in terms of vindicating the role of judges and the meaning of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment.”)

For many years, Article III district court judges, including Mr. Lopez’s judge, have issued opinions lamenting and criticizing mandatory minimums, often, while reluctantly imposing them. Erik Lunca and Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 1 (Sept. 2010) (“In the past, it was perhaps unsurprising to find federal judges—including Justices Stephen Breyer and Anthony Kennedy, and the late Chief Justice William Rehnquist—

voicing dismay at the excessive sentences they were required to pronounce and affirm.”)

It is undeniable that many district judges regularly conclude, in the exercise of their wisdom and discretion, that justice and fairness are best served in an individual case by imposition of a custodial sentence shorter than the statutory minimum. The district judge here made such a determination in August but rescinded the 90-month sentence in September, lamenting that it had to follow the mandatory minimums.

The argument that statutory mandatory minimums should be construed as advisory in the same way that Guidelines provisions are advisory is a colorable one that this Court has not addressed. Mandatory minimums should be considered advisory just as the Guidelines are, with a presumption of legality, and searching review for sentences under the minimum—but that, just as with the Guidelines, it is unconstitutional to make them mandatory and binding. Under *Booker*, and its progeny, the separation of powers doctrine, and the constitution, district judges have the inherent power to impose such sentences subject to reasonableness review of the sort this Court applies to sentencing appeals arising under the Guidelines.

E. This Court has not squarely addressed these arguments.

This case presents a challenge to the constitutionality of the statutory mandatory minimum scheme. Here, a federal district court wanted to exercise its Article III power to impose, in the interest of justice and with due consideration of all relevant facts, an individualized sentence that was sufficient but not greater than necessary. Because the Government had chosen to charge under the mandatory minimum statutes, however, the court could not do so. Because this issue arises repeatedly in federal district courts around the country, this Court should grant writ of certiorari.

This Court has held repeatedly that only judges, neutral decision makers, may exercise sentencing discretion. Prosecutors now exercise more sentencing discretion than judges. Prosecutorial discretion over charges carrying mandatory minimum sentences violates the Fifth Amendment, the Eighth Amendment, and the Separation of Powers doctrine. The Court should grant certiorari to revisit whether *Harmelin v. Michigan* is still good law, or to determine whether statutory mandatory minimum sentences should be advisory and the sentence imposed reviewable for reasonableness.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

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