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HARRIS V. UNITED STATES: THE SUPREME COURT'S LATEST AVOIDANCE OF PROVIDING CONSTITUTIONAL PROTECTION TO SENTENCING FACTORS

Harris v. United States, 536 U.S. 545 (2002)

I. INTRODUCTION

In *Harris v. United States*,¹ the United States Supreme Court addressed the constitutionality of 18 U.S.C. § 924(c)(1)(A)(ii), a federal drug and firearm statute that increases a defendant's minimum sentence by two years based upon a determination that the defendant brandished a firearm.² The sharply divided Court concluded that the brandishing of a firearm under § 924(c)(1)(A)(ii) is a sentencing factor to be determined by the judge, rather than an element of a separate offense to be found by the jury.³ The Court held that § 924(c)(1)(A)(ii) did not violate the Fifth or Sixth Amendments, which provide certain protections to the criminally accused.⁴ Reconciling *McMillan v. Pennsylvania*⁵ with *Apprendi v. New Jersey*,⁶ the Court's plurality opinion reasoned that although a jury must find facts that would extend the defendant's sentence beyond the statutory maximum, a judge alone may find facts that merely increase a minimum sentence because the jury would have already authorized the maximum sentence with its guilty verdict.⁷

This Note examines several Supreme Court decisions that have defined the respective roles of judges and juries in determining sentencing factors and elements of a criminal offense. Interestingly enough, these prior decisions were also sharply divided. This Note argues that although the Court was correct in finding a distinction between *McMillan* and *Apprendi*,

¹ 536 U.S. 545 (2002).

² See 18 U.S.C. § 924(c)(1)(A)(ii) (1994 & Supp. V 1999).

³ *Harris*, 536 U.S. at 556.

⁴ *Id.* at 568.

⁵ 477 U.S. 79 (1986).

⁶ 530 U.S. 466 (2000).

⁷ See *Harris*, 536 U.S. at 556-68.

the Court erred in failing to overrule *McMillan* and in holding that the brandishing of a firearm is a sentencing factor to be determined by the judge. In order to simplify the considerations that courts must make in light of the Supreme Court precedent, the Court should have created a bright-line rule requiring any fact (other than a prior conviction) that a statute links to a variation in the defendant's sentence to be treated as an element of the offense. To comply with constitutional protections, such a fact must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

II. BACKGROUND

A. THE FIFTH AND SIXTH AMENDMENT PROTECTIONS

The Fifth and Sixth Amendments to the United States Constitution provide certain protections to persons accused of a crime. The Fifth Amendment guarantees that “[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 . . . nor be deprived of life, liberty, or property, without due process of law[.]”⁸ The Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation[.]”⁹

The Supreme Court has elaborated on these constitutional protections. In *Hamling v. United States*,¹⁰ the Court stated that a sufficient indictment “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and . . . enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”¹¹ Continuing, the Court wrote that “[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’”¹² In *In re Winship*,¹³ the Court held that “the Due Process Clause protects the accused against conviction except

⁸ U.S. CONST. amend. V.

⁹ U.S. CONST. amend. VI.

¹⁰ 418 U.S. 87 (1974).

¹¹ *Id.* at 117 (citing *United States v. Debrow*, 346 U.S. 374 (1953); *Hagner v. United States*, 285 U.S. 427 (1932)).

¹² *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)).

¹³ 397 U.S. 358 (1970).

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹⁴

B. EVOLUTION OF SENTENCING PRACTICES IN THE UNITED STATES

A tug-of-war between judge and jury has long existed, from the foundation of English common law to recent cases before the Supreme Court.¹⁵ As early as 1628, it was established common law that juries determined the facts of a case, while judges determined the law.¹⁶ With respect to sentencing practices, however, this distinction between the two roles has been blurred. In the mid-nineteenth century, criminal statutes in the United States evolved from providing fixed sentences to providing for judicial discretion within a sentencing range.¹⁷ Such discretion led to a disparity in sentences among like offenders.¹⁸ This caused many legislatures at the end of the twentieth century to revise their criminal statutes once more to take away some of that discretion.¹⁹ One of the measures used to limit judicial discretion was to assign a particular weight to a specified fact.²⁰ That fact, for example, could determine a defendant’s minimum or maximum sentence, or the fact could add extra years in prison to a defendant’s regular sentence.²¹ The following cases document some of the ways in which the Supreme Court has handled difficult constitutional questions stemming from these new statutes.

1. *Mandatory Minimums: McMillan v. Pennsylvania*

In a 1986 case, *McMillan v. Pennsylvania*,²² the Supreme Court examined the constitutionality of Pennsylvania’s Mandatory Minimum Sentencing Act.²³ Under the Act, those who were convicted of particular felonies received a prison sentence of at least five years if the judge found,

¹⁴ *Id.* at 364.

¹⁵ *See, e.g., Jones v. United States*, 526 U.S. 227, 245 (1999) (stating that “competition developed between judge and jury over the real significance of their respective roles”).

¹⁶ EDUARDO COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 155b (1628), *cited in Jones*, 526 U.S. at 247 n.8.

¹⁷ *See Harris*, 536 U.S. at 558.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (reviewing sentence enhancement statute); *Jones v. United States*, 526 U.S. 227, 245 (1999) (reviewing maximum sentence statute); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (reviewing minimum sentence statute).

²² 477 U.S. 79 (1986).

²³ *Id.*; *see* 42 PA. CONS. STAT. § 9712 (1982).

by a preponderance of the evidence, that the convicted person “visibly possessed a firearm” while committing the felony.²⁴ At the other end of the sentencing range, the judge could not impose a sentence that was greater than the maximum permitted for the crime.²⁵ The act also set forth that visible possession was not an element of the crime and that notice that the state would attempt to show visible possession was not required until after a conviction.²⁶

In a 5-4 decision,²⁷ the Court held the act constitutional and rejected the argument of four petitioners that visible possession must be proved beyond a reasonable doubt because it is an element of a “new set of upgraded felonies.”²⁸ The Court noted its basic rejection of the idea “that whenever a State links the ‘severity of punishment’ to ‘the presence or absence of an identified fact’ the State must prove that fact beyond a reasonable doubt.”²⁹ The Court for the first time referred to such facts as “sentencing factors”³⁰ and distinguished them from elements, which are “included in the definition of the offense” and must be proved beyond a reasonable doubt.³¹ Although the Constitution limits the extent to which states may define crimes and penalties, the act in question did not exceed those limits.³² Visible possession did not appear to be “a tail which wags the dog of the substantive offense.”³³ Rather, the act merely “ups the ante” for defendants by limiting the sentencing judge’s discretion to selecting a sentence within the range that would have been available without the factual finding.³⁴

²⁴ *McMillan*, 477 U.S. at 81.

²⁵ *Id.* at 82.

²⁶ *Id.* at 81 n.1.

²⁷ *Id.* at 79. Chief Justice Burger and Justices Rehnquist, White, Powell, and O’Connor formed the majority in *McMillan*. Justices Marshall, Brennan, Blackmun, and Stevens dissented. *Id.*

²⁸ *Id.* at 83. In their argument, the petitioners relied on *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

²⁹ *McMillan*, 477 U.S. at 84 (quoting *Patterson v. New York*, 432 U.S. 197, 214 (1977)). Justice Stevens argued in his dissent that the majority misinterpreted *Patterson* because that case actually said the state did not have to “prove beyond a reasonable doubt every fact, the existence or nonexistence of which it was willing to recognize as an *exculpatory or mitigating circumstance* affecting the degree of culpability or the severity of the punishment.” See *id.* at 98-99 (Stevens, J., dissenting) (quoting *Patterson*, 432 U.S. at 207) (emphasis added).

³⁰ See *id.* at 85-86; *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000).

³¹ *McMillan*, 477 U.S. at 85 (quoting *Patterson*, 432 U.S. at 210).

³² See *id.* at 86-91.

³³ *Id.* at 88.

³⁴ *Id.* at 87-88.

In his dissent, Justice Stevens argued that visible possession is an element to be proved beyond a reasonable doubt “[b]ecause the [act] describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same.”³⁵ Justice Stevens asserted that “a State may not advance the objectives of its criminal laws at the expense of the accurate factfinding owed to the criminally accused who suffer the risk of nonpersuasion.”³⁶

Justice Marshall’s dissent, largely in agreement with Justice Stevens,³⁷ asserted that the majority gave too much deference to the Pennsylvania legislature’s statement that visible possession is not an element.³⁸ The *Winship* decision requires that the prosecution prove visible possession beyond a reasonable doubt.³⁹

2. *An Element in Disguise: Jones v. United States*

In a 1999 case, *Jones v. United States*,⁴⁰ the Supreme Court determined that what superficially appeared to be sentencing factors in a particular federal offense were actually elements of the crime.⁴¹ *Jones* involved a federal carjacking statute consisting of a main paragraph containing elements of the offense, followed by three clauses establishing maximum sentences.⁴² The first clause set the maximum sentence for the offense at fifteen years; the second clause stipulated a twenty-five-year maximum sentence upon the finding of “serious bodily injury,” and the third clause

³⁵ *Id.* at 96 (Stevens, J., dissenting). Justice Stevens then explained this assertion in broader terms, arguing that the Due Process Clause requires a state to prove beyond a reasonable doubt “any component of the prohibited transaction that gives rise to both a special stigma and a special punishment.” *Id.*

³⁶ *Id.* at 102 (Stevens, J., dissenting).

³⁷ *Id.* at 93 (Marshall, J., dissenting). Justices Brennan and Blackmun joined in this dissent. *Id.*

³⁸ *Id.* (Marshall, J., dissenting).

³⁹ *Id.* at 94 (Marshall, J., dissenting).

⁴⁰ 526 U.S. 227 (1999).

⁴¹ *See id.*

⁴² *See id.* at 230. The statute read:

Whoever, possessing a firearm . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

stipulated a maximum sentence of life imprisonment upon a finding that death resulted from the offense.⁴³ As such, the statute in question either defined three different offenses or one offense with three possible maximum sentences, two of which turn on sentencing factors.⁴⁴

In another 5-4 decision,⁴⁵ the Court held that the statute defined three distinct offenses and that the facts on which the sentences were conditioned are considered elements, not sentencing factors.⁴⁶ Yet, despite this holding, the Court adhered to its past rejection of the notion that “every fact with a bearing on sentencing must be found by a jury.”⁴⁷ The Court explained its reasoning as follows. First, although the “look” of the statute suggests that serious bodily injury and death are sentencing factors, the substantial penalties attached to them imply otherwise.⁴⁸ Second, Congress seems to have intended serious bodily injury (the fact relevant to the crime at issue in *Jones*) to be an element of this offense.⁴⁹ Although serious bodily injury is used both as a sentencing factor and an element in other federal statutes, in the context of robbery, it is traditionally treated as an element.⁵⁰ Model statutes used by Congress in drafting the statute, as well as state statutes, also suggest serious bodily injury is an element.⁵¹ Lastly, the Court should apply the doctrine of constitutional avoidance, interpreting the statute in a way that avoids raising constitutional issues.⁵²

Justice Kennedy’s dissent in *Jones* asserted that the statute at issue defined one offense.⁵³ He explained that the majority erred not only in its interpretation of statutory construction,⁵⁴ but also in its decision to rely on the constitutional avoidance doctrine.⁵⁵

⁴³ See 18 U.S.C. § 2119.

⁴⁴ *Jones*, 526 U.S. at 229.

⁴⁵ *Id.* at 227. Justices Souter, Stevens, Scalia, Thomas, and Ginsburg formed the majority, while Chief Justice Rehnquist and Justices Kennedy, O’Connor, and Breyer dissented. *Id.*

⁴⁶ See *id.* at 229.

⁴⁷ *Id.* at 248.

⁴⁸ *Id.* at 233.

⁴⁹ See *id.* at 235.

⁵⁰ *Id.* Carjacking is a form of robbery. *Id.*

⁵¹ See *id.* at 235-37.

⁵² *Id.* at 239. (“[W]here 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.” (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909))).

⁵³ *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting). Chief Justice Rehnquist and Justices O’Connor and Breyer joined in this dissent. *Id.*

⁵⁴ See *id.* at 254-64.

⁵⁵ *Id.* at 254, 264-71.

3. Sentence Enhancement: *Apprendi v. New Jersey*

In 2000, the Supreme Court decided *Apprendi v. New Jersey*.⁵⁶ *Apprendi* questioned the constitutionality of a New Jersey hate crime law that authorized a trial judge to “enhance” the sentence of any defendant convicted of a second-degree offense to between ten and twenty years’ imprisonment, if the judge found by a preponderance of the evidence that the defendant committed the offense “with a purpose to intimidate an individual or group of individuals because of race[.]”⁵⁷ The defendant in *Apprendi* had been convicted of a second-degree offense regularly punishable by five to ten years’ imprisonment.⁵⁸ However, the defendant was sentenced to twelve years pursuant to the hate crime law.⁵⁹ The case questioned whether the Constitution requires a fact that would increase a defendant’s sentence beyond the statutory maximum to be proved beyond a reasonable doubt to a jury.⁶⁰

Like *McMillan* and *Jones*, *Apprendi* was decided by a 5-4 vote.⁶¹ The Court found that the sentence-enhancing law was unconstitutional and held that “[o]ther 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.”⁶² The Court endorsed a rule set forth in the concurring opinions in *Jones*, that “[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. . . . [S]uch facts must be established by proof beyond a reasonable doubt.”⁶³ The Court explicitly did not overrule *McMillan* but emphasized *McMillan*’s limitation 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.”⁶⁴

Justice O’Connor’s dissent, which would have found the statute constitutional, criticizes the majority for its “watershed change in

⁵⁶ 530 U.S. 466 (2000).

⁵⁷ *Id.* at 468-69; see N.J. STAT. ANN. §§ 2C:43-7(a)(3), 44-3(e) (West Supp. 2000).

⁵⁸ *Id.* at 468.

⁵⁹ *Id.* at 474.

⁶⁰ *Id.* at 469.

⁶¹ See *id.* at 466. Justices Stevens, Scalia, Souter, Thomas, and Ginsburg formed the majority in *Apprendi*, while Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer dissented. *Id.*

⁶² *Id.* at 490.

⁶³ *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)); see also *Jones*, 526 U.S. at 253 (Scalia, J., concurring).

⁶⁴ *Apprendi*, 530 U.S. at 487 n.13.

constitutional law.”⁶⁵ Rather than using a traditional “cautious approach,”⁶⁶ the majority creates confusion in sentencing with its apparent holding: “[A]ny 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.”⁶⁷ Such a rule conflicts with *McMillan*.⁶⁸ Moreover, the Court’s “increase in the maximum penalty” rule is not required by the Constitution.⁶⁹

In a separate dissent, Justice Breyer added that the Court’s holding was “impractical.”⁷⁰ Judges, rather than juries, determine sentence-affecting facts not out of “an ideal of procedural fairness” but out of “an administrative need for procedural compromise.”⁷¹ There are so many facts that could pertain to a sentence that it is not practical to submit all, or even many, of them to the jury.⁷² Justice Breyer also criticized the Court’s logic for seemingly approving judicial consideration of facts that could increase a defendant’s sentence, but just not when those facts are stipulated in the statute.⁷³

III. FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

William Joseph Harris owned and operated a pawn shop in Abermarle, North Carolina.⁷⁴ During business hours, Harris typically carried a handgun

⁶⁵ *Id.* at 524, 554 (O’Connor, J., dissenting). Chief Justice Rehnquist and Justices Kennedy and Breyer joined in this dissent. *Id.*

⁶⁶ *See id.* at 525, 552 (O’Connor, J., dissenting).

⁶⁷ *Id.* at 533 (O’Connor, J., dissenting).

⁶⁸ *Id.* (O’Connor, J., dissenting).

⁶⁹ *Id.* at 552 (O’Connor, J., dissenting).

⁷⁰ *Id.* at 555 (Breyer, J., dissenting). Chief Justice Rehnquist joined in this dissent. *Id.*

⁷¹ *Id.* at 556-57 (Breyer, J., dissenting) (internal quotation marks and emphasis omitted).

⁷² *Id.* at 557 (Breyer, J., dissenting). Justice Breyer explained that if such facts were required to be submitted to the jury, the defendant might be placed in the “awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, e.g., ‘I did not sell drugs, but I sold no more than 500 grams.’” *Id.* Although he noted that “special postverdict sentencing juries could cure this problem,” Justice Breyer says such juries “have seemed (but for capital cases) not worth their administrative costs.” *Id.*

⁷³ *See id.* at 561 (Breyer, J., dissenting).

⁷⁴ Brief for Petitioner at 3, *Harris v. United States*, 536 U.S. 545 (2002) (No. 00-10666).

in an unconcealed hip holster,⁷⁵ which he removed each night before leaving the shop.⁷⁶

On the afternoon of April 29, 1999, an undercover law enforcement officer visited Harris's pawn shop to purchase marijuana.⁷⁷ The agent brought with him a confidential informant, Rodney Deaton, Harris's half brother.⁷⁸ After thirty minutes of casual conversation, a sale of one ounce of marijuana was negotiated.⁷⁹ Deaton then noticed Harris's gun and inquired about it.⁸⁰ After further inquiries from Deaton and the officer, Harris removed the gun from the holster.⁸¹ He stated that the gun "was an outlawed firearm because it had a high-capacity magazine."⁸² Harris also showed them his homemade bullets,⁸³ which he claimed "could pierce a police officer's armored jacket."⁸⁴

The undercover officer returned twice more to Harris's shop during business hours.⁸⁵ The officer purchased four ounces of marijuana on April 30 and some marijuana and other drugs on May 6.⁸⁶ Harris was wearing the gun on both days, but the gun was not discussed and Harris did not remove it from the holster.⁸⁷

B. HARRIS'S INDICTMENT, CONVICTION, AND SENTENCING

After Harris's arrest,⁸⁸ a federal grand jury in the Middle District of North Carolina returned an indictment charging him with two counts of distribution of marijuana and two counts of carrying a firearm during and in relation to a drug trafficking crime.⁸⁹ The firearm charge was brought pursuant to 18 U.S.C. § 924(c)(1)(A), which states that a person who

⁷⁵ See *id.* (also stating that it was lawful for Harris to do so); Brief for the United States at 2, *Harris v. United States*, 536 U.S. 545 (2002) (No. 00-10666).

⁷⁶ Brief for Petitioner at 3, *Harris* (No. 00-10666).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* It is debated whether the sale was concluding or already completed when the first inquiry about the gun took place. See Brief for the United States at 2, *Harris* (No. 00-10666); Brief for Petitioner at 3, *Harris* (No. 00-10666).

⁸¹ Brief for Petitioner at 3, *Harris* (No. 00-10666).

⁸² Brief for the United States at 2, *Harris* (No. 00-10666).

⁸³ *Id.*

⁸⁴ *Id.*; Brief for Petitioner at 3, *Harris* (No. 00-10666).

⁸⁵ Brief for Petitioner at 3, *Harris* (No. 00-10666).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*; Brief for the United States at 3, *Harris* (No. 00-10666).

“during and in relation to” a drug trafficking crime, “uses or carries a firearm” or who “possesses” a firearm “in furtherance of” such a crime, will receive punishment in addition to that given for the drug trafficking crime.⁹⁰ The punishment, listed in the first of three clauses following the main paragraph, is imprisonment for a minimum of five years.⁹¹ However, if the defendant “brandished” the firearm, the second clause mandates imprisonment for a minimum of seven years, and if the defendant “discharged” the firearm, the third clause mandates imprisonment for a minimum of ten years.⁹² Notably, Harris’s indictment did not charge him with having brandished a firearm, “nor did it charge him with any crime pertaining to the events of April 29.”⁹³

The prosecution dropped one of the two counts of distribution, and Harris pleaded guilty to the other.⁹⁴ The prosecution also dropped one count of the firearm charge.⁹⁵ On the remaining count, carrying a firearm in relation to a drug trafficking crime on April 30,⁹⁶ Harris waived his right to a jury and went to a bench trial.⁹⁷ The judge found Harris guilty pursuant to § 924(c)(1)(A).⁹⁸

For the distribution count, the pre-sentence report recommended zero to six months of imprisonment, calculated according to the United States Sentencing Guidelines.⁹⁹ For the firearm count, the Sentencing Guidelines

⁹⁰ 18 U.S.C. § 924(c)(1)(A) (1994 & Supp. V 1999). The statute states:

Any 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.

Id.

⁹¹ *Id.* § 924(c)(1)(A)(i).

⁹² *Id.* § 924(c)(1)(A)(ii)-(iii).

⁹³ Brief for Petitioner at 4, *Harris* (No. 00-10666).

⁹⁴ *See id.*; Brief for the United States at 3, *Harris* (No. 00-10666).

⁹⁵ Brief for Petitioner at 4, *Harris* (No. 00-10666); Brief for the United States at 3, *Harris* (No. 00-10666).

⁹⁶ *See United States v. Harris*, 243 F.3d 806, 807 (4th Cir. 2001).

⁹⁷ Brief for Petitioner at 4, *Harris* (No. 00-10666); Brief for the United States at 3, *Harris* (No. 00-10666).

⁹⁸ Brief for Petitioner at 4, *Harris* (No. 00-10666); Brief for the United States at 3, *Harris* (No. 00-10666).

⁹⁹ Brief for Petitioner at 4, *Harris* (No. 00-10666); Brief for the United States at 3,

required “the minimum term of imprisonment required by statute.”¹⁰⁰ Under § 924(c)(1)(A)(i), five years is the minimum sentence for one who “uses or carries” a firearm “during and in relation to” a drug trafficking crime, or who “possesses” a firearm “in furtherance of” such crime.¹⁰¹ However, the pre-sentence report, without explanation,¹⁰² suggested a minimum sentence of seven years pursuant to § 924(c)(1)(A)(ii), which provides for a minimum sentence of seven years “if the firearm is brandished.”¹⁰³

Harris disputed the report’s recommendation of a seven-year sentence, arguing instead for a five-year sentence.¹⁰⁴ Harris argued that as a matter of statutory construction, brandishing is an element of a separate offense which must be charged in the indictment and proved beyond a reasonable doubt at trial.¹⁰⁵ The district court rejected this claim.¹⁰⁶

Harris also argued that he had not in fact brandished the firearm within the meaning of § 924(c)(1)(A)(ii).¹⁰⁷ “Brandish” is defined by § 924(c)(4) as “with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.”¹⁰⁸ Harris contended that he had not displayed the gun “in order to intimidate” another person.¹⁰⁹

In considering whether Harris brandished the firearm, the district court judge stated that it was a “close case”¹¹⁰ and that “the only thing that happened here is [Harris] had the gun during the drug transaction.”¹¹¹ The judge remarked that the definition of brandishing includes “carrying an exposed weapon during the drug transaction.”¹¹² The judge found that

Harris (No. 00-10666).

¹⁰⁰ Brief for the United States at 4, *Harris* (No. 00-10666).

¹⁰¹ 18 U.S.C. § 924(c)(1)(A)(i) (1994 & Supp. V 1999).

¹⁰² Brief for Petitioner at 4, *Harris* (No. 00-10666).

¹⁰³ See 18 U.S.C. § 924(c)(1)(A)(ii); Brief for Petitioner at 4, *Harris* (No. 00-10666); Brief for the United States at 4, *Harris* (No. 00-10666).

¹⁰⁴ Brief for Petitioner at 5, *Harris* (No. 00-10666); Brief for the United States at 4, *Harris* (No. 00-10666).

¹⁰⁵ Brief for Petitioner at 5, *Harris* (No. 00-10666); Brief for the United States at 4, *Harris* (No. 00-10666).

¹⁰⁶ Brief for Petitioner at 5, *Harris* (No. 00-10666).

¹⁰⁷ *Id.*; Brief for the United States at 4, *Harris* (No. 00-10666).

¹⁰⁸ 18 U.S.C. § 924(c)(4) (1994 & Supp. V 1999).

¹⁰⁹ Brief for Petitioner at 5, *Harris* (No. 00-10666).

¹¹⁰ *Id.* (“close case”); Brief for the United States at 4, *Harris* (No. 00-10666) (“close question”).

¹¹¹ Brief for Petitioner at 5, *Harris* (No. 00-10666).

¹¹² Brief for the United States at 4, *Harris* (No. 00-10666).

Harris had worn the gun in order “to intimidate people . . . during his illegal business” and that “a sentence of seven years is appropriate” upon “considering all the aspects of this case.”¹¹³ In support of his decision, the judge cited Harris’s comments about the gun’s ammunition,¹¹⁴ despite the judge’s prior commitment not to consider the “conversation about the gun . . . and the bullets” because the comments were made in answer to questions from Deaton and the undercover officer.¹¹⁵ Finding by a preponderance of the evidence that Harris brandished the firearm, the judge sentenced Harris to seven years of imprisonment on the firearm count.¹¹⁶ Harris received a two-day sentence for the distribution count.¹¹⁷

C. THE FOURTH CIRCUIT AFFIRMED

Harris appealed his conviction to the United States Court of Appeals for the Fourth Circuit.¹¹⁸ Harris argued to the panel that brandishing is an element of a separate offense for which he was not indicted or tried and, in the alternative, if brandishing is a sentencing factor, then § 924(c)(1)(A) is unconstitutional under *Apprendi*.¹¹⁹ The Fourth Circuit rejected both arguments,¹²⁰ explaining, “While the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or ‘range’ of punishment, rather than only the maximum punishment, that is not our role.”¹²¹

D. THE UNITED STATES SUPREME COURT GRANTED CERTIORARI

Harris filed a petition for certiorari with the United States Supreme Court. The Court granted certiorari on the question: “Given that a finding of ‘brandishing,’ as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of ‘brandishing’ be alleged in the indictment and proved beyond a reasonable doubt?”¹²²

¹¹³ Brief for the United States at 4-5, *Harris* (No. 00-10666). This brief also notes, “[a]lthough the court declined to say definitively that it would reimpose that [seven-year] sentence if petitioner’s arguments on brandishing succeeded on appeal, the court made it clear that it might do so.” *Id.* at 5.

¹¹⁴ Brief for Petitioner at 5, *Harris* (No. 00-10666).

¹¹⁵ *Id.*; Brief for the United States at 4, *Harris* (No. 00-10666).

¹¹⁶ Brief for Petitioner at 5, *Harris* (No. 00-10666).

¹¹⁷ *Id.*

¹¹⁸ *United States v. Harris*, 243 F.3d 806 (4th Cir. 2001).

¹¹⁹ See *Harris*, 536 U.S. at 551-52; *United States v. Harris*, 243 F.3d 806, 808-09 (4th Cir. 2001).

¹²⁰ *Harris*, 243 F.3d at 808-09.

¹²¹ *Id.* at 809 (citation omitted).

¹²² *Harris v. United States*, 534 U.S. 1064 (2001).

IV. SUMMARY OF OPINIONS

The constitutional question in *Harris* was decided by a 5-4 split among the Justices.¹²³ Justice Kennedy authored the four-part opinion, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Breyer joined as to Parts I, II, and IV.¹²⁴ Of those five Justices, only Justice Breyer abstained from joining in Part III.¹²⁵ Justices Thomas, Stevens, Souter, and Ginsburg dissented.¹²⁶

A. THE OPINION OF THE COURT

The Supreme Court affirmed the Fourth Circuit's decision.¹²⁷ The Court held that 18 U.S.C. § 924(c)(1)(A) defines a single offense, in which brandishing and discharging are sentencing factors not required to be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.¹²⁸ Moving on to what it characterized as the main issue, "whether *McMillan* stands after *Apprendi*,"¹²⁹ the Court reaffirmed *McMillan*.¹³⁰ The Court then held § 924(c)(1)(A)(ii) constitutional in light of the *McMillan* opinion.¹³¹

1. *Brandishing is a Sentencing Factor*

In determining whether brandishing in § 924(c)(1)(A) was a sentencing factor or an element of a separate offense, the Court first examined the structure of the statute.¹³² Federal statutes "usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'"¹³³ In § 924(c)(1)(A), the word "shall" at the end of the main paragraph separates the elements of the offense from the sentencing factors.¹³⁴ Subsection (i) is a "catchall minimum," while subsections (ii) and (iii) increase the minimum based on the presence of certain facts.¹³⁵

¹²³ *Harris*, 536 U.S. at 545.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 568-69.

¹²⁸ *Id.* at 556, 568.

¹²⁹ *Id.* at 550.

¹³⁰ *Id.* at 568.

¹³¹ *Id.*

¹³² *Id.* at 552-53.

¹³³ *Id.* at 552 (quoting *Castillo v. United States*, 530 U.S. 120, 125 (2000)).

¹³⁴ *Id.*; see *Jones v. United States*, 526 U.S. 227, 233 (1999).

¹³⁵ *Harris*, 536 U.S. at 552-53.

Thus, the structure of the statute suggests that brandishing is a sentencing factor.¹³⁶

The Court next examined traditional use and past congressional practice, which were the clues in *Jones*, to ensure that what appeared to be sentencing factors were not meant to be elements.¹³⁷ The Court found no tradition of using brandishing and discharging as elements of an offense in federal law.¹³⁸ In fact, in *Castillo v. United States*,¹³⁹ the Court had mentioned brandishing as a “paradigmatic sentencing factor.”¹⁴⁰ Moreover, the Sentencing Guidelines use brandishing and discharging to “affect the sentences for numerous federal crimes.”¹⁴¹ Of all the federal provisions that define offenses, only § 924(c)(1)(A) mentions brandishing.¹⁴² The Court concluded from these observations that Congress intended brandishing and discharging to function as sentencing factors.¹⁴³

In addition, the Court found that brandishing and discharging actually function as sentencing factors.¹⁴⁴ Unlike the terms in *Jones*, which authorized “steeply higher penalties” and thus were unlikely to be left up to the court,¹⁴⁵ the factors in § 924(c)(1)(A) “constrain, rather than extend” the judge’s discretion.¹⁴⁶ This effect on a defendant’s sentence is more in accord with “traditional understandings about how sentencing factors operate.”¹⁴⁷

The Court also considered the doctrine of constitutional avoidance.¹⁴⁸ This doctrine dictates that if a statute may be interpreted in multiple ways, a court should adopt whichever approach avoids raising constitutional questions.¹⁴⁹ Harris had argued that the Court should consider brandishing

¹³⁶ *Id.*

¹³⁷ *Id.* at 553.

¹³⁸ *Id.*

¹³⁹ 530 U.S. 120 (2000).

¹⁴⁰ *Harris*, 536 U.S. at 553 (citing *Castillo v. United States*, 530 U.S. 120, 126 (2000), which states, “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).”).

¹⁴¹ *Harris*, 536 U.S. at 553 (citing U.S. Sentencing Guidelines Manual §§ 2A2.2(b)(2), 2B3.1(b)(2), 2B3.2(b)(3)(A), 2E2.1(b)(1), 2L1.1(b)(4) (2001)).

¹⁴² *Id.* at 554.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 233 (1999)) (internal quotation marks omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 554-56.

¹⁴⁹ *Id.* at 555 (citing *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)); see *supra* note 52.

as an element in order to avoid deciding whether the Fifth and Sixth Amendment protections apply to facts increasing the minimum sentence.¹⁵⁰ The Court refused to do so, stating that because *McMillan* was in place when Congress enacted § 924(c)(1)(A), the statute had to be read in the context of *McMillan* or else “the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed.”¹⁵¹ The Court concluded that § 924(c)(1)(A) defines a single offense, with brandishing and discharging as sentencing factors to be determined by the judge.¹⁵²

2. *The Statute is Constitutional*

The Court reaffirmed *McMillan* as sound authority and held § 924(c)(1)(A)(ii) constitutional.¹⁵³ Five Justices agreed that “[b]asing 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.”¹⁵⁴ Consequently, the fact of brandishing “need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”¹⁵⁵

Only four Justices, however, agreed on why the statute is constitutional in light of *McMillan* and *Apprendi*.¹⁵⁶ Rejecting Harris’s argument that *Apprendi* cannot be reconciled with *McMillan*,¹⁵⁷ the plurality found a “fundamental distinction” between facts that increase a minimum sentence and facts that extend a sentence beyond the statutory maximum.¹⁵⁸ *Apprendi* required facts extending a sentence beyond the maximum authorized by the jury to be treated as elements.¹⁵⁹ *McMillan* recognized that facts increasing the mandatory minimum but not beyond the statutory maximum may be determined by a judge because the jury with its verdict, “authorized the judge to impose the minimum with or without the finding.”¹⁶⁰

¹⁵⁰ *Harris*, 536 U.S. at 555.

¹⁵¹ *Id.* at 556.

¹⁵² *Id.*

¹⁵³ *Id.* at 568.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* at 557-60.

¹⁵⁷ *Id.* at 557.

¹⁵⁸ *Id.* at 557, 566.

¹⁵⁹ *Id.* at 557.

¹⁶⁰ *Id.*

The Court justified its distinction first by citing historical understandings about the judge's role in sentencing.¹⁶¹ The Court documented a shift in the mid-nineteenth century "from criminal statutes providing fixed-term sentences to those providing judges discretion within a permissible range."¹⁶² Such judicial discretion led to disparities in the sentences of like offenders, so in the late twentieth century, legislatures put measures in place to reduce judicial discretion.¹⁶³ The Court reasoned from this evolution that "[i]f 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."¹⁶⁴

The Court found no evidence that the Framers of the Fifth and Sixth Amendments would have considered facts that increase a minimum sentence, without exceeding the maximum, to be elements.¹⁶⁵ Although it is not clear how such facts were actually treated, they could not have been elements, because elements were "facts legally essential to the punishment to be inflicted."¹⁶⁶ Since Harris could receive seven years of imprisonment with or without a finding of brandishing, that fact could not be essential to his punishment.¹⁶⁷

Lastly, the Court rejected Harris's argument that because facts increasing a mandatory minimum typically have a greater effect on the actual sentence given to a defendant, *Apprendi* should apply.¹⁶⁸ The Court explained that the practical effect of a factual finding cannot control the constitutional analysis.¹⁶⁹ Although "[t]he Fifth and Sixth Amendments ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime,' . . . they do not promise that he will

¹⁶¹ See *id.* at 557-59.

¹⁶² *Id.* at 558 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000)) (internal quotation marks omitted).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 560.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting) (internal quotation marks and original alterations omitted)).

¹⁶⁷ See *id.* at 561.

¹⁶⁸ *Id.* at 566.

¹⁶⁹ *Id.*

receive ‘anything less’ than that.”¹⁷⁰ A fact is not an element just because it has a dramatic effect on the defendant’s sentence.¹⁷¹

McMillan and *Apprendi* may be read together, the Court concluded, to include any “facts setting the outer limits of a sentence” as elements of an offense.¹⁷² However, “[w]ithin the range authorized by the jury’s verdict . . . the political system may channel judicial discretion—and rely upon judicial expertise” by permitting judges to find the facts establishing minimum sentences.¹⁷³ The Court emphasized that adherence to this framework is critical to maintain the validity of the many statutes and sentences made in reliance on *McMillan*.¹⁷⁴

3. *Comments on Mandatory Minimum Sentencing*

The five Justices of the majority acknowledged the failure of mandatory minimum sentencing to take into consideration defendants’ unique circumstances that might warrant a lesser sentence.¹⁷⁵ Such problems, said the Court, “would persist whether the judge or the jury found the facts giving rise to the minimum.”¹⁷⁶ Resolution lies not with the Court but with “Congress, the States, and the democratic processes.”¹⁷⁷

B. JUSTICE BREYER’S PARTIAL CONCURRENCE

Justice Breyer abstained from joining in the plurality’s harmonization of *McMillan* and *Apprendi* because he did not easily find a logical distinction between Harris’s case and *Apprendi*.¹⁷⁸ Still disagreeing with the holding of *Apprendi*, Justice Breyer explained that the Sixth Amendment permits judges to decide sentencing factors, whether they apply to a mandatory minimum or cause a sentence to exceed the statutory maximum.¹⁷⁹ He concurred in the judgment because “extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal,

¹⁷⁰ *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 567.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 567-68.

¹⁷⁵ *Id.* at 568.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (Breyer, J., concurring in part and concurring in the judgment).

¹⁷⁹ *Id.* (Breyer, J., concurring in part and concurring in the judgment).

consequences.”¹⁸⁰ As a matter of policy, however, Justice Breyer does not approve of mandatory minimum sentencing.¹⁸¹

C. THE DISSENT

The dissenting Justices argued that the Court should have reaffirmed *Apprendi*, overruled *McMillan*, and reversed the lower court in this case.¹⁸² According to the dissent, the plurality’s “fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny.”¹⁸³ The principles underlying *Apprendi* equally apply to facts increasing a mandatory minimum.¹⁸⁴ The dissent explained, “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.”¹⁸⁵ Because a finding of brandishing exposes a defendant to a harsher range of penalties, representing both a special stigma and a special punishment, as a constitutional matter that fact must be deemed an element.¹⁸⁶ The dissent cited actual sentencing practices as support that these factual findings result in harsher penalties.¹⁸⁷ Nearly all defendants sentenced under § 924(c)(1)(A) received the mandatory minimum of five, seven, or ten years depending on whether the defendant carried, brandished, or discharged a firearm.¹⁸⁸

The dissent criticized the plurality for allowing *Apprendi* to be avoided with clever statutory drafting.¹⁸⁹ For example, under the plurality’s reasoning, if Congress clearly intended brandishing to be a sentencing factor and had instead attached to it a mandatory minimum of life imprisonment, that fact would not have to be charged in the indictment or proved beyond a reasonable doubt.¹⁹⁰ Under the plurality’s reasoning, a factual finding of brandishing must still be left to the judge “because surely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity.”¹⁹¹

¹⁸⁰ *Id.* (Breyer, J., concurring in part and concurring in the judgment).

¹⁸¹ *See id.* at 570-71 (Breyer, J., concurring in part and concurring in the judgment).

¹⁸² *Id.* at 572-73 (Thomas, J., dissenting).

¹⁸³ *Id.* at 574 (Thomas, J., dissenting).

¹⁸⁴ *Id.* at 579 (Thomas, J., dissenting).

¹⁸⁵ *Id.* (Thomas, J., dissenting).

¹⁸⁶ *See id.* at 577 (Thomas, J., dissenting) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000)).

¹⁸⁷ *Id.* at 578 (Thomas, J., dissenting).

¹⁸⁸ *Id.* (Thomas, J., dissenting).

¹⁸⁹ *Id.* at 579 (Thomas, J., dissenting).

¹⁹⁰ *Id.* (Thomas, J., dissenting).

¹⁹¹ *Id.* (Thomas, J., dissenting).

The dissent would have overruled *McMillan* for its “inherently flawed” analysis.¹⁹² Moreover, the underlying rule in *McMillan* permitting a state to treat aggravated behavior as a sentencing factor was questioned in *Jones* and limited by *Apprendi*, so the plurality’s reliance on that principle is also flawed.¹⁹³ *Stare decisis*, the doctrine of precedent,¹⁹⁴ fails to justify upholding *McMillan* because the effect of *McMillan* is particularly weak in contrast to the common law roots of the relationship between punishment and constitutional protection.¹⁹⁵ Lastly, the dissent noted that Justice Breyer’s partial concurrence “leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today’s holding.”¹⁹⁶

V. ANALYSIS

The Court properly determined that *Apprendi* did not overrule *McMillan*, but the Court should not have reaffirmed *McMillan* and held that brandishing pursuant to § 924(c)(1)(A) need not be alleged in the indictment or proved beyond a reasonable doubt before a jury.¹⁹⁷ In light of the Court’s heavily split decisions on this issue, the Court should have overruled *McMillan* and articulated a new, clearer rule, rather than contributing to the list of considerations that a court must make when faced with a sentencing factor. Essentially, the Court should have done what it has consistently refused to do: set forth a bright-line rule providing that when an offense stipulates a change in punishment to be contingent on a specified factual finding other than a prior conviction, that fact must be alleged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.¹⁹⁸ Such a rule is necessary in order to provide proper protection to the criminally accused, as guaranteed by the Fifth and Sixth Amendments.¹⁹⁹

¹⁹² *Id.* (Thomas, J., dissenting).

¹⁹³ *Id.* (Thomas, J., dissenting).

¹⁹⁴ See BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

¹⁹⁵ *Harris*, 536 U.S. at 582 (Thomas, J., dissenting).

¹⁹⁶ *Id.* at 583 (Thomas, J., dissenting).

¹⁹⁷ See *id.* at 568.

¹⁹⁸ See, e.g., *Jones v. United States*, 526 U.S. 227, 248 (1999); *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986); *Patterson v. New York*, 432 U.S. 197, 214 (1977).

¹⁹⁹ See U.S. CONST. amend. V; U.S. CONST. amend. VI; *Hamling v. United States*, 418 U.S. 87, 117 (1974); *In re Winship*, 397 U.S. 358, 364 (1970).

A. *APPENDI* DID NOT OVERRULE *MCMILLAN*

The Court in *Harris* boiled the issue down to whether *McMillan* stands after *Appendi*,²⁰⁰ and the plurality reached a logical conclusion as far as the consistency of those two cases' holdings. The holding of *McMillan* is not inconsistent with that of *Appendi*.²⁰¹ *McMillan* held that a statute that establishes a mandatory minimum, where a judge decides the sentencing factor, is constitutional because it merely "ups the ante" for defendants.²⁰² *Appendi* held that enhancement of a sentence beyond the statutory maximum, where a judge decides the fact needed for the enhancement, is unconstitutional.²⁰³ Because *McMillan* did not involve a situation where the sentence could exceed the statutory maximum, it does not directly conflict with the later holding of *Appendi*.²⁰⁴

B. THE COURT SHOULD HAVE OVERRULED *MCMILLAN*

Although the holdings of *McMillan* and *Appendi* are logically consistent, the *Harris* Court should have overruled *McMillan*. *McMillan* failed to recognize that a loss of opportunity for a lower sentence warrants constitutional protection. *McMillan* also failed to clarify when a sentencing factor becomes an element, and it failed to recognize the constitutional difference when the legislature, and not a judge, attaches punishment to a fact. *McMillan* simply leaves too much power in the hands of lawmakers.

The reasoning behind *McMillan* is not sound, and the facts presented in *Harris* illustrate the problem. Given that a judge determines the fact of brandishing as a sentencing factor, if the judge does not find that the defendant brandished, the defendant is subject to a minimum of five years of imprisonment.²⁰⁵ If the judge finds that the defendant brandished, the defendant is subject to a minimum of seven years of imprisonment.²⁰⁶ This defendant, due to a judicial determination with a lower standard of proof than that required for a jury,²⁰⁷ has just lost the opportunity to receive five to six years of imprisonment.²⁰⁸ He must serve, at the very least, two years

²⁰⁰ See *Harris*, 536 U.S. at 550.

²⁰¹ See *id.* at 557.

²⁰² See *McMillan*, 477 U.S. at 87-88.

²⁰³ See *Appendi v. New Jersey*, 530 U.S. 466, 490 (2000).

²⁰⁴ See *Harris*, 536 U.S. at 557, 566.

²⁰⁵ See 18 U.S.C. § 924(c)(1)(i) (1994 & Supp. V 1999).

²⁰⁶ See *id.* § 924(c)(1)(A)(ii).

²⁰⁷ The standard of proof for a judge is the preponderance of the evidence. The standard of proof for a jury is proof beyond a reasonable doubt. See, e.g., *McMillan*, 477 U.S. at 81, 83; Brief for Petitioner at 5, *Harris* (No. 00-10666).

²⁰⁸ See 18 U.S.C. § 924(c)(1)(A)(i)-(ii).

more in prison.²⁰⁹ Thus, the defendant has been given a harsher penalty.²¹⁰ It is this loss of opportunity which demands constitutional protection.²¹¹

The Court in *Harris* seems to have no problem with this loss of opportunity largely because the judge could have sentenced Harris to seven years regardless of the finding,²¹² and because the firearm statute had no maximum sentence, so the factual finding could not “increase[] the penalty . . . beyond the prescribed statutory maximum.”²¹³ But rather than clearing the statute, this “tough luck” assertion highlights the problem with the holding of *McMillan* and with the narrow rule of *Apprendi*. A legislature could have established a mandatory minimum of sixty years for brandishing and that fact would not need to be alleged in the indictment or proved beyond a reasonable doubt because, under the Court’s current jurisprudence, it does not exceed the statutory maximum of life imprisonment.²¹⁴ Such a high mandatory minimum would then raise a question similar to the one that arose in *Jones*, where the Court found that what appeared to be a sentencing factor was really an element of the crime.²¹⁵ In that scenario, one would argue that with a sixty-year minimum for brandishing, it must be an element of the offense.²¹⁶ This argument has merit, but it still leaves unclear the point at which the punishment becomes so great that a sentencing factor becomes an element. Constitutionality should not depend on a particular number of years of increase, or a percentage of change, in a sentence.²¹⁷ The *Harris* plurality even stated as

²⁰⁹ See *id.*

²¹⁰ See *Harris*, 536 U.S. at 578 (Thomas, J., dissenting) (“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.”).

²¹¹ See U.S. CONST. amend. V; U.S. CONST. amend. VI; *Hamling v. United States*, 418 U.S. 87, 117 (1974); *In re Winship*, 397 U.S. 358, 364 (1970).

²¹² See *Harris*, 536 U.S. at 560; *McMillan*, 477 U.S. at 87-88; *United States v. Harris*, 243 F.3d 806, 811-812 (4th Cir. 2001).

²¹³ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see *Harris*, 243 F.3d at 809 n.2.

²¹⁴ See *Harris*, 536 U.S. at 578-79 (Thomas, J., dissenting) (“[T]he 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.”)

²¹⁵ See *Jones v. United States*, 526 U.S. 227, 229 (1999).

²¹⁶ See *id.* at 233.

²¹⁷ See *Harris*, 536 U.S. at 578-79 (Thomas, J., dissenting) (“[S]urely our fundamental constitutional principles cannot alter depending on degrees of sentencing severity.”); *Harris*, 243 F.3d at 812 (stating that “the claimed forty percent increase [in Harris’s sentence] is less than the 500 percent increase in Castillo or even the sixty-six percent increase in Jones. And regardless of the percentages, a two-year sentence enhancement is not as ‘steep’ as an additional ten or twenty-five years in prison.”).

much: "That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element."²¹⁸ Yet, it seems unlikely that such a sentencing scheme would succeed in the public eye.

Another reason why the *McMillan* analysis fails is its faulty reliance on judges' historical freedom to determine sentencing factors.²¹⁹ The Court argued that since judges had the freedom to consider a range of facts when choosing a sentence, there should be no difference when the legislature attaches a certain punishment to a specified factor.²²⁰ The Court neatly glossed over a key occurrence in the history of the *McMillan* case: each of the sentencing judges had found the statute unconstitutional and then imposed a lesser sentence than the statute required.²²¹ So, it appears that even judges accustomed to considering facts in the sentencing process might have been uncomfortable with the mandatory minimum sentencing scheme. Perhaps this discomfort came from an understanding that although judges consider many facts and circumstances in determining a defendant's sentence, the constitutional analysis changes when a statute ties a particular fact to a change in the defendant's punishment.

Finally, the Court should have overruled *McMillan* because it leaves too much power with the legislature. Even Justice Breyer's dissent in *Apprendi* recognized that "by leaving mandatory minimum sentences untouched, the majority's rule [in *Apprendi*] simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums. That result would mean significantly less procedural fairness, not more."²²²

C. SENTENCING FACTORS REQUIRE CONSTITUTIONAL PROTECTION

As the law now stands, a judge faced with a sentencing factor must consider the minimum and maximum sentences involved, as well as the function, statutory construction, and traditional and congressional uses of that sentencing factor in order to decide whether that factor should receive the constitutional protection provided to elements.²²³ Instead of contributing to this myriad of considerations, the Court should have set forth a bright-line rule. Such a rule would require any fact, other than a

²¹⁸ *Harris*, 536 U.S. at 566.

²¹⁹ See *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986).

²²⁰ See *id.*

²²¹ See *McMillan*, 477 U.S. at 82.

²²² *Apprendi v. New Jersey*, 530 U.S. 466, 564 (2000) (Breyer, J., dissenting).

²²³ See *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Harris*, 243 F.3d 806 (4th Cir. 2001).

prior conviction,²²⁴ that a statute links to a variation in the defendant's sentence to be treated as an element of the offense. This fact should therefore be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.²²⁵ Sentencing factors should receive this level of protection because it is guaranteed by the Fifth and Sixth Amendments and because juries, not judges, are the proper finders of fact. Moreover, a fact should receive consistent constitutional protection regardless of its placement in a paragraph.

One might conclude from a plain reading of the Fifth and Sixth Amendments, *Hamling*, and *Winship*, that facts statutorily connected to sentences should receive the same constitutional protection afforded to facts that are deemed to be elements of the crime.²²⁶ The Fifth Amendment guarantees due process of law,²²⁷ and the Sixth Amendment requires that defendants "be informed of the nature and cause of the accusation."²²⁸ *Hamling* requires indictments to "fairly inform[] a defendant of the charge against which he must defend," and to "fully, directly, and expressly . . . set forth all the elements necessary to constitute the offence intended to be punished."²²⁹ Similarly, *Winship* requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is being charged."²³⁰ These same protections should apply to brandishing in the *Harris* case. Part of the accusation against Harris was that he brandished his firearm.²³¹ Furthermore, Harris specifically had to defend himself against the brandishing allegation because that fact was linked to

²²⁴ Prior convictions are excluded from this rule because full disclosure of that fact could prejudice a jury. See *Old Chief v. United States*, 519 U.S. 172, 178-92 (1997) (holding that when the prosecution only needs to prove the fact of a prior conviction, and the defendant concedes a prior conviction, the court cannot permit his complete judgment record to be revealed over the defendant's objection if the details of the record could taint the jury's consideration). "Proving status [by stipulation or admission] without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality[.]" *Id.* at 191; see also *Apprendi*, 530 U.S. at 490 (expressing the rule that "[o]ther 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.") (emphasis added).

²²⁵ See, e.g., *Jones*, 526 U.S. at 248; *McMillan*, 477 U.S. at 87; *Patterson v. New York*, 432 U.S. 197, 214 (1977).

²²⁶ See U.S. CONST. amend. V; U.S. CONST. amend. VI; *Hamling v. United States*, 418 U.S. 87, 117 (1974); *In re Winship*, 397 U.S. 358, 364 (1970).

²²⁷ U.S. CONST. amend. V.

²²⁸ U.S. CONST. amend. VI.

²²⁹ *Hamling*, 418 U.S. at 117.

²³⁰ *Winship*, 397 U.S. at 364.

²³¹ See Brief for Petitioner at 5, *Harris* (No. 00-10666); Brief for the United States at 4, *Harris* (No. 00-10666).

his punishment.²³² Sentencing factors should receive the higher level of protection afforded to elements of the offense because they directly correspond to a defendant's punishment.²³³

The fundamental common law principle that juries are finders of fact, and judges are finders of law, suggests that juries, not judges, should determine sentencing factors.²³⁴ Whether Harris brandished a firearm is a question of fact, so jurors should have had the responsibility of deciding whether Harris's use of the firearm satisfied the definition of brandishing pursuant to § 924(c)(4).²³⁵ The sentencing judge usurped the role of the jury by deciding the question of fact in Harris's case.²³⁶ In order to properly balance sentencing power between the judge and the jury, those facts that a statute links to a defendant's sentence should be found by the jury.

Finally, even under existing Supreme Court jurisprudence, it is usually debatable whether a particular fact that appears to be a sentencing factor should really be treated as an element of the offense.²³⁷ *Jones* found "serious bodily injury" to be an element of the offense, even while the Federal Sentencing Guidelines often used "serious bodily injury" as a sentencing factor.²³⁸ In *Harris*, the Fourth Circuit acknowledged that a state and a territory treated brandishing as an element of an offense, even while it correctly placed weight on the fact that no federal statutes did.²³⁹ The Fourth Circuit also documented the original proposed amendment which led to the firearm statute at issue in *Harris*.²⁴⁰ The Fourth Circuit noted that in

²³² See Brief for Petitioner at 5, *Harris* (No. 00-10666); Brief for the United States at 4, *Harris* (No. 00-10666).

²³³ See U.S. CONST. amend. V; U.S. CONST. amend. VI; *Hamling*, 418 U.S. at 117; *Winship*, 397 U.S. at 364.

²³⁴ See COKE, *supra* note 16.

²³⁵ See 18 U.S.C. § 924(c)(4) (1994 & Supp. V 1999).

²³⁶ See Brief for the United States at 4-5, *Harris* (No. 00-10666).

²³⁷ See *Jones v. United States*, 526 U.S. 227, 229 (1999).

²³⁸ See *United States v. Harris*, 243 F.3d 806, 810 n.4 (4th Cir. 2001).

²³⁹ See *id.* at 810 n.3.

²⁴⁰ See *id.* at 810-11. The amendment, as passed by the House, read:

A person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States—

(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years[.]

the final version of the statute, possession of a firearm moved up into the main paragraph detailing the elements, but “Congress decided not to include brandishing or discharging as actus reus elements of the offenses proscribed in the initial principal paragraph.”²⁴¹ Although the Fourth Circuit used this to support the classification of brandishing as a sentencing factor,²⁴² the disturbing point remains that the same fact could receive very different constitutional protection based on its final placement in a paragraph. Because the line between sentencing factors and elements is so easily crossed, the constitutional protection provided to sentencing factors and elements should be identical.

VI. CONCLUSION

In *Harris v. United States*, the Supreme Court reaffirmed *McMillan v. Pennsylvania* and held 18 U.S.C. § 924(c)(1)(A)(ii) constitutional.²⁴³ The Court decided that § 924(c)(1)(A) defines a single offense with multiple sentencing factors.²⁴⁴ Whether a defendant “brandished” a firearm is a sentencing factor to be determined by a judge and is not required to be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.²⁴⁵ In a plurality opinion, the Court reasoned, among other things, that the sentencing judge had the power to sentence the defendant to seven years with or without a finding of brandishing.²⁴⁶

The Court was correct in maintaining a distinction between *McMillan* and *Apprendi*. However, the Court should have overruled *McMillan* in favor of a new rule stating that any fact, other than a prior conviction, which a statute links to a change in the defendant’s sentence, must be afforded the constitutional protections provided to elements of an offense. Like elements, sentencing factors should be alleged in the indictment and proved beyond a reasonable doubt before a jury.

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1998) (passing the bill in the House).

²⁴¹ See *Harris*, 243 F.3d at 811.

²⁴² See *id.*

²⁴³ *Harris*, 536 U.S. at 569.

²⁴⁴ *Id.* at 557.

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 561.