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 THOMAS, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The range of punishment to which petitioner William J. Harris was exposed turned on the fact that he brandished a firearm, a fact that was neither charged in his indictment nor proved at trial beyond a reasonable doubt. The United States Court of Appeals for the Fourth Circuit nonetheless held, in reliance on *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), that the fact that Harris brandished a firearm was a mere sentencing factor to which no constitutional protections attach. 243 F. 3d 806, 808–812 (2001).

McMillan, however, conflicts with the Court's later decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), as the dissenting opinion in *Apprendi* recognized. See *id.,* at 533 (O'CONNOR, J., dissenting). The Court's holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi* just two years ago. Given that considerations of *stare decisis* are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants, I would reaffirm *Apprendi*, overrule *McMillan*, and reverse the Court of Appeals.

I

Harris was indicted for distributing marijuana in violation of 21 U. S. C. §841 and for carrying a firearm "in relation to" a drug trafficking crime in violation of 18 U. S. C. §924(c)(1)(A). Harris pleaded guilty to distributing marijuana but disputed that he had carried a firearm "in relation to" a drug trafficking crime. The District Court disagreed,[1] and he was convicted by the judge, having waived his right to trial by jury. Although the mandatory minimum prison sentence under §924(c)(1)(A)(i) is five years in prison, the presentence report relied on §924(c)(1)(A)(ii), which increases the mandatory minimum prison sentence to seven years when the firearm is brandished.[2] At sentencing, the District Court acknowledged that it was a "close question" whether Harris "brandished" a firearm, and noted that "[t]he only thing that happened here is [that] he had [a gun] during the drug transaction." App. 231–232, 244–247. The District Court nonetheless found by a preponderance of the evidence that Harris had brandished a firearm and as a result sentenced him to the minimum mandatory sentence of seven years' imprisonment for the violation of §924(c)(1)(A).

Relying on *McMillan*, the Court of Appeals affirmed the sentence and held as a matter of statutory interpretation that brandishing is a sentencing factor, not an element of the §924(c)(1)(A) offense. Accordingly, the Court of Ap-

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[1] Harris owned a pawn shop and routinely wore a gun at work; the District Court accepted that it was Harris' ordinary practice to wear a gun whether or not he was selling small amounts of marijuana to his friends. The District Court, however, determined that the gun was carried "in relation to" a drug trafficking offense within the meaning of §924(c) because it was "unable to draw the distinction that if it is [carried] for a legitimate purpose, it cannot be for an illegitimate purpose." App. 163.

[2] The presentence report recommended that Harris be given a term of imprisonment of zero to six *months* for the distribution charge.

peals concluded that the allegation of brandishing a firearm did not need to be charged in the indictment or proved beyond a reasonable doubt in order for the 7-year mandatory minimum to be triggered.

II

The Court construes §924(c)(1)(A) to "defin[e] a single offense," *ante*, at 8, rather than the multiple offenses the Court found in a similarly structured statute in *Jones* v. *United States*, 526 U. S. 227 (1999).[3] In reliance on *McMillan*, it then discounts the increasing mandatory minimum sentences set forth in the statutory provision as constitutionally irrelevant. In the plurality's view, any punishment less than the statutory maximum of life imprisonment for any violation of §924(c)(1)(A) avoids the single principle the Court now gleans from *Apprendi:* "'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.'" *Ante*, at 2 (quoting *Apprendi*, *supra,* at 490). According to the plurality, the historical practices underlying the Court's decision in *Apprendi* with respect to penalties that exceed the statutory maximum do not support extension of *Apprendi*'s rule to facts that increase a defendant's mandatory minimum sentence. Such fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny.

A

The Federal Constitution provides those "accused" in federal courts with specific rights, such as the right "to be informed of the nature and cause of the accusation," the

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[3] See 18 U. S. C. §2119.

right to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and the right to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. Also, no Member of this Court disputes that due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived. See *In re Winship,* 397 U. S. 358, 364 (1970). As with *Apprendi*, this case thus turns on the seemingly simple question of what constitutes a "crime."

This question cannot be answered by reference to statutory construction alone solely because the sentence does not exceed the statutory maximum. As I discussed at great length in *Apprendi*, the original understanding of what facts are elements of a crime was expansive:

> "[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element. No multifactor parsing of statutes, of the sort that we have attempted since *McMillan*, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact for that entitlement is an element." 530 U. S., at 501 (concurring opinion).

The fact that a defendant brandished a firearm indis-

putably alters the prescribed range of penalties to which he is exposed under 18 U. S. C. §924(c)(1)(A). Without a finding that a defendant brandished or discharged a firearm, the penalty range for a conviction under §924(c)(1)(A)(i) is five years to life in prison. But with a finding that a defendant brandished a firearm, the penalty range becomes harsher, seven years to life imprisonment. §924(c)(1)(A)(ii). And if the court finds that a defendant discharged a firearm, the range becomes even more severe, 10 years to life. §924(c)(1)(A)(iii). Thus, it is ultimately beside the point whether as a matter of statutory interpretation brandishing is a sentencing factor, because as a constitutional matter brandishing must be deemed an element of an aggravated offense. See *Apprendi*, *supra,* at 483, n. 10 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense").

I agree with the Court that a legislature is free to decree, within constitutional limits, which facts are elements that constitute a crime. See *ante*, at 2. But when the legislature provides that a particular fact shall give rise "'both to a special stigma and to a special punishment,'" *ante*, at 12 (plurality opinion) (quoting *McMillan*, 477 U. S., at 103 (STEVENS, J., dissenting)), the constitutional consequences are clear. As the Court acknowledged in *Apprendi*, society has long recognized a necessary link between punishment and crime, 530 U. S., at 478 ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). This link makes a great deal of sense: Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act? We made clear in *Apprendi* that if a statute "'annexes a higher degree of pun-

ishment'" based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt. *Id.*, at 480 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51 (15th ed. 1862)).

This constitutional limitation neither interferes with the legislature's ability to define statutory ranges of punishment nor calls into question judicial discretion to impose "judgment *within the range* prescribed by statute." *Apprendi*, 530 U. S., at 481. But it does protect the criminal defendant's constitutional right to know, *ex ante*, those circumstances that will determine the applicable range of punishment and to have those circumstances proved beyond a reasonable doubt:

> "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached." *Id.,* at 484.

B

The Court truncates this protection and holds that "facts, sometimes referred to as sentencing factors," do not need to be "alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt," *ante*, at 2, so long as they do not increase the penalty for the crime beyond the statutory maximum. This is so even if the fact alters the statutorily mandated sentencing range, by increasing the mandatory minimum sentence. But to say that is in effect to claim that the imposition of a 7-year,

rather than a 5-year, mandatory minimum does not change the constitutionally relevant sentence range because, regardless, either sentence falls between five years and the statutory maximum of life, the longest sentence range available under the statute. This analysis is flawed precisely because the statute provides incremental sentencing ranges, in which the mandatory minimum sentence varies upward if a defendant "brandished" or "discharged" a weapon. As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.

Actual sentencing practices appear to bolster this conclusion. The suggestion that a 7-year sentence could be imposed even without a finding that a defendant brandished a firearm ignores the fact that the sentence imposed when a defendant is found only to have "carried" a firearm "in relation to" a drug trafficking offense appears to be, almost uniformly, if not invariably, five years. Similarly, those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years. Cf. United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1 (illustrating that almost all persons sentenced for violations of 18 U. S. C. §924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment). This is true even though anyone convicted of violating §924(c)(1)(A) is theoretically eligible to receive a sentence as severe as life imprisonment.[4] Yet under the

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[4] Indeed it is a certainty that in virtually every instance the sentence imposed for a §924(c)(1)(A) violation is tied directly to the applicable mandatory minimum. See United States Sentencing Commission, Guidelines Manual §2K2.4, comment., n. 1 (Nov. 2001) (stating clearly

decision today, those key facts actually responsible for fixing a defendant's punishment need not be charged in an indictment or proved beyond a reasonable doubt.

The incremental increase between five and seven years in prison may not seem so great in the abstract (of course it must seem quite different to a defendant actually being incarcerated). However, the constitutional analysis adopted by the plurality would hold equally true if the mandatory minimum for a violation of §924(c)(1) without brandishing was five years, but the mandatory minimum with brandishing was life imprisonment. The result must be the same because surely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity. So long as it was clear that Congress intended for "brandishing" to be a sentencing factor, that fact would still neither have to be charged in the indictment nor proved beyond a reasonable doubt. But if this is the case, then *Apprendi* can easily be avoided by clever statutory drafting.

It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." 530 U. S., at 483, n. 10. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.

This is no less true because mandatory minimum sen-

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that "the guideline sentence for a defendant convicted under 18 U. S. C. §924(c) . . . is the minimum term required by the relevant statute. . . . A sentence above the minimum term . . . is an upward departure").

tences are a 20th-century phenomena. As the Government acknowledged at oral argument, this fact means only that historical practice is not directly dispositive of the question whether facts triggering mandatory minimums must be treated like elements. Tr. of Oral Arg. 47. The Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins. Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum. In either case the defendant cannot predict the judgment from the face of the felony, see 530 U. S., at 478–479, and the absolute statutory limits of his punishment change, constituting an increased penalty. In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty. See *id.,* at 490; *Jones*, 526 U. S., at 253 (SCALIA, J., concurring).

III

McMillan rested on the premise that the "'applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.'" 477 U. S., at 85 (quoting *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977)). Thus, it cannot withstand the logic of *Apprendi*, at least with respect to facts for which the legislature has prescribed a new statutory sentencing range. *McMillan* broke from the "traditional understanding" of crime definition, a tradition that "continued well into the 20th century, at least until the middle of the century." *Apprendi*, *supra,* at 518 (THOMAS, J., concurring). The Court in

McMillan did not, therefore, acknowledge that the change in the prescribed sentence range upon the finding of particular facts changed the prescribed range of penalties in a constitutionally significant way. Rather, while recognizing applicable due process limits, it concluded that the mandatory minimum at issue did not increase the prescribed range of penalties but merely required the judge to impose a specific penalty "within the range already available to it." 477 U. S., at 87–88. As discussed, *supra*, at 6–8, this analysis is inherently flawed.

Jones called into question, and *Apprendi* firmly limited, a related precept underlying *McMillan:* namely, the State's authority to treat aggravated behavior as a factor increasing the sentence, rather than as an element of the crime. Although the plurality resurrects this principle, see *ante*, at 12, 18, it must do so in the face of the Court's contrary conclusion in *Apprendi*, which adopts the position taken by the dissent in *McMillan:* "[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*." 477 U. S., at 103 (STEVENS, J., dissenting). See *Apprendi*, *supra,* at 483–484.

Nor should *stare decisis* dictate the outcome in this case; the *stare decisis* effect of *McMillan* is considerably weakened for a variety of reasons. As an initial matter, where the Court has wrongly decided a constitutional question, the force of *stare decisis* is at its weakest. See *Ring* v. *Arizona*, *post,* at 22; *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). And while the relationship between punishment and the constitutional protections attached to the elements of a crime traces its roots back to the common law,

McMillan was decided only 16 years ago.[5] No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect. The United States concedes, with respect to prospective application, that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury. Tr. of Oral Arg. 42–42. Consequently, one is hard pressed to give credence to the plurality's suggestion that "[i]t is critical not to abandon" *McMillan* "at this late date." *Ante*, at 19. Rather, it is imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Finally, before today, no one seriously believed that the Court's earlier decision in *McMillan* could coexist with the logical implications of the Court's later decisions in *Apprendi* and *Jones*. In both cases, the dissent said as much:

> "The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today. First, the Court endorses the following principle: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts *that increase the prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' *Ante,* at 490 (emphasis added) (quoting *Jones, supra,* at 252–253

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[5] Mandatory minimum sentence schemes are themselves phenomena of fairly recent vintage genesis. See *ante*, at 12; see also *Apprendi* v. *New Jersey*, 530 U. S. 466, 518 (2000) (THOMAS, J., concurring) ("In fact, it is fair to say that *McMillan* began a revolution in the law regarding the definition of 'crime.' Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments").

> (STEVENS, J., concurring)). Second, the Court endorses the rule as restated in JUSTICE SCALIA's concurring opinion in *Jones*. See *ante,* at 490. There, JUSTICE SCALIA wrote: '[I]t is unconstitutional to remove from the jury the assessment of facts *that alter the congressionally prescribed range of penalties* to which a criminal defendant is exposed.' *Jones, supra,* at 253 (emphasis added). Thus, the Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties—must be proved to a jury beyond a reasonable doubt. In *McMillan,* however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan,* but also to explain why such a course of action is appropriate under normal principles of *stare decisis*." *Apprendi,* 530 U. S., at 533 (O'CONNOR, J., dissenting).

See also *Jones*, 526 U. S., at 268 (KENNEDY, J., dissenting) ("[B]y its terms, JUSTICE SCALIA's view . . . would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*. Once the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered"). There is no question but that *stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

Further supporting the essential incompatibility of *Apprendi* and *McMillan*, JUSTICE BREYER concurs in the judgment but not the entire opinion of the Court, recog-

nizing that he "cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction." *Ante*, at 1 (BREYER, J., concurring in part and concurring in judgment). This leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding, and at least one Member explicitly continues to reject both *Apprendi* and *Jones*. *Ante*, at 1 (O'CONNOR, J., concurring).

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"Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*," in *Apprendi*, "we reserve[d] for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." 530 U. S., at 487, n. 13. But that day has come, and adherence to *stare decisis* in this case would require infidelity to our constitutional values. Because, like most Members of this Court, I cannot logically distinguish the issue here from the principles underlying the Court's decision in *Apprendi*, I respectfully dissent.