SUPREME COURT OF THE UNITED STATES

No. 00–10666

WILLIAM JOSEPH HARRIS, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 24, 2002]

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join.

Once more we consider the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence. Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts. In federal prosecutions, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" alleging all the elements of the crime. U. S. Const., Amdt. 5; see *Hamling* v. *United States,* 418 U. S. 87, 117 (1974). "In all criminal prosecutions," state and federal, "the accused shall enjoy the right to . . . trial . . . by an impartial jury," U. S. Const., Amdt. 6; see *Duncan* v. *Louisiana,* 391 U. S. 145, 149 (1968), at which the government must prove each element beyond a reasonable doubt, see *In re Winship,* 397 U. S. 358, 364 (1970).

Yet not all facts affecting the defendant's punishment

are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor. The Court described one limitation in this respect two Terms ago in *Apprendi* v. *New Jersey,* 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury, and proved beyond a reasonable doubt." Fourteen years before, in *McMillan* v. *Pennsylvania,* 477 U. S. 79 (1986), the Court had declined to adopt a more restrictive constitutional rule. *McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.

The principal question before us is whether *McMillan* stands after *Apprendi*.

I

Petitioner William Joseph Harris sold illegal narcotics

out of his pawnshop with an unconcealed semiautomatic pistol at his side. He was later arrested for violating federal drug and firearms laws, including 18 U. S. C. §924(c)(1)(A). That statute provides in relevant part:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The Government proceeded on the assumption that §924(c)(1)(A) defines a single crime and that brandishing is a sentencing factor to be considered by the judge after the trial. For this reason the indictment said nothing of brandishing and made no reference to subsection (ii). Instead, it simply alleged the elements from the statute's principal paragraph: that "during and in relation to a drug trafficking crime," petitioner had "knowingly carr[ied] a firearm." At a bench trial the United States District Court for the Middle District of North Carolina found petitioner guilty as charged.

Following his conviction, the presentence report recommended that petitioner be given the 7-year minimum because he had brandished the gun. Petitioner objected, citing this Court's decision in *Jones* v. *United States*, 526 U. S. 227 (1999), and arguing that, as a matter of statutory interpretation, brandishing is an element of a separate offense, an offense for which he had not been indicted or tried. At the sentencing hearing the District Court

overruled the objection, found by a preponderance of the evidence that petitioner had brandished the gun, and sentenced him to seven years in prison.

In the Court of Appeals for the Fourth Circuit petitioner again pressed his statutory argument. He added that if brandishing is a sentencing factor as a statutory matter, the statute is unconstitutional in light of *Apprendi*—even though, as petitioner acknowledged, the judge's finding did not alter the maximum penalty to which he was exposed. Rejecting these arguments, the Court of Appeals affirmed. 243 F. 3d 806 (2001). Like every other Court of Appeals to have addressed the question, it held that the statute makes brandishing a sentencing factor. *Id.,* at 812; accord, *United States* v. *Barton,* 257 F. 3d 433, 443 (CA5 2001); *United States* v. *Carlson,* 217 F. 3d 986, 989 (CA8 2000); *United States* v. *Pounds,* 230 F. 3d 1317, 1319 (CA11 2000). The court also held that the constitutional argument was foreclosed by *McMillan*. 243 F. 3d, at 809.

We granted certiorari, 534 U. S. 1064 (2001), and now affirm.

II

We must first answer a threshold question of statutory construction: Did Congress make brandishing an element or a sentencing factor in §924(c)(1)(A)? In the Government's view the text in question defines a single crime, and the facts in subsections (ii) and (iii) are considerations for the sentencing judge. Petitioner, on the other hand, contends that Congress meant the statute to define three different crimes. Subsection (ii), he says, creates a separate offense of which brandishing is an element. If petitioner is correct, he was neither indicted nor tried for that offense, and the 7-year minimum did not apply.

So we begin our analysis by asking what §924(c)(1)(A) means. The statute does not say in so many words whether brandishing is an element or a sentencing factor,

but the structure of the prohibition suggests it is the latter. Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "into subsections." *Castillo* v. *United States,* 530 U. S. 120, 125 (2000). Here, §924(c)(1)(A) begins with a lengthy principal paragraph listing the elements of a complete crime—"the basic federal offense of using or carrying a gun during and in relation to" a violent crime or drug offense. *Id.,* at 124. Toward the end of the paragraph is "the word 'shall,' which often divides offense-defining provisions from those that specify sentences." *Jones,* 526 U. S., at 233. And following "shall" are the separate subsections, which explain how defendants are to "be sentenced." Subsection (i) sets a catchall minimum and "certainly adds no further element." *Ibid.* Subsections (ii) and (iii), in turn, increase the minimum penalty if certain facts are present, and those subsections do not repeat the elements from the principal paragraph.

When a statute has this sort of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors. But even if a statute "has a look to it suggesting that the numbered subsections are only sentencing provisions," *id.,* at 232, the text might provide compelling evidence to the contrary. This was illustrated by the Court's decision in *Jones,* in which the federal carjacking statute, which had a similar structure, was interpreted as setting out the elements of multiple offenses.

The critical textual clues in this case, however, reinforce the single-offense interpretation implied by the statute's structure. Tradition and past congressional practice, for example, were perhaps the most important guideposts in *Jones*. The fact at issue there—serious bodily injury—is an element in numerous federal statutes, including two on which the carjacking statute was modeled; and the *Jones* Court doubted that Congress would have made this fact a

sentencing factor in one isolated instance. *Id.,* at 235–237; see also *Castillo, supra*, at 126–127; *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230 (1998). In contrast, there is no similar federal tradition of treating brandishing and discharging as offense elements. In *Castillo* v. *United States, supra,* the Court singled out brandishing as a paradigmatic sentencing factor: "Traditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (*e.g.,* that the defendant . . . brandished a gun)." *Id.*, at 126. Under the Sentencing Guidelines, moreover, brandishing and discharging affect the sentences for numerous federal crimes. See, *e.g.,* United States Sentencing Commission, Guidelines Manual §§2A2.2(b)(2), 2B3.1(b)(2), 2B3.2(b)(3)(A), 2E2.1(b)(1), 2L1.1(b)(4) (Nov. 2001). Indeed, the Guidelines appear to have been the only antecedents for the statute's brandishing provision. The term "brandished" does not appear in any federal offense-defining provision save 18 U. S. C. §924(c)(1)(A), and did not appear there until 1998, when the statute was amended to take its current form. The numbered subsections were added then, describing, as sentencing factors often do, "special features of the manner in which" the statute's "basic crime" could be carried out. *Castillo, supra*, at 126. It thus seems likely that brandishing and discharging were meant to serve the same function under the statute as they do under the Guidelines.

We might have had reason to question that inference if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors. *Jones* is again instructive. There the Court accorded great significance to the "steeply higher penalties" authorized by the carjacking statute's three subsections, which enhanced the defendant's maximum sentence from 15 years, to 25 years, to life—enhancements the Court doubted Congress would have made contingent

upon judicial factfinding. 526 U. S., at 233; see also *Castillo, supra*, at 131; *Almendarez-Torres*, *supra*, at 235–236. The provisions before us now, however, have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion. Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm. The incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration.

Nothing about the text or history of the statute rebuts the presumption drawn from its structure. Against the single-offense interpretation to which these considerations point, however, petitioner invokes the canon of constitutional avoidance. Under that doctrine, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408 (1909). It is at least an open question, petitioner contends, whether the Fifth and Sixth Amendments require every fact increasing a federal defendant's minimum sentence to be alleged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. To avoid resolving that question (and possibly invalidating the statute), petitioner urges, we should read §924(c)(1)(A) as making brandishing an element of an aggravated federal crime.

The avoidance canon played a role in *Jones,* for the subsections of the carjacking statute enhanced the maxi-

mum sentence, and a single-offense interpretation would have implicated constitutional questions later addressed—and resolved in the defendant's favor—by *Apprendi*. See *Jones,* 526 U. S., at 243, n. 6 ("[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"). Yet the canon has no role to play here. It applies only when there are serious concerns about the statute's constitutionality, *Reno* v. *Flores,* 507 U. S. 292, 314, n. 9 (1993), and petitioner's proposed rule—that the Constitution requires any fact increasing the statutory minimum sentence to be accorded the safeguards assigned to elements—was rejected 16 years ago in *McMillan*. Petitioner acknowledges as much but argues that recent developments cast doubt on *McMillan*'s viability. To avoid deciding whether *McMillan* must be overruled, he says, we should construe the problem out of the statute.

Petitioner's suggestion that we use the canon to avoid overruling one of our own precedents is novel and, given that *McMillan* was in place when §924(c)(1)(A) was enacted, unsound. The avoidance canon rests upon our "respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan,* 500 U. S. 173, 191 (1991). The statute at issue in this case was passed when *McMillan* provided the controlling instruction, and Congress would have had no reason to believe that it was approaching the constitutional line by following that instruction. We would not further the canon's goal of eliminating friction with our coordinate branch, moreover, if we alleviated our doubt about a constitutional premise we had supplied by adopting a strained reading of a statute that Congress had enacted in reliance on the premise. And if we stretched the text to avoid the question of *McMillan*'s continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean

one thing when enacted yet another if the prevailing view of the Constitution later changed. We decline to adopt that approach.

As the avoidance canon poses no obstacle and the interpretive circumstances point in a common direction, we conclude that, as a matter of statutory interpretation, §924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury.

III

Confident that the statute does just what *McMillan* said it could, we consider petitioner's argument that §924(c)(1)(A)(ii) is unconstitutional because *McMillan* is no longer sound authority. *Stare decisis* is not an "inexorable command," *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting), but the doctrine is "of fundamental importance to the rule of law," *Welch* v. *Texas Dept. of Highways and Public Transp.,* 483 U. S. 468, 494 (1987). Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a "special justification." *Arizona* v. *Rumsey,* 467 U. S. 203, 212 (1984).

The special justification petitioner offers is our decision in *Apprendi,* which, he says, cannot be reconciled with *McMillan*. Cf. *Ring* v. *Arizona, post*, at 22 (overruling *Walton* v. *Arizona,* 497 U. S. 639 (1990), because "*Walton* and *Apprendi* are irreconcilable"). We do not find the argument convincing. As we shall explain, *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the

jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.

Though defining criminal conduct is a task generally "left to the legislative branch," *Patterson* v. *New York,* 432 U. S. 197, 210 (1977), Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt, *Jones, supra,* at 240–241; *Mullaney* v. *Wilbur,* 421 U. S. 684, 699 (1975). *McMillan* and *Apprendi* asked whether certain types of facts, though labeled sentencing factors by the legislature, were nevertheless "traditional elements" to which these constitutional safeguards were intended to apply. *Patterson* v. *New York, supra,* at 211, n. 12.

McMillan's answer stemmed from certain historical and doctrinal understandings about the role of the judge at sentencing. The mid-19th century produced a general shift in this country from criminal statutes "providing fixed-term sentences to those providing judges discretion within a permissible range." *Apprendi,* 530 U. S., at 481. Under these statutes, judges exercise their sentencing discretion through "an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *United States* v. *Tucker,* 404 U. S. 443, 446 (1972). The Court has recognized that this process is constitutional—and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. See, *e.g., United States* v. *Watts,* 519

U. S. 148, 156 (1997) *(per curiam); Nichols* v. *United States,* 511 U. S. 738, 747 (1994); *Williams* v. *New York,* 337 U. S. 241, 246 (1949). As the Court reiterated in *Jones:* "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." 526 U. S., at 248. Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.

That proposition, coupled with another shift in prevailing sentencing practices, explains *McMillan*. In the latter part of the 20th century, many legislatures, dissatisfied with sentencing disparities among like offenders, implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's factfinding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence. See, *e.g., Payne* v. *Tennessee,* 501 U. S. 808, 820 (1991). One example of reform, the kind addressed in *McMillan*, was mandatory minimum sentencing. The Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. §9712 (1982), imposed a minimum prison term of five years when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm while committing the crime of conviction.

In sustaining the statute the *McMillan* Court placed considerable reliance on the similarity between the sentencing factor at issue and the facts judges contemplate when exercising their discretion within the statutory range. Given that the latter are not elements of the crime, the Court explained, neither was the former:

> "Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense

> calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 'ups the ante' for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. . . . Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished . . . would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, . . . but it does not." 477 U. S., at 87–88 (footnote omitted).

In response to the argument that the Act evaded the Constitution's procedural guarantees, the Court noted that the statute "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *Id.,* at 89–90.

That reasoning still controls. If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legislatures require the judge to impose a minimum sentence when those facts are found—a sentence the judge could have imposed absent the finding. It does not matter, for the purposes of the constitutional analysis, that in statutes like the Pennsylvania Act the "State provides" that a fact "shall give rise both to a special stigma and to a special punishment." *Id.,* at 103 (STEVENS, J., dissenting). Judges choosing a sentence within the range do the same, and "[j]udges, it is sometimes necessary to remind ourselves, are part of the State." *Apprendi, supra,* at 498 (SCALIA, J., concurring). These facts, though stigmatizing and punitive, have been

the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt. There is no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of them as the elements of the crime.

This conclusion might be questioned if there were extensive historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements. The evidence on this score, however, is lacking. Statutes like the Pennsylvania Act, which alter the minimum sentence without changing the maximum, were for the most part the product of the 20th century, when legislatures first asserted control over the sentencing judge's discretion. Courts at the founding (whose views might be relevant, given the contemporaneous adoption of the Bill of Rights, see *Apprendi,* 530 U. S., at 478–484) and in the mid-19th century (whose views might be relevant, given that sentencing ranges first arose then, see *id.,* at 501–518 (THOMAS, J., concurring)) were not as a general matter required to decide whether a fact giving rise to a mandatory minimum sentence within the available range was to be alleged in the indictment and proved to the jury. See King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1474–1477 (2001). Indeed, though there is no clear record of how history treated these facts, it is clear that they did not fall within the principle by which history determined what facts were elements. That principle defined elements as "fact[s] . . . legally essential to the punishment to be inflicted." *United States* v. *Reese,* 92 U. S. 214, 232 (1876) (Clifford, J., dissenting) (citing 1 J. Bishop, Law of Criminal Procedure §81, p. 51 (2d ed. 1872)). This formulation includes facts that, as *McMillan* put it, "alte[r] the maximum penalty," 477 U. S., at 87, but it does not include facts triggering a mandatory minimum. The minimum may be imposed with or without the factual finding;

the finding is by definition not "essential" to the defendant's punishment.

McMillan was on firm historical ground, then, when it held that a legislature may specify the condition for a mandatory minimum without making the condition an element of the crime. The fact of visible firearm possession was more like the facts considered by judges when selecting a sentence within the statutory range—facts that, as the authorities from the 19th century confirm, have never been charged in the indictment, submitted to the jury, or proved beyond a reasonable doubt:

> "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances. The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy. This is an entirely different thing from punishing one for what is not alleged against him." Bishop, Criminal Procedure, §85, at 54.

Since sentencing ranges came into use, defendants have not been able to predict from the face of the indictment precisely what their sentence will be; the charged facts have simply made them aware of the "heaviest punishment" they face if convicted. *Ibid.* Judges, in turn, have

always considered uncharged "aggravating circumstances" that, while increasing the defendant's punishment, have not "swell[ed] the penalty above what the law has provided for the acts charged." *Ibid.* Because facts supporting a mandatory minimum fit squarely within that description, the legislature's choice to entrust them to the judge does not implicate the "competition . . . between judge and jury over . . . their respective roles," *Jones,* 526 U. S., at 245, that is the central concern of the Fifth and Sixth Amendments.

At issue in *Apprendi,* by contrast, was a sentencing factor that did "swell the penalty above what the law has provided," Bishop, *supra,* §85, at 54, and thus functioned more like a "traditional elemen[t]." *Patterson* v. *New York,* 432 U. S., at 211, n. 12. The defendant had been convicted of illegal possession of a firearm, an offense for which New Jersey law prescribed a maximum of 10 years in prison. See N. J. Stat. Ann. §§2C:39–4(a), 2C:43–6(a)(2) (1995). He was sentenced to 12 years, however, because a separate statute permitted an enhancement when the judge found, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race." §2C:44–3(e) (Supp. 2001–2002).

The Court held that the enhancement was unconstitutional. "[O]ur cases in this area, and the history upon which they rely," the Court observed, confirmed the constitutional principle first identified in *Jones:* "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legisla-

ture had attached the maximum punishment. Any "fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone," the Court concluded, *id.*, at 483, would have been, under the prevailing historical practice, an element of an aggravated offense. See *id.,* at 479–481; see also *id.,* at 501–518 (THOMAS, J., concurring).

Apprendi's conclusions do not undermine *McMillan*'s. There was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule did not extend to those facts. Indeed, the Court made clear that its holding did not affect *McMillan* at all:

> "We do not overrule *McMillan.* We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself." 530 U. S., at 487, n. 13.

The sentencing factor in *McMillan* did not increase "the penalty for a crime beyond the prescribed statutory maximum," 530 U. S., at 490; nor did it, as the concurring opinions in *Jones* put it, "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," 526 U. S., at 253 (SCALIA, J., concurring)). As the *Apprendi* Court observed, the *McMillan* finding merely required the judge to impose "a specific sentence *within the range* authorized by the jury's finding that the defendant [was] guilty." 530 U. S., at 494, n. 19; see also *Jones, supra,* at 242 ("[T]he *Winship* issue [in *McMillan*] rose from a provision that a judge's finding (by a preponderance) of visible possession of a firearm would require a mandatory minimum sentence for certain felonies, but a minimum that fell within the sentencing ranges otherwise

prescribed").

As its holding and the history on which it was based would suggest, the *Apprendi* Court's understanding of the Constitution is consistent with the holding in *McMillan*. Facts extending the sentence beyond the statutory maximum had traditionally been charged in the indictment and submitted to the jury, *Apprendi* said, because the function of the indictment and jury had been to authorize the State to impose punishment:

> "The evidence . . . that punishment was, by law, tied to the offense . . . and the evidence that American judges have exercised sentencing discretion within a legally prescribed range . . . point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." 530 U. S., at 483, n. 10.

The grand and petit juries thus form a "'strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government].'" *Duncan* v. *Louisiana,* 391 U. S., at 151 (quoting W. Blackstone, Commentaries on the Laws of England 349 (T. Cooley ed. 1899)). Absent authorization from the trial jury—in the form of a finding, by proof beyond a reasonable doubt, of the facts warranting the extended sentence under the New Jersey statute—the State had no power to sentence the defendant to more than 10 years, the maximum "authorized by the jury's guilty verdict." *Apprendi,* 530 U. S., at 494. "[T]hose facts that determine the maximum sentence the law allows," then, are necessarily elements of the crime. *Id.,* at 499 (SCALIA, J., concurring).

Yet once the jury finds all those facts, *Apprendi* says

that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum. That is why, as *Apprendi* noted, "nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range*." *Id.,* at 481. That is also why, as *McMillan* noted, nothing in this history suggests that it is impermissible for judges to find facts that give rise to a mandatory minimum sentence below "the maximum penalty for the crime committed." 477 U. S., at 87–88. In both instances the judicial factfinding does not "expose a defendant to a punishment greater than that otherwise legally prescribed." *Apprendi, supra,* at 483, n. 10. Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*.

Petitioner argues, however, that the concerns underlying *Apprendi* apply with equal or more force to facts increasing the defendant's minimum sentence. Those factual findings, he contends, often have a greater impact on the defendant than the findings at issue in *Apprendi*. This is so because when a fact increasing the statutory maximum is found, the judge may still impose a sentence far below that maximum; but when a fact increasing the minimum is found, the judge has no choice but to impose that

minimum, even if he or she otherwise would have chosen a lower sentence. Cf. *Almendarez-Torres,* 523 U. S., at 244–245. Why, petitioner asks, would fairness not also require the latter sort of fact to be alleged in the indictment and found by the jury under a reasonable-doubt standard? The answer is that because it is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less" than that. *Apprendi*, *supra*, at 498 (SCALIA, J., concurring). If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

In light of the foregoing, it is not surprising that the decisions for the Court in both *Apprendi* and *Jones* insisted that they were consistent with *McMillan*—and that a distinction could be drawn between facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum. See*, e.g., Apprendi, supra,* at 494, n. 19 ("The term [sentencing factor] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense"); *Jones,* 526 U. S., at 242 ("*McMillan,* then,

recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: . . . [M]ay judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?"); see also *Almendarez-Torres, supra*, at 256 (SCALIA, J., dissenting) ("[N]o one can read *McMillan* . . . without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, *rather than* substantially increasing the available sentence"). That distinction may continue to stand. The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.

Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date. Legislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. Congress and the States have conditioned mandatory minimum sentences upon judicial findings that, as here, a firearm was possessed, brandished, or discharged, Ala. Code §13A–5–6(a)(4) (1994); Kan. Stat. Ann. §21–

4618 (1995); Minn. Stat. Ann. §609.11 (Supp. 2002); N. J. Stat. Ann. §§2C:43–6(c), 6(d) (1998); or among other examples, that the victim was over 60 years of age, 42 Pa. Cons. Stat. §9717(a) (1998); that the defendant possessed a certain quantity of drugs, Ill. Comp. Stat., ch. 730, §5/5–5–3(c)(2)(D) (2000); that the victim was related to the defendant, Alaska Stat. §12.55.125(b) (2000); and that the defendant was a repeat offender, Md. Ann. Code, Art. 27, §286 (Supp. 2000). We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.

IV

Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that the federal provision at issue, 18 U. S. C. §924(c)(1)(A)(ii), is constitutional. Basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments. Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *McMillan,* 477 U. S., at 89–90. That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.

The Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. See, *e.g.,* Brief for Families Against Mandatory Minimums Foundation as *Amicus Curiae* 25, n. 16; cf. *Almendarez-Torres, supra*, at 245 (citing United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System 26–34 (Aug. 1991)). These criticisms may be sound, but they would persist whether the judge or the jury found the facts giving rise to the

minimum. We hold only that the Constitution permits the judge to do so, and we leave the other questions to Congress, the States, and the democratic processes.

The judgment of the Court of Appeals is affirmed.

It is so ordered.