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## A PROPOSAL TO CHANGE SENTENCING APPEALS IN ARKANSAS

*Anthony L. McMullen, J.D.\**

### I. INTRODUCTION

Consider the following: a jury finds a defendant guilty of a Class Y felony, which carries a potential sentence of ten to forty years or life in prison on the first offense.<sup>1</sup> Because this is Arkansas, the jury hears evidence relevant to sentencing. The prosecutor seeks a long term of imprisonment and is willing to say and do anything necessary to see it happen. And the judge, who does not want to be perceived as being “soft on crime,” lets the prosecutor proceed unfettered over the defendant’s vehement objections. The jury then deliberates. Before the sentencing phase, the jury was inclined to give the defendant the minimum sentence of ten years. After hearing the prosecutor’s closing argument, the jury is so fearful that it finds a thirty-year sentence more appropriate. On appeal, the defendant raises his objections again. No matter how meritorious the defendant’s arguments may be, he will not be able to get past one strange rule: “A defendant who has received a sentence less than the maximum sentence for the offense cannot show prejudice from the sentence itself.”<sup>2</sup> Because of this maxim, the most egregious prosecutorial misconduct during the sentencing phase may go unchecked if the jury sentences the defendant to anything less than the maximum.

A review of Arkansas case law reveals a lack of logic in adopting this rule. Further, Arkansas appears to be unique among the states that use jury sentencing in holding that a criminal defendant cannot establish prejudice from anything short of a maximum sentence. This brief article will review the history of sentencing appeals in Arkansas. It will then compare Arkansas’s current law to other states that have jury sentencing in non-capital cases. Finally, it will present an argument for overruling this precedent and adopting a better approach for reviewing allegations of error as it relates to the sentence.

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1. ARK. CODE ANN. § 5-4-401(a)(1) (West, Westlaw through 2018).

2. *E.g.*, *State v. Franklin*, 351 Ark. 131, 142, 89 S.W.3d 865, 870 (2002).

## II. SENTENCING APPEALS IN THE MID-20TH CENTURY

Before 1987, the Supreme Court of Arkansas appeared not to require a maximum sentence before granting sentencing relief. There are three cases from the 1970s involving erroneous application of the habitual offender statute, which provides enhanced penalties for multiple offenders. In *Richards v. State*,<sup>3</sup> the court ruled that the trial court erred by having the jury consider an improperly certified out-of-state conviction. This error affected the sentence only.<sup>4</sup> Therefore, the court gave the Attorney General the choice of consenting to the sentence being reduced to the minimum for the crime or having the judgment reversed and the case remanded for a new trial.<sup>5</sup> The court cited no cases to support its holding.<sup>6</sup> However, it relied on *Richards* in two subsequent cases. In *Roach v. State*,<sup>7</sup> the court ruled that the trial court erred in admitting a conviction without proof that the offense was punishable by imprisonment in the Arkansas penitentiary. The court reduced appellant's sentence to the minimum "to remove all possibility of any prejudicial effect to the appellant."<sup>8</sup> Again, the Attorney General had the choice of accepting this sentence or having the case remanded for a new trial.<sup>9</sup>

In 1976, the state supreme court considered *Rogers v. State*.<sup>10</sup> There, a jury convicted appellant of burglary.<sup>11</sup> The State sought to increase his sentence under the habitual offender statute.<sup>12</sup> However, the court found that two of appellant's five convictions were inadmissible.<sup>13</sup> This rendered the relevant subdivision of the habitual offender statute inapplicable.<sup>14</sup> The court then commented as to the effect on the sentence:

When cumulated with appellant's instant conviction the language of s 43—2328(3) becomes applicable. This section makes mandatory the imposition of the maximum term of imprisonment, 21 years, against one falling within its ambit. It additionally provides that a multiplier may be used to lengthen this term, and it is clear that the jury, in sentencing appellant to a 31 1/2-year term of imprisonment, thus increased the period of incarceration by use of this device. However, because we cannot ascertain beyond speculative persuasion what role the inadmissible convic-

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3. *Richards v. State*, 254 Ark. 760, 498 S.W.2d 1 (1973).

4. *Id.*

5. *Id.* at 761, 498 S.W.2d at 2.

6. *See generally id.*

7. *Roach v. State*, 255 Ark. 773, 503 S.W.2d 467 (1973).

8. *Id.* at 779, 503 S.W.2d at 471.

9. *Id.*, 503 S.W. 2d at 471.

10. *Rogers v. State*, 260 Ark. 232, 538 S.W.2d 300 (1976).

11. *Id.* at 233, 538 S.W.2d at 301.

12. *Id.*, 538 S.W.2d at 301.

13. *Id.* at 236, 538 S.W.2d at 303.

14. *Id.*, 538 S.W.2d at 303.

tion played in enhancing appellant's sentence and because the potential for prejudice is thereby engendered, we reduce this sentence to the minimum permissible term, or 21 years.<sup>15</sup>

Again, the Attorney General had the choice of accepting the reduced sentence or retrying the appellant.<sup>16</sup>

So, the law at this point appeared clear: when there was trial error that related to the sentence only, the Supreme Court of Arkansas gave the Attorney General the choice of accepting a modified sentence or retrying the case. In addition to the aforementioned cases, this result can be seen in the 1963 case *Osborne v. State*,<sup>17</sup> where the trial court erroneously refused to instruct the jury not to consider a prior bad act for the purposes of enhancing an appellant's sentence; the 1972 case *Wilburn v. State*,<sup>18</sup> where the trial court erred in allowing the prosecutor to read into evidence a certified record of a prior conviction when that record failed to show that the appellant was represented by counsel or waived his right to counsel; and the 1985 case *Meadows v. State*,<sup>19</sup> where the appellant was convicted of manslaughter of a viable fetus, though such was not within the purview of the manslaughter statute at the time.<sup>20</sup> Language in *Meadows* is particularly instructive:

Appellant's final point is that his conviction for the manslaughter of Randy Waldrip must be reversed because of the prejudice caused by the evidence adduced in the jointly tried case involving the viable fetus. Indubitably, some of the evidence concerning the fetus could have inflamed the jury. The State introduced evidence concerning the viability of the fetus at various stages of gestation, and then presented detailed evidence about the death of the fetus as a result of "slow asphyxiation" caused by a "shearing" of the umbilical cord, much like an astronaut might die in outer space if he lost his "lifeline" to his orbiting space vehicle. Under A.R.E. Rule 401, such a vivid and detailed explanation of the death of the fetus was neither relevant, nor properly admissible, in the Waldrip case. However, the erroneous evidence would not have influenced the jury on the question of guilt or innocence, but could have improperly influenced the jury in fixing the sentence. Because of this possible prejudice in the fixing of the sentence, we affirm the judgment of conviction but reduce the sentence to the minimum the jury could

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15. *Id.*, 538 S.W.2d at 303.

16. *Rogers*, 538 S.W.2d at 303.

17. *Osborne v. State*, 237 Ark. 5, 237 S.W.2d 170 (1963).

18. *Wilburn v. State*, 253 Ark. 608, 487 S.W.2d 600 (1972).

19. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

20. The law has since changed. See Ark. Act 1273 of 1999 (codified at Ark. Code Ann. § 5-1-102) (expanding the definition of "person," for the purpose of the homicide statutes, to include "a living fetus of twelve (12) weeks or greater gestation.").

have set for the offense of which the appellant was convicted.<sup>21</sup>

It also is helpful to consider the 1980 Arkansas Court of Appeals' decision in *Philmon v. State*.<sup>22</sup> There the trial court committed two evidentiary errors. The court of appeals found that the errors were harmless as it related to the appellant's guilt, but it reduced the appellant's sentence due to the inadmissible evidence possibly influencing the jury on sentencing.<sup>23</sup>

### III. *YOUNG V. STATE* AND *BUCKLEY V. STATE*: A CHANGE FOR THE WORSE

The change in the law started in 1985 with *Young v. State*.<sup>24</sup> There, the appellant was convicted of rape.<sup>25</sup> At the time the appellant committed the crime, rape was a Class A felony, punishable by a term of imprisonment of between five and fifty years. The statute was later amended to make rape a Class Y felony, punishable by a term between ten to forty years. In a petition for post-conviction relief, the appellant argued that the State had improperly tried and punished him for a Class Y felony.<sup>26</sup> The Supreme Court of Arkansas stated that, had the appellant raised the issue, he would have been entitled to a jury instruction on rape as a Class A felony.<sup>27</sup> But the court held that, because his fourteen-year sentence fell within the range for both Class A and Class Y felonies, the appellant could not show any prejudice from this error.<sup>28</sup> The supreme court provided no citation to support the conclusion, and nothing in the opinion indicates that the court considered the possibility that the jury could have handed down a sentence somewhere between five and ten years imprisonment (less than the minimum for a Class Y felony, but above the then minimum for a Class A felony).<sup>29</sup> *Young* still represents the starting point for the increased difficulty in appeals from a sentence in Arkansas.

The supreme court relied on *Young* when reviewing the sentence in *Buckley v. State*.<sup>30</sup> There, the appellant had previously received two life sentences for two counts of delivery of a controlled substance, but he appealed and received a new trial on sentencing.<sup>31</sup> The appellant wanted to waive his

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21. *Meadows*, 291 Ark. at 112, 722 S.W.2d at 587–88.

22. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ark. App. 1980).

23. *Id.* at 1127, 593 S.W.2d at 508.

24. *Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985) (per curiam).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Buckley v. State*, 349 Ark. 53, 67, 76 S.W.3d 825, 833–34 (2002).

31. *Id.* at 60, 76 S.W.3d at 829.

right to a jury trial, but the State objected, and a new jury sentenced him to two consecutive twenty-eight-year terms of imprisonment.<sup>32</sup> The appellant challenged the trial court's decision to try him in front of a jury, but the supreme court held that the Arkansas Code explicitly authorized such a procedure.<sup>33</sup> After so holding, the court continued:

Additionally, Buckley cannot demonstrate that he was prejudiced by being resentenced by a new jury, because he received a sentence within the statutory range, and one that was significantly less than his original sentence. Delivery of a controlled substance is a Class Y felony, . . . which carries a sentencing range of ten-to-forty years or life. A defendant who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself. *See Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985).<sup>34</sup>

The appellant also sought review of several evidentiary issues and claimed prejudice due to him receiving a sentence greater than the statutory minimum. In addition to finding that his claim was not preserved for appellate review, the court relied on *Young* and stated that he still could not show prejudice due to being sentenced to less than the maximum.

Four years later, the supreme court cited *Young* in *Tate v. State*.<sup>35</sup> There, the alleged error was introducing pictures depicting the victim's life during the sentencing phase of trial.<sup>36</sup> While there is language in the opinion suggesting that the court would have ruled against the appellant on the merits of the argument,<sup>37</sup> the court declined to review the argument due to the appellant receiving a forty-year sentence (less than the maximum sentence of life imprisonment for first-degree murder).<sup>38</sup>

The supreme court seems steadfast in preserving this rule. In *State v. Thompson*,<sup>39</sup> the State sought to reverse post-conviction relief due to ineffective assistance of counsel.<sup>40</sup> The defendant was convicted of two counts of second-degree sexual assault and one count of rape.<sup>41</sup> The jury imposed sen-

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32. *Id.*, 76 S.W.3d at 829.

33. *Id.* at 69, 76 S.W.3d at 835.

34. *Id.* at 64, 76 S.W.3d at 832 (internal footnote reference and statutory citations omitted).

35. *Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006).

36. *Id.* at 577, 242 S.W.3d at 256.

37. "In *Hicks v. State*, 327 Ark. 727, 940 S.W.2d 855 (1997), this court affirmed the trial court's admission of a series of photographs during the penalty phase which was much more extensive and detailed than the series in question here[.]" *Tate*, 367 Ark. at 583, 242 S.W.3d at 261.

38. *Id.*, 242 S.W.3d at 261.

39. *State v. Thompson*, 2017 Ark. 50, 510 S.W.3d 775.

40. *Id.* at 1, 510 S.W.3d at 776.

41. *Id.* at 2, 510 S.W.3d at 777.

tences that were less than the maximum.<sup>42</sup> After the court affirmed the convictions on appeal, the defendant sought post-conviction relief, arguing ineffective assistance of counsel.<sup>43</sup> Some of the arguments directly related to errors during the sentencing phase. The trial court granted the defendant's petition and specifically referenced alleged errors related to the sentence.<sup>44</sup> The supreme court reversed, explaining "We have held that a sentence less than the maximum sentence for an offense cannot show prejudice from the sentence itself. . . . As appellee was sentenced to less than the maximum on all charges, there must be something more than the sentence received in order for him to demonstrate prejudice."<sup>45</sup> However, Justice Hart dissented:

[T]he majority applies a prejudice standard that precludes a defendant from establishing prejudice from the sentence itself if the defendant receives a discretionary sentence of less than the maximum. Again, without knowing what the jury considered, this standard is virtually impossible to meet. We have never explained our reason for adopting the draconian standard. As one commentator has noted, "The only plausible explanation for these heightened standards is to help dispose of (i.e., deny) many ineffective assistance claims." . . . The United States Supreme Court has noted [in *Glover v. United States*<sup>46</sup>] that its "jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." . . . Thus, our prejudice standard is in clear tension with *Glover*. Certainly, "nothing in *Glover* suggests that a non-capital defendant must receive the maximum available sentence in order to demonstrate prejudice." . . . It is time to reexamine our reliance on this impossible prejudice standard.<sup>47</sup>

It is not clear how the supreme court started with the sentencing problem in *Young*<sup>48</sup> and reached the conclusion that an appellant cannot establish prejudice absent a maximum sentence. True, appellate courts do not reverse absent a showing of prejudice.<sup>49</sup> And because the Arkansas Rules of Evidence protect the sanctity of jury deliberations,<sup>50</sup> it would be difficult to

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42. *Id.*, 510 S.W.3d at 777.

43. *Id.* at 1, 510 S.W.3d at 776.

44. *Id.*, 510 S.W.3d at 776.

45. *State v. Thompson*, 2017 Ark. 50, 7–8, 510 S.W.3d at 780.

46. *Glover v. United States*, 531 U.S. 198 (2001).

47. *Thompson*, 2017 Ark. 50, at 12–13, 510 S.W.3d at 782 (Hart, J., dissenting) (internal citations omitted).

48. *Young v. State*, 287 Ark. 361, 363, 699 S.W.2d 398, 399 (1985) (per curiam) (holding that there was no prejudicial error when a defendant's sentence was within both the erroneous range given to the jury and the correct range provided under the law).

49. See, e.g., *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

50. See ARK. R. EVID. 606(b) (West, Westlaw through November 1, 2017) ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything

conclude with reasonable certainty what effect any error would have on the jury's sentencing decision. However, the supreme court has acknowledged the obvious when it comes to the State's introduction of evidence: "Of course, it is likely that evidence offered by the state will be prejudicial to an accused, or it probably would not be offered."<sup>51</sup> If it is introduced, then it is probably prejudicial.<sup>52</sup> And if it is prejudicial, then a jury will likely consider it when assessing a sentence, as the prosecutor intends. Some may argue that the appellate courts should not speculate about the possible effect of an improper argument when that effect could be minimal. But even a minimally prejudicial remark by a prosecutor should be considered when determining the fairness of a defendant's sentence. After all, every day that a defendant spends in jail counts.

There have been a few occasions after *Young* and *Buckley* when the appellate court reversed despite the defendant not being sentenced to the maximum. When it comes to the habitual offender statute, the supreme court does not require a maximum sentence in order to establish prejudice. In *Vanesch v. State*,<sup>53</sup> the State erroneously introduced the appellant's juvenile delinquency record for the purpose of seeking a habitual offender sentencing enhancement. The appellant's sentence was less than the maximum for non-habitual sentences.<sup>54</sup> The Arkansas Court of Appeals held that the appellant failed to show prejudice, citing the familiar maxim and rejecting the appellant's reliance on *Rogers*, previously mentioned in this article.<sup>55</sup> But probation was available for some of the appellant's offenses, and the supreme court explained, "[W]e know that the trial judge in sentencing Vanesch departed from the sentencing grid and sentenced Vanesch as a habitual offender on all three felony counts. We can only speculate what impact the inadmissible prior juvenile delinquency adjudication played in enhancing Vanesch's sentences."<sup>56</sup> It then remanded the case for resentencing.<sup>57</sup>

In addition, the decision to run multiple sentences concurrently or consecutively belongs to the trial judge.<sup>58</sup> However, the mechanical acceptance of the jury's recommendation without the exercise of discretion is reversible

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upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith[.]").

51. *Beed v. State*, 271 Ark. 526, 542, 609 S.W.2d 898, 909 (1980); *accord Morris v. State*, 367 Ark. 406, 240 S.W.3d 593 (2006).

52. *Id.*

53. *Vanesch v. State*, 343 Ark. 381, 37 S.W.3d 196 (2001).

54. *Id.* at 386, 37 S.W.3d at 199.

55. *See Vanesch v. State*, 70 Ark. App. 277, 283, 16 S.W.3d 306, 310–11. *Supra* Part II.

56. *Vanesch*, 343 Ark. at 390–91, 37 S.W.3d at 202.

57. *Id.* at 391, 37 S.W.3d at 202.

58. *Lawhon v. State*, 327 Ark. 675, 940 S.W.2d 475 (1997) (citing *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995)).

error.<sup>59</sup> A defendant need not be sentenced to the maximum in such cases. Finally, a sentence must be within the range provided by statute.<sup>60</sup> Not only is a sentence outside the statutory range reversible error, it is a matter that the appellate court must raise *sua sponte*.<sup>61</sup>

Otherwise, the Arkansas appellate courts have held steadfastly to the rule that an appellant cannot show prejudice absent a maximum sentence.<sup>62</sup> Most of these cases can be traced back to *Tate*, *Buckley*, or *Young* itself. Thus, with every decision involving a defendant sentenced to less than the maximum, Arkansas appellate courts compound the unsupported maxim that a defendant is not prejudiced by the sentence until the jury gives the maximum sentence for an offense.

#### IV. ARKANSAS IS UNIQUE IN ITS APPROACH

Arkansas's requirement of a maximum sentence as a prerequisite is an anomaly, when comparing it to the other states that use jury sentencing in non-capital cases. Like Arkansas, the states of Kentucky, Missouri, Oklahoma, Texas, and Virginia have jury sentencing in non-capital cases.<sup>63</sup> None of them provide the barriers on sentencing appeals that Arkansas courts do.

##### A. Kentucky

Like Arkansas, Kentucky courts require a showing of prejudice before remanding a case for resentencing.<sup>64</sup> This may be an easy showing in cases where the jury gives the defendant a maximum sentence. For example, the defendant was able to make such a showing in *Blane v. Commonwealth*,<sup>65</sup> where the prosecutor introduced evidence of charges that were subsequently amended.<sup>66</sup>

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59. *Id.* (citing *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980)).

60. *See, e.g.*, *Barber v. State*, 2016 Ark. 54, 482 S.W.3d 314.

61. *Id.*

62. *See, e.g.*, *Holley v. State*, 2014 Ark. App. 557, 444 S.W.3d 889 (alleging an evidentiary error); *Stover v. State*, 2014 Ark. App. 393, 437 S.W.3d 699 (alleging an evidentiary error); *Walden v. State*, 2012 Ark. App. 307, 419 S.W.3d 746 (alleging an evidentiary error); *Gill v. State*, 2010 Ark. App. 524, 376 S.W.3d 537 (alleging an improper closing argument); *Bond v. State*, 374 Ark. 332, 288 S.W.3d 206 (2008) (alleging an erroneous jury instruction).

63. *See* Caleb R. Stone, *Sentencing Roulette: How Virginia's Criminal Sentencing System is Imposing an Unconstitutional Trial Penalty that Suppresses the Rights of Criminal Defendants to a Jury Trial*, 23 WM. & MARY BILL RTS. J. 559 (2014). *See also* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 314 (2003) (noting that thirteen states had jury sentencing in non-capital cases in 1960).

64. *See* KY. R. CRIM. P. 10.26 (West, Westlaw through January 1, 2018).

65. *Blane v. Commonwealth*, 364 S.W.3d 140, 151–52 (Ky. 2012).

66. The appellant was successful on this argument despite failing to raise it before the trial court. Unlike many states and the federal judiciary, Arkansas has no “plain-error” rule,

But even when the potential additional time is relatively minimal, the Kentucky appellate courts recognize the possibility of prejudice. For example, the appellant in *Jackson v. Commonwealth*<sup>67</sup> was sentenced to ten years in prison.<sup>68</sup> During the sentencing phase, the prosecutor erroneously told the jury that the appellant would be eligible for parole after serving fifteen percent of his sentence.<sup>69</sup> The Commonwealth argued that the misstatement was harmless, as it only amounted to a six-month difference. The Kentucky Court of Appeals responded, “we note that while the six-month difference in parole eligibility may seem insignificant to the Commonwealth, it is surely significant to [the appellant] or anyone else who might have an additional six months to serve in prison before being eligible for release.”<sup>70</sup> In so holding, the court relied on the Supreme Court of Kentucky’s decision in *Robinson v. Commonwealth*.<sup>71</sup> There, the jury heard incorrect testimony regarding the use of “good time credits” in calculating parole eligibility.<sup>72</sup> When assessing whether this false testimony had any effect on the jury’s decision to render the maximum sentence, the court wrote, “We believe it did and, for sure, can’t say it didn’t.”<sup>73</sup> The court also reversed and remanded for resentencing in *Williams v. Commonwealth*<sup>74</sup> when the prosecutor erroneously introduced convictions that were still subject to appeal.<sup>75</sup> Such an error affected the defendant’s status as a persistent felony offender.<sup>76</sup> And in *Offutt v. Commonwealth*,<sup>77</sup> when the jury was not given an instruction on the appellant’s eligibility for parole, the Supreme Court of Kentucky commented, “While we may doubt whether absent the inaccuracy the result would have been more favorable to the defendant, we decline to speculate, and conclude that resentencing is in order.”<sup>78</sup> While many reported appeals in Kentucky are from maximum sentences, language from the Kentucky appellate courts confirms that the courts are willing to do a true “harmless error” analysis

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and exceptions to the requirement of raising the issue before the trial court are rare. See generally *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

67. *Jackson v. Commonwealth*, 2011 WL 112427 (Ky. App. Jan. 14, 2011) (unpublished opinion).

68. *Id.* at \*1.

69. *Id.* at \*4 (noting that the defendant would not have been eligible until he served twenty percent of his sentence).

70. *Id.* at \*5.

71. *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005).

72. *Id.* at 38. The jury was told that the good time credits would be figured into the defendant’s parole eligibility. *Id.* However, the appellate court explained that a defendant could not get credit for that time until he reaches the minimum parole eligibility. *Id.*

73. *Id.*

74. *Williams v. Commonwealth*, 178 S.W.3d 491 (Ky. 2005).

75. *Id.* at 499.

76. *Id.*

77. *Offutt v. Commonwealth*, 799 S.W.2d 815 (Ky. 1990).

78. *Id.* at 817.

rather than assume no prejudice results from sentences that are less than the maximum.

## B. Missouri

Missouri also takes a different approach to sentencing appeals, though it has some support for its position in Missouri statutory law. In *State v. Troya*,<sup>79</sup> the appellant challenged his ten-year sentence, arguing that the trial court misunderstood the applicable sentencing range.<sup>80</sup> The court thought that the applicable range was ten-to-thirty years or life, when in fact it was *five-to-thirty* years or life.<sup>81</sup> Granted, the appellant in *Troya* was sentenced to the perceived minimum, while the appellant in *Young* was not. However, Missouri law clearly states:

A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in light of the true facts, regardless of the eventual outcome. This is so even if it is likely the court will return the same sentence.<sup>82</sup>

Missouri courts require a showing of prejudice before reversing a sentence.<sup>83</sup> The question is “whether there is a reasonable probability that the jury would have imposed a lesser sentence but for the erroneously admitted [evidence].”<sup>84</sup> Further, when it comes to persistent offender status, Missouri courts are willing to review it for plain error.<sup>85</sup>

Admittedly, there is one Missouri case, *State v. Ray*,<sup>86</sup> where the court found that the appellant could not show prejudice in part because he was sentenced to less than the maximum.<sup>87</sup> However, the court also considered that the trial court ruled in the defendant’s favor when the State attempted to charge him as a persistent offender.<sup>88</sup>

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79. *State v. Troya*, 407 S.W.3d 695 (Mo. App. 2013).

80. *Id.* at 696.

81. *Id.* at 700.

82. *Id.* at 700. *But see* *State v. Bommarito*, 856 S.W.2d 680, 683 (Mo. App. 1993) (noting that, even if the court relied on the prosecutor’s erroneous statement of a ten-year minimum rather than a five-year minimum, there was evidence that the court would have still sentenced the appellant to the maximum of thirty years).

83. *State v. Fassero*, 256 S.W.3d 109, 119 (Mo. 2008).

84. *Id.*

85. *See* *State v. Nesbitt*, 299 S.W.3d 26, 28 (Mo. App. 2009).

86. *State v. Ray*, 852 S.W.2d 165 (Mo. App. 1993).

87. *Id.* at 170.

88. *Id.*

### C. Oklahoma

Oklahoma code explicitly provides for reversals and remand on sentencing errors:

Upon any appeal of a conviction by the defendant in a noncapital criminal case, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence rendered and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced for resentencing.<sup>89</sup>

In *McIntosh v. State*,<sup>90</sup> a jury found the defendant guilty of trafficking ecstasy.<sup>91</sup> The court instructed the jury that the minimum sentence was thirty years, and it sentenced the defendant to that minimum.<sup>92</sup> The appellate court later held that the trial court should have instructed the jury that the minimum was actually twelve years.<sup>93</sup> While the court had to conduct a harmless-error review, there was no analysis of the maximum sentence:

In this instance, the erroneous instruction required the jury to sentence McIntosh to a term of imprisonment at least eighteen years above the minimum sentence prescribed by statute. With nothing but the bare verdict and the fact that the jury imposed the minimum sentence for the range it was given, we have no basis to conclude that this jury would have imposed the same thirty year sentence had it been properly instructed on the twelve year minimum. Consequently, we cannot conclude that the error was harmless.<sup>94</sup>

There was no resentencing in this case. Instead, the court modified the sentence to twelve years' imprisonment.<sup>95</sup>

The Oklahoma Court of Criminal Appeals ruled similarly in *Ellis v. State*.<sup>96</sup> There, a jury sentenced a robbery defendant to sixty years of imprisonment after being erroneously instructed of a twenty-year minimum.<sup>97</sup> The court subsequently reduced the defendant's sentence to the actual minimum: ten years.<sup>98</sup> And in *Lewallen v. State*,<sup>99</sup> the appellate court remanded for re-

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89. 22 OKLA. ST. ANN. § 929(A) (West, Westlaw through 2018).

90. *McIntosh v. State*, 237 P.3d 800 (Okla. Crim. App. 2010).

91. *Id.* at 801.

92. *Id.*

93. *Id.* at 802.

94. *Id.* at 803.

95. *Id.* at 801.

96. *Ellis v. State*, 749 P.2d 114 (Okla. Crim. App. 1988).

97. *Id.* at 115.

98. *Id.* at 116.

99. *Lewallen v. State*, 2016 OK CR 4, 370 P.3d 828.

sentencing when the defendant was subjected to a twenty-year minimum sentence rather than the correct four-year minimum.<sup>100</sup>

One thing that makes these Oklahoma cases persuasive is that the defendants were similarly situated to the defendant in *Young*, who was subjected to a higher minimum sentence because of an incorrect jury instruction. Where the Supreme Court of Arkansas ruled that there was no prejudicial error because the sentence was still within the valid range, Oklahoma courts still reviewed the record for harmless error.

#### D. Texas

Texas clearly does not require a maximum sentence before considering a sentencing error. For example, in *Harding v. State*,<sup>101</sup> a robbery defendant was sentenced to sixty years, far below the maximum range of life imprisonment.<sup>102</sup> The error involved instructions related to parole eligibility.<sup>103</sup> In reviewing the sentence, the court explained:

[T]he prosecutor did indeed direct the jury to consider the § 4(a) instruction—not once but twice—to decide “how are we going to protect society against that man.” . . . “[An argument] made in terms tending to induce consideration of the eligibility formula and other teachings of a § 4 instruction compounds *Rose* error and may influence the jury in its deliberations on punishment.” . . . Certainly such was his stated purpose and that “alone or coupled with other indicia in the record” can create implications of harm. . . .

Another indicator is the term of years assessed: “it serves somewhat as a barometric measure of other pressures . . . likely to influence the jury in assessing punishment.” . . . The Houston [1st] Court itself has made the point that even without an explanation from counsel jurors are capable of calculating effect of what it calls the “one-third rule” and then “fixing a term of years to compensate for parole eligibility.” . . . Experience proves the point has merit. . . .

However, in this cause the court seems to take the view that a term of sixty years is “mid-range” punishment, thus somehow suggesting harmless error. The fact of the matter is that under § 4(a) sixty years is the minimum term that must be assessed in order to achieve the maximum delay in parole eligibility. . . . So, as we demonstrated in *Arnold*, “it is not enough to say that a § 4 instruction made no contribution to punishment merely because the term assessed is ‘mid-range’ relative to

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100. *Id.* at 828–29.

101. *Harding v. State*, 790 S.W.2d 638 (Tex. Crim. App. 1990).

102. *Id.* at 639.

103. *Id.*

the potential maximum.” . . . The burden is on the State to show beyond reasonable doubt that it did not. . . . “The evil to be avoided is the consideration by the jury of parole in assessing punishment.” . . . We conclude that a rational appellate court could not determine and declare beyond a reasonable doubt that the error in allowing jurors to consider aspects of parole law stated in the § 4(a) instruction did not influence the jury adversely to appellant in assessing punishment, . . . that it made no contribution to punishment assessed against appellant.<sup>104</sup>

In other words, there is no automatic rejection of the appeal simply for lack of a maximum sentence.<sup>105</sup> True, the burden of proof regarding harmless error is different, with the Texas court putting the burden of proof on the State to establish harmless error and Arkansas courts normally placing that burden on the appellant to show prejudice.<sup>106</sup> But the essential point is still clear: a sentence far short of the maximum can be prejudicial.

The decision in *Brown v. State*<sup>107</sup> is likewise instructive. There, the prosecutor committed error by comparing the defendant to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy.<sup>108</sup> The defendant was sentenced to sixty years; the maximum potential term was life.<sup>109</sup> The court acknowledged the difficulty in assessing the effect of the prosecutor’s statement:

In sum, the determination of harm is little more than a matter of educational guess. What the jurors *actually* thought persuasive or *actually* considered is seldom, if ever, available to us. So, we peruse the record to assess potentialities. And, in assessing the potentialities at bar, we are unable to say that the cumulative effect of each instance of misconduct was nil or only slight. It may be that appellant’s acts merited a lengthy prison sentence but that is something which the jury below was to decide free of 1) suggestion about what the court would do if it were levying punishment and 2) allusion to several of the most notorious murderers in recent memory. Appellant is not entitled to a perfect trial, but he is entitled to at least one tolerably fair.<sup>110</sup>

In short, harmless-error analysis may be a challenge and may require effort, but it can be done even when the defendant is not sentenced to the maximum.<sup>111</sup>

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104. *Id.* at 640–41 (internal citations omitted).

105. *Id.*

106. *See, e.g.,* Shreck v. State, 2017 Ark. 39, 5, 510 S.W.3d 750, 753.

107. *Brown v. State*, 978 S.W.2d 708 (Tex. App. 1998).

108. *Id.* at 714.

109. *Id.* at 715.

110. *Id.* at 715–16 (citations and internal quotes omitted).

111. *See also* Sunbury v. State, 33 S.W.3d 436 (2000) (reversing a fifteen-year sentence, five years short of the maximum).

## E. Virginia

The harmless-error analysis itself makes Virginia very different from Arkansas. If there is an error related to a sentence, the sentence is reversed unless it plainly appears that the error did not affect the sentence.<sup>112</sup> This is the opposite of Arkansas appellate procedure, where the appellant must demonstrate prejudice in an appeal. Thus, a defendant who is sentenced to less than the maximum has a chance for resentencing in the event of trial court error.

## V. A PROPOSAL

There is no justification for Arkansas's blanket assumption that a criminal defendant cannot show prejudice if a jury has not given the maximum sentence. The logic cannot be found in case law, and it is an approach that is unique among the states that use jury sentencing for non-capital offenses.

One might argue that the rule has been so ingrained in Arkansas jurisprudence that the Supreme Court of Arkansas should not reverse it. The court often reminds litigants that "[t]he policy behind *stare decisis* is to lend predictability and stability to the law."<sup>113</sup> However, there are no reliance issues here.<sup>114</sup> Presumably, no defendant does anything to induce a jury to hand down a sentence any greater than necessary. And no prosecutor blatantly disregards the rules in the hopes that the jury would hand down a stiff sentence less than the maximum (or at least one would hope).

The bar for overcoming the application of *stare decisis* is high: a showing that "adherence to the principle . . . is manifestly unjust or patently wrong."<sup>115</sup> However, the Supreme Court of Arkansas has stated, "[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."<sup>116</sup> The rule that a criminal defendant be sentenced to the maximum before being able to show prejudice in the sen-

112. See *Webb v. Commonwealth*, 31 Va. App. 466, 470, 524 S.E.2d 164, 166 (2000); *Resio v. Commonwealth*, 29 Va. App. 616, 623, 513 S.E.2d 892, 896 (1999).

113. *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 287, 149 S.W.3d 325, 337 (2004). See also *Aka v. Jefferson Hosp. Ass'n Inc.*, 344 Ark. 627, 641, 42 S.W.3d 508, 518 (2001); *State Office of Child Support Enf't v. Mitchell*, 330 Ark. 338, 343, 954 S.W.2d 907, 909 (1997).

114. See *Franklin v. Healthsource of Ark.*, 328 Ark. 163, 173–74, 942 S.W.2d 837, 842–43 (1997) (Imber, J., dissenting) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991); *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968)) (noting the importance of *stare decisis* in contract law, where parties rely on it before executing a document).

115. *Engram v. State*, 341 Ark. 196, 209, 15 S.W.3d 678, 685 (2000).

116. *Zinger v. Terrell*, 336 Ark. 423, 430–31, 985 S.W.2d 737, 741 (1999) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828–29 (1991)).

tencing phase of a trial is indeed badly reasoned. No interest is served by mechanical application of that rule.

Some might also argue that a defendant would have difficulty showing prejudice unless a jury had sentenced him or her to the maximum. This may be true for several reasons. Even in cases that do not involve sentencing, a court can only speculate as to the effect that any piece of evidence or argument may have on a jury. It may be easier to make inferences when the question concerns guilt. There are a limited number of choices: guilty, guilty on a lesser-included offense, or not guilty. When it comes to sentencing, however, the jury has several options. What effect does an inflammatory statement from the prosecutor have on a sentence? Could it increase a defendant's sentence by ten percent? Fifty percent? One hundred percent? There is no way to tell. But the difficulty in determining the effect of an erroneous admission or exclusion of evidence or argument should not lead to a blanket rule requiring a maximum sentence as a prerequisite for a showing of prejudice.

In her dissent in *Thompson*, mentioned in Part III of this article, Justice Hart relied heavily on Professor Hessick's comments in her article *Ineffective Assistance at Sentencing*.<sup>117</sup> Professor Hessick has also remarked that Arkansas courts "have not provided much of an explanation for the rule."<sup>118</sup> She offers a few possible reasons for the rule. One of them is a lack of entitlement to any particular sentence within a discretionary sentencing scheme.<sup>119</sup> If a defendant is not entitled to a particular sentence, then he cannot show prejudice when appealing from the sentence alone.<sup>120</sup> But the professor rejects this argument easily; under such circumstances, a defendant would not even be able to show prejudice from a maximum sentence.<sup>121</sup> On its face, that does not seem fair to the defendant.

Finally, the refusal to review errors for sentences that are less than the maximum ignores the significance of every day spent behind bars. This reality was recognized by the Supreme Court of the United States in *Rosales-Mireles v. United States*.<sup>122</sup> The defendant in that case was convicted of illegal reentry into the United States.<sup>123</sup> The Probation Office submitted a sentencing report that yielded a sentencing range of seventy-seven to ninety-six months.<sup>124</sup> Based on that report, the United States District Court for the

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117. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C.L. REV. 1069 (2009). *Supra* Part III.

118. *Id.* at 1092.

119. *See id.* at 1093–94.

120. *Id.*

121. *Id.* at 1091.

122. *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018).

123. *Id.* at 1905.

124. *Id.*

Western District of Texas sentenced the defendant to seventy-eight months.<sup>125</sup> However, the Probation Office's report contained an error that affected the calculation of the sentencing range, and a proper calculation would have yielded a range of seventy to eighty-seven months.<sup>126</sup> Worse yet, the defendant did not catch the error before sentencing.<sup>127</sup>

The defendant raised the issue before the United States Court of Appeals for the Fifth Circuit. Because this was the first time the defendant raised the issue, the Fifth Circuit reviewed for plain error.<sup>128</sup> Again, unlike Arkansas law, Federal Rule of Criminal Procedure 52(b) allows for review of plain error even if not raised at the district court level.<sup>129</sup> The Fifth Circuit held that it had the discretion to correct the District Court's error,<sup>130</sup> but it declined to do so.<sup>131</sup> To reverse plain error under federal law, the court must hold that "the error seriously affects the fairness, integrity or public reputation of judicial proceedings."<sup>132</sup> Because the defendant's seventy-eight-month sentence fell within the correct sentencing range, the Fifth Circuit held that neither the error nor the sentence "would shock the conscience."<sup>133</sup>

The Supreme Court of the United States reversed, holding that the Fifth Circuit was too restrictive when it declined to reverse the error.<sup>134</sup> While much of the *Rosales-Mireles* holding is inapplicable to Arkansas, due to its rejection of a plain-error rule, the Supreme Court provided wise words as it relates to a defendant's sentence.

"[W]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." . . . In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than "necessary" to fulfill the purposes of incarceration. . . . "To a prisoner," this prospect of additional "time behind bars is not some theoretical or mathematical concept." . . . "[A]ny amount of actual jail time" is significant, . . . and "ha[s] excep-

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Rosales-Mireles*, 138 S. Ct. at 1905–1906.

129. *Compare to Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

130. Before correcting plain error under Rule 52(b), an appellate court must find that the error (1) "[has] not been intentionally relinquished or abandoned," (2) "be plain—that is to say, clear or obvious," and (3) "affect[s] the defendant's substantial rights." *Rosales-Mireles*, 138 S. Ct. at 1904 (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016)).

131. *Id.* at 1905.

132. *Id.* (quoting *Molina-Martinez*, 136 S. Ct. at 1342).

133. *Id.*

134. *Id.* at 1904–1911.

tionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration.” . . . The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners “as people.”<sup>135</sup>

To summarize, even when considering what might be perceived as a relatively short amount of time to someone who is not incarcerated, sentencing errors involving months in prison ought to be fully considered by the appellate court. Arkansas’s rule requiring a maximum sentence before holding that there could be a showing of prejudice goes against this reality.

The solution is simple. At its next opportunity, the Supreme Court of Arkansas should hold that a defendant could be prejudiced from an error related to sentencing even though he or she received a sentence less than the maximum. It might be difficult to determine the prejudice resulting from any error from sentencing, but the author would recommend the harmless-error analysis announced by the Texas Court of Criminal Appeals in *Harris v. State*<sup>136</sup> and applied in sentencing appeals in *Enos v. State*:<sup>137</sup>

[T]he court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications. Further, the court should consider how much weight a juror would probably place upon the error. In addition, the Court must also determine whether declaring the error harmless would encourage the State to repeat it with impunity. In summary, the reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the jurors’ decision-making; it should ask not whether the jury reached the correct result, but rather whether the jurors were able properly to apply law to facts in order to reach a verdict. Consequently, the reviewing court must focus upon the process and not on the result. In other words, a reviewing court must always examine whether the trial was an essentially fair one. If the error was of a magnitude that it disrupted the juror’s orderly evaluation of the evidence, no matter how overwhelming it might have been, then the conviction is tainted. Again, it is the effect of the error and not the other evidence that must dictate the reviewing court’s judgment.<sup>138</sup>

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135. *Id.* at 1907 (internal citations omitted).

136. *Harris v. State*, 790 S.W.2d 568 (Tex. Crim App. 1989).

137. *Enos v. State*, 909 S.W.2d 293, 295 (1995).

138. *Harris*, 790 S.W.2d at 587–88.

As for what to do about a tainted sentence, Arkansas case law already provides a solution: if the error affects the sentence only, the appellate court can give the Attorney General the choice of accepting the minimum sentence or having the case remanded for a new sentencing hearing.<sup>139</sup>

## VI. CONCLUSION

The Supreme Court of the United States has made it clear: “any amount of actual jail time has Sixth Amendment significance.”<sup>140</sup> Even if an error increases a defendant’s time in jail by a few months, that time still matters. Current Arkansas appellate jurisprudence fails to acknowledge this reality. There is no good reason for holding as a matter of law that a defendant be sentenced to the maximum before being able to show prejudice. Further, no other state with jury sentencing in non-capital cases has this rule. Simply put, it is time for the Supreme Court of Arkansas to eliminate this rule from its jurisprudence, thus opening the door for a true review of sentencing errors in Arkansas.

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139. *See supra* notes 4–16 and accompanying text.

140. *Glover*, 531 U.S. at 203.