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Criminal Law - Sentencing and Punishment: The United States Supreme Court Defines What Constitutes a Crime

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CRIMINAL LAW—SENTENCING AND PUNISHMENT: THE UNITED STATES SUPREME COURT DEFINES WHAT CONSTITUTES A "CRIME"

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

I. FACTS

The petitioner, William Joseph Harris, owned a pawnshop in North Carolina.[1] On April 29, 1999, an undercover law enforcement agent accompanied a confidential informant into Harris' pawnshop.[2] The agent purchased a small amount of marijuana from Harris.[3] The agent then returned the next day to Harris' shop and purchased an additional 114 grams of marijuana.[4]

During both of the drug transactions with the agent, Harris carried a handgun in an unconcealed hip holster.[5] The agent testified that Harris removed the handgun from its holster and explained that it "was an outlawed firearm because it had a high-capacity magazine."[6] The agent also testified that Harris stated he had homemade bullets that would pierce a police officer's bulletproof vest.[7]

Harris was later arrested and indicted on two counts of distributing marijuana and two counts of carrying a firearm "in relation to" drug trafficking.[8] After the indictment, the Government dismissed one distribution of marijuana count and one firearm count.[9] Harris pled guilty to the other count of distributing marijuana, but he decided to proceed to a bench trial on the remaining count of carrying a firearm in relation to drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A).[10] Section 924(c)(1)(A) provides in relevant part:

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1. United States v. Harris, 243 F.3d 806, 807 (4th Cir. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* The handgun that Harris carried was a semiautomatic nine-millimeter Taurus. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* The two counts of distributing were brought under 21 U.S.C. § 841(a)(1) and (b)(1)(D). *Id.*
9. *Id.*
10. *Id.* The remaining count of carrying a firearm was in relation to the second drug trafficking incident on April 30, 1999. *Id.*

> [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—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
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> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[11]

When preparing the indictment, the Government proceeded on the assumption that § 924(c)(1)(A) defined a single crime, and that brandishing of the firearm was a sentencing factor to be considered by the judge after trial.[12] Therefore, the indictment included nothing about brandishing the firearm and made no reference to subsection (ii) of the statute.[13] The indictment simply alleged the elements from the statute's main paragraph.[14]

At the bench trial, the United States District Court for the Middle District of North Carolina found Harris carried a handgun in relation to a drug trafficking offense and found him guilty of violating 18 U.S.C. § 924(c)(1)(A).[15] Following Harris' conviction, the presentence report recommended that he be given the seven-year minimum sentence provided for in § 924(c)(1)(A)(ii) because he had brandished the firearm.[16] Harris objected to the presentence report and argued that, as a matter of statutory interpretation, brandishing was an element of a separate offense for which he had not been indicted or tried.[17] At the sentencing hearing, the district court overruled Harris' objection and found by a preponderance of the evidence that Harris had brandished the firearm within the meaning of § 924(c)(1)(A)(ii) and (c)(4).[18] The judge consequently sentenced Harris to

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11. 18 U.S.C. § 924(c)(1)(A) (2000).

12. Harris v. United States, 536 U.S. 545, 551 (2002).

13. *Id.*

14. *Id.* The elements of the main paragraph that were alleged in the indictment were "during and in relation to a drug trafficking crime" and "knowingly carried a firearm." *Id.* (quoting 18 U.S.C. § 924(c)(1)(A)).

15. *Id.*; United States v. Harris, 243 F.3d 806, 807 (4th Cir. 2001).

16. *Harris*, 536 U.S. at 551; 18 U.S.C. § 924(c)(1)(A)(ii).

17. *Harris*, 536 U.S. at 551. Harris based his argument on the Supreme Court's decision in Jones v. United States, 526 U.S. 227 (1999). *Id.*

18. *Id.*; *Harris*, 243 F.3d at 807. 18 U.S.C. § 924(c)(4) provides that:

> For purposes of this subsection, the term "brandished" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the

the mandatory minimum of seven years imprisonment that was prescribed by the statute.[19]

Harris then appealed to the Fourth Circuit Court of Appeals.[20] He contended that § 924(c)(1)(A)(ii) did not set forth a sentencing factor, but it was rather an element of the offense that must be set forth in the indictment and was proven beyond a reasonable doubt at trial.[21] The Fourth Circuit looked to the statute's language, structure, context, and history to determine whether it should consider "brandished" a sentencing factor or an element of the crime that must be proven beyond a reasonable doubt.[22] The court found that because § 924(c)(1)(A)(ii) did not contain a maximum penalty, but rather increased the minimum sentence to which Harris could be sentenced, "brandished" did not have to be charged in the indictment and proven beyond a reasonable doubt.[23] The court reasoned that failure to charge and prove "brandished" beyond a reasonable doubt did not expose Harris to any greater punishment than he was already exposed to.[24]

Harris also argued that after *Apprendi v. New Jersey*,[25] even if the court found "brandished" to be a sentencing factor, § 924(c)(1)(A) should have been found unconstitutional.[26] The court found that *Apprendi* itself foreclosed Harris' argument since the Supreme Court specifically stated in *Apprendi* that its holding was limited to cases that involve increases in statutory maximums.[27]

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firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 924(c)(4).

19. *Harris*, 243 F.3d at 807.

20. *Harris*, 536 U.S. at 552.

21. *Harris*, 243 F.3d at 808.

22. *Id.*

23. *Id.* at 809. The court based its reasoning on the similarity of § 924(c)(1)(A) to the statute at issue in McMillan v. Pennsylvania, 477 U.S. 79 (1986). *Id.* at 808-09. The statute in *McMillan* provided that anyone convicted of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault, kidnapping, or an attempt of any of the those crimes, be sentenced to a minimum sentence of five years imprisonment if the judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the crime. *McMillan*, 477 U.S. at 81-82, & 82 n.1; *see generally* 42 PA. CONS. STAT. ANN. § 9712 (West 1998).

24. *Harris*, 243 F.3d at 809. Harris could have received a seven-year sentence even if the district court judge did not find that he brandished the firearm. *Id.* However, the court of appeals did acknowledge that it was unlikely Harris would receive anything higher than five years under the sentencing guidelines. *Id.* at 809 n.2.

25. 530 U.S. 466 (2000).

26. *Harris*, 243 F.3d at 809. Harris acknowledged that the facts in *Apprendi* dealt with an increase in a statutory maximum, but he argued that the same reasoning should be applied to an increase in statutory minimums. *Id.* (quoting Appellant's Reply Brief at 2, Harris v. United States 243 F.3d 806 (4th Cir. 2001) (No. 00-4154)).

27. *Id.*

The court also found that the structure of § 924(c)(1)(A) indicated that "brandished" was a sentencing factor to be decided by a judge.[28] It pointed out that the main paragraph of § 924(c)(1)(A) was set apart from the three subsections that followed.[29] The court also rested its judgment on the fact that the differences in penalties for the three sub-elements of § 924(c)(1)(A) were not severe.[30]

The court rejected all of Harris' arguments and held that the "brandished" clause of § 924(c)(1)(A)(ii) constituted a sentencing factor that did not need to be charged in an indictment or proven beyond a reasonable doubt.[31] The court therefore confirmed Harris' conviction and sentence.[32] Harris appealed the Fourth Circuit's decision and the United States Supreme Court granted certiorari.[33] The Court *held* "brandished" a firearm was a sentencing factor rather than an element of a crime, and allowing the judge to find that factor did not violate Harris' constitutional rights.[34]

II. LEGAL BACKGROUND

In most criminal prosecutions, an accused has the right to a fair and speedy trial by an impartial jury.[35] This right to a jury trial does not necessarily mean that an accused has the right to be sentenced by a jury.[36]

An accused facing felony charges also has the right to have a grand jury review the presentment of an indictment.[37] The indictment must allege

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28. *Id.* at 810.

29. *Id.*

30. *Id.* at 811. There was a two-year difference in penalty between subsections (i) and (ii) and a three-year difference in penalty between subsections (ii) and (iii). 18 U.S.C. § 924(c)(1)(A) (2000).

31. *Harris*, 243 F.3d at 812.

32. *Id.*

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

34. Harris v. United States 536 U.S. 545, 567-68 (2002).

35. U.S. CONST. amend. VI; *see also* U.S. CONST. amend. XIV, § 1 (stating that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). *But see* Lewis v. United States, 518 U.S. 322, 325 (1996) (holding that there is no right to a jury trial for "petty offenses"). "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious." *Id.* at 326.

36. *See* Spaziano v. Florida, 468 U.S. 447, 458-59 (1984) (finding that the Sixth Amendment has never been thought to guarantee the right to have a jury determine the appropriate punishment to be imposed on an individual).

37. U.S. CONST. amend. V; *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1473-74 (2001) (stating that "[t]he Fifth Amendment right to grand jury review and the right to a jury trial in the Sixth Amendment . . . do not extend to petty offenses"). The text of the Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

each of the elements of the offense charged.[38] The indictment does not need to set forth factors that are only relevant for sentencing the defendant.[39] An indictment is issued by the grand jury if it believes that probable cause exists that the accused committed the offense charged.[40]

The burden of proof at a criminal trial is on the prosecution to prove all "elements" alleged in the indictment beyond a reasonable doubt.[41] A judge may find those facts that are not elements of the crime, after trial, by a preponderance of the evidence.[42]

Whether any of the above constitutional rights applies to an accused depends on the essential elements of an offense.[43] The Supreme Court has wrestled with deciding which elements should be found by a jury in order to satisfy due process.[44] The Court has looked at the requirements of due process in distinguishing elements of a crime from defenses and sentencing factors.[45]

A. DISTINGUISHING ELEMENTS FROM DEFENSES

In *McFarland v. American Sugar Refining Co.*,[46] the United States Supreme Court recognized that there are limitations on how a legislature may define a crime.[47] In *McFarland*, the Louisiana Legislature passed a

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naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

38. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (stating that "an indictment must set forth each element of the crime it charges"); United States v. Carll, 105 U.S. 611, 612 (1882) (holding that an indictment must set forth all the elements necessary to constitute the offense to be punished).

39. *Alemendarez-Torres*, 523 U.S. at 228.

40. CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE FEDERAL RULES OF CRIMINAL PROCEDURE § 52 (3d ed. 2002).

41. *See, e.g.*, Seling v. Young, 531 U.S. 250, 254-55 (2001) (holding that the State had the burden of proving that the defendant was a sexually violent predator); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting United States v. Guadin, 515 U.S. 506, 510 (1995)) (stating that the defendant is entitled to a jury determination that he or she is guilty of every element of the crime with which he or she is charged beyond a reasonable doubt).

42. *See* McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986) (holding that "visible possession of a firearm" was a sentencing factor that could be decided by the judge by a preponderance of the evidence and need not be proven beyond a reasonable doubt).

43. *See generally* King & Klein, *supra* note 37, at 1503.

44. *Id.* at 1502.

45. *Id.*

46. 241 U.S. 79 (1916).

47. *See McFarland*, 241 U.S. at 86-87 (holding the statute at issue unconstitutional because it violated equal protection and due process).

law that presumed a business guilty if it paid less money for sugar in Louisiana than it did in another state.[48] The Court ruled that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[49]

In *Tot v. United States*,[50] the Supreme Court had another chance to address constitutional concerns over legislative presumptions.[51] The Court ruled that in order to not violate due process, the legislature could not make a presumption of all facts essential to guilt.[52] The Court reasoned that this was not permissible because it would place the burden upon defendants to come forward with evidence to maintain their innocence, switching the burden of proof from the prosecution to the defendant.[53]

In *Leland v. Oregon*,[54] the Supreme Court looked specifically at what facts constituted an element of a crime and what facts constituted a defense.[55] At issue in *Leland* was an Oregon statute that required a defendant who entered a plea of insanity to prove insanity beyond a reasonable doubt.[56] Although Oregon was the only state at that time to require the accused to establish the defense beyond a reasonable doubt, the Court ruled that the statute did not violate due process.[57] The Court reasoned that insanity was a defense to the crime charged, and making the defendant prove his sanity beyond a reasonable doubt did not relieve the prosecution of its burden to prove every element of the crime.[58] The Court noted that the burden on the prosecution to prove every element of the crime beyond a reasonable doubt was not a constitutional doctrine, "but only the rule to be followed in federal courts."[59]

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48. *Id.* at 80-81.

49. *Id.* at 86.

50. 319 U.S. 463 (1943).

51. *See Tot*, 319 U.S. at 467-68 (finding the statutory rule that possession of a firearm or ammunition by any person convicted of a crime of violence was presumptive evidence that the firearm or ammunition was received in interstate commerce to be in violation of the Fifth and Fourteenth Amendments).

52. *Id.* at 469.

53. *Id.*

54. 343 U.S. 790 (1952).

55. *Leland*, 343 U.S. at 793-96.

56. *Id.* at 792. The appellant argued that the statute violated his due process rights because it made him disprove elements of the crime necessary for a guilty verdict. *Id.* at 793. In the statute, Oregon adopted the doctrine that because most people are sane, a defendant must prove his or her insanity to avoid responsibility. *Id.* at 796. This was the rule announced in an 1843 English decision, *M'Naghten's Case*. *Id.* (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).

57. *See id.* at 799 (stating that "we cannot say that [the] policy violates generally accepted concepts of basic standards of justice").

58. *Id.*

59. *Id.* at 797.

In *In re Winship*,[60] the Supreme Court once again took on the constitutionality of the reasonable doubt standard.[61] The Court, for the first time, explicitly held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[62] The Court did not, however, explicitly define what facts are necessary to constitute a certain crime.[63]

In *Mullaney v. Wilbur*,[64] the Supreme Court refined what facts had to be proven in a murder charge by the prosecution and what facts had to be proven by the defendant.[65] At issue was Maine's practice of requiring a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter."[66] Maine argued that *Winship* should not be extended to its felonious homicide statute.[67] The Court rejected this argument and ruled that due process required the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation "when the issue is properly presented in a homicide case."[68] The Court reasoned that it could "discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability."[69]

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60. 397 U.S. 358 (1970).

61. *See In re Winship*, 397 U.S. at 363-65 (discussing the importance of the reasonable doubt standard in criminal trials).

62. *Id.* at 364. The Court noted that "it ha[d] long been assumed" that proof beyond a reasonable doubt in criminal trials was constitutionally required. *Id.* at 362 (citing Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881)).

63. *See id.* at 365 (turning to the question of whether juveniles are constitutionally entitled to proof beyond a reasonable doubt).

64. 421 U.S. 684 (1975).

65. *Mullaney*, 421 U.S. at 703-04.

66. *Id.* at 684-85. Maine divided the crime of felonious homicide into three punishment categories: murder, voluntary manslaughter, and involuntary manslaughter. *Id.* at 698. Maine interpreted these categories as bearing on punishment and not as elements of the crime of felonious homicide. *Id.* at 699.

67. *Id.* at 696-97. Maine argued that the absence of heat of passion on sudden provocation was not a "fact necessary to constitute the crime" of felonious homicide. *Id.* at 697 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). Maine further argued that the facts in *Mullaney* were distinguished from *Winship* because heat of passion did not come into play until after the defendant was already found guilty of felonious homicide and could be punished for at least manslaughter. *Id.*

68. *Id.* at 703-04.

69. *Id.* at 702. Justice Rehnquist wrote a concurring opinion expressing that the decision in *Mullaney* did not affect the Court's ruling in *Leland* with respect to insanity. *Id.* at 705-06 (Rehnquist, J., concurring). *See also supra* notes 54-59 and accompanying text.

Seven years later, in *Patterson v. New York*,[70] the Supreme Court revisited the issue of what elements had to be proven by the prosecution in the context of murder.[71] The question presented to the Court was whether New York's practice of placing the burden on a defendant in a murder trial to prove the affirmative defense of extreme emotional disturbance was unconstitutional as a due process violation.[72]

Patterson argued that the New York statute was "functionally equivalent" to the statute struck down by the Court in *Mullaney*.[73] The Court rejected Patterson's argument and held that his conviction under the New York murder statute did not deprive him of due process.[74] The Court reasoned that New York satisfied the "mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [Patterson was] charged.'"[75] The Court rejected Patterson's claim that whenever a state links the "severity of punishment" to the "presence of an identified fact," it must prove that fact beyond a reasonable doubt.[76] The Court also refused to adopt a constitutional rule requiring states to disprove every fact constituting any and all affirmative defenses related to a defendant's culpability.[77] However, the Court noted that "there are obviously constitutional limits beyond which the States may not go in this regard."[78]

In *Martin v. Ohio*,[79] the State of Ohio tested the constitutional limits of what it could require a defendant to prove.[80] The question before the Court

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70. 432 U.S. 197 (1977).

71. *Patterson*, 432 U.S. at 198.

72. *Id.* Patterson was charged with second-degree murder, a crime with two essential elements: (1) "intent to cause the death of another person," and (2) "causing the death of such person or of a third person." *Id.* (citing N.Y. PENAL LAW § 125.25 (McKinney 1975)). The State of New York allowed defendants to raise the affirmative defense that they "acted under the extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* Defendants would be convicted of manslaughter if they could prove the affirmative defense of "extreme emotional disturbance" instead. *See id.* at 198-99 (pointing out that New York also recognized the crime of manslaughter, which was the intentional killing of another "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance").

73. *Id.* at 201.

74. *Id.* at 205.

75. *Id.* at 206 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). The Court reasoned that death of another, intent to kill, and causation were the facts that the prosecution was required to prove beyond a reasonable doubt to convict a person of murder. *Id.* at 205. Acting under the influence of extreme emotional disturbance was an affirmative defense, which the prosecution was not responsible for proving. *Id.* at 206.

76. *Id.* at 214.

77. *Id.* at 210.

78. *Id.* The Court was referring to the limit on a state's ability to reallocate burdens of proof by labeling elements of a crime as affirmative defenses. *Id.*

79. 480 U.S. 228 (1987).

80. *See Martin*, 480 U.S. at 230 (explaining the Ohio statute at issue).

was whether the Due Process Clause "forbids placing the burden of proving self-defense on the defendant when she is charged by the State of Ohio with committing the crime of aggravated murder."[81] The Court held that Martin's conviction did not violate the Due Process Clause.[82] The Court reasoned that Ohio did not exceed its authority in defining the crime of aggravated murder.[83] The State did not shift the burden of proving any of the elements of the crime to the defendant.[84] A second distinction that the Court has drawn with respect to what elements constitute a crime is between elements and sentencing factors.[85]

B. DISTINGUISHING ELEMENTS FROM SENTENCING FACTORS

In *Williams v. New York*,[86] the Supreme Court looked at the proper role of a judge in sentencing and the discretion that a judge may use in deciding what punishment to give to an offender.[87] In *Williams*, a jury found the defendant guilty of first-degree murder and recommended life imprisonment.[88] Instead of following the jury's recommendation, the sentencing judge imposed a death sentence.[89] Speaking about the role of a judge in determining sentences, the Court pointed out that judges are given broad discretion to decide the type and extent of punishment for defendants.[90] The Court reasoned, "A sentencing judge . . . is not confined to the

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81. *Id.* The Ohio Code provided that the burden of production and the burden of proof, which was by a preponderance of the evidence, for an affirmative defense was on the defendant. *Id.* (citing OHIO REV. CODE ANN. § 2901.05(A) (Anderson 1982)). Self-defense was an affirmative defense under Ohio law. *Id.* at 231. The Ohio Code defined an affirmative defense as "involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." *Id.* at 230 (citing OHIO REV. CODE ANN. § 2901.05(C)(2)).

82. *Id.* at 233. Martin was charged and convicted of aggravated murder. *Id.* at 231. The crime of aggravated murder was defined as "purposely, and with prior calculation and design, caus[ing] the death of another." *Id.* at 230 (alteration in original) (citing OHIO REV. CODE ANN. § 2903.01).

83. *Id.* at 233.

84. *Id.* The Court noted that its decision would have been different if the jury had been instructed that it could not consider self-defense evidence in determining if there was reasonable doubt. *Id.* "Such an instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate." *Id.* at 234.

85. *See generally* King & Klein, *supra* note 37, at 1502.

86. 337 U.S. 241 (1949).

87. *See Williams*, 337 U.S. at 245-47 (pointing out the type of discretion and role the judge has traditionally had in New York).

88. *Id.* at 242.

89. *Id.* The judge stated that the evidence had been considered in light of additional outside information that was not presented to the jury. *Id.* at 242-43. This use of "outside" information in determining the sentence was one of the grounds on which the defendant appealed. *Id.* at 243.

90. *See id.* at 244-45 (referring specifically to New York judges). During this period in history, the trend in sentencing was to individualize punishment to each separate offender. *See id.*

narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined."[91]

In *Specht v. Patterson*,[92] the Supreme Court looked at what facts a judge may decide and what facts must be put to a jury.[93] At issue in *Specht* was whether a judge may sentence an offender under a different statute than the one under which the offender had originally been convicted.[94] The Court ruled that sentencing an offender under a different statute constituted a new finding of fact "that was not an ingredient of the offense charged."[95] The Court reasoned that the Colorado Sex Offenders Act[96] did not make the "commission of a specified crime the basis for sentencing."[97] The Act made one conviction the basis for commencing a different proceeding, under a different statute, to determine whether a person constitutes a threat of bodily harm to the general public.[98] This was a fact that the judge could not decide without a proper hearing.[99] Nineteen years later, the Court made its first ruling on the effect of mandatory minimum sentencing on the definition of a crime.[100]

1. *McMillan v. Pennsylvania*

In *McMillan v. Pennsylvania*,[101] the United States Supreme Court considered the constitutionality of Pennsylvania's Mandatory Minimum Sen-

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at 247 (stating that "[u]ndoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime").

91. *Id.* The statutory limits that the judge was confined to were life imprisonment or death. *Id.* at 243 n.2 (citing N.Y. PENAL LAW § 1045-a (McKinney 1949)) (stating that "[m]urder in the first degree is punishable by death, unless the jury recommends life imprisonment").

92. 386 U.S. 605 (1967).

93. *Specht*, 386 U.S. at 607-08.

94. *Id.* at 607. The petitioner was convicted for "indecent liberties" under one Colorado statute, which carried a maximum sentence of ten years, but was sentenced under the Sex Offenders Act, which had a sentence range of one day to life imprisonment. *Id.* (citing COLO. REV. STAT. ANN. §§ 39-19-1 to 10, 40-2-32 (West 1963)).

95. *Id.* at 608. The Sex Offenders Act could be used if the trial court found that the convicted offender "constitute[d] a threat of bodily harm" to members of the public or "[was] an habitual offender and mentally ill." *Id.* at 607.

96. COLO. REV. STAT. ANN. §§ 39-19-1 to 10.

97. *Specht*, 386 U.S. at 608.

98. *Id.*

99. *See id.* at 609-10 (holding that the petitioner was entitled to a full judicial hearing before sentence was imposed).

100. *See generally* McMillan v. Pennsylvania, 477 U.S. 79 (1986).

101. 477 U.S. 79 (1986).

tencing Act under the Due Process Clause of the Fourteenth Amendment and the Right to Jury Clause of the Sixth Amendment.[102]

The petitioners argued that "visible possession of a firearm" was an element of the crime or crimes for which they were convicted and therefore should have been proven beyond a reasonable doubt under *In re Winship* and *Mullaney*.[103] The Court rejected this argument and held that Pennsylvania's Mandatory Minimum Sentencing Act "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty."[104] The Court concluded that Pennsylvania was allowed to treat "visible possession of a firearm" as a sentencing factor instead of an element of a crime that had to be proven beyond a reasonable doubt.[105] The Court reasoned that the Act only limited the sentencing judge's discretion within the range already available to him without finding an additional sentencing factor.[106] The petitioners' argument would have carried more weight if the finding of "visible possession of a firearm" had exposed the defendants to punishment that was greater than what was already allowed by statute.[107]

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102. *McMillan*, 477 U.S. at 80. The statute in question provided that anyone convicted of third degree murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault, kidnapping, or an attempt of any of those crimes, be sentenced to a minimum of five years imprisonment if the judge found by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the crime. *Id.* at 81-82 n.1; 42 PA. CONS. STAT. ANN. § 9712 (West 1998). The text of the Sixth Amendment states:

> In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The text of Section One of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

103. *McMillan*, 477 U.S. at 83; *see also supra* notes 60-69 and accompanying text.

104. *McMillan*, 477 U.S. at 87-88. The crimes that were enumerated in the statute subjected a defendant to a maximum sentence of twenty years imprisonment for the first-degree felonies and a maximum sentence of ten years imprisonment for the second-degree felonies. *Id.* at 87. The minimum sentence imposed for "visibly possessing a firearm" in the commission of one of the enumerated felonies was five years. *Id.* at 81 n.1.

105. *Id.* at 91.

106. *Id.* at 88.

107. *Id.*

The petitioners also argued that even if "visible possession of a firearm" was not an element of the crime, it nonetheless needed to be proven by clear and convincing evidence instead of by a preponderance of the evidence.[108] The Court concluded that the preponderance standard satisfied due process.[109] The Court reasoned that sentencing courts had traditionally heard evidence and found facts without any prescribed burden at all, so burdens of proof at sentencing should not be constitutionalized.[110] Twelve years later, the Court would again revisit the element versus sentencing factor distinction.[111]

2. *Almendarez-Torres v. United States*

In *Almendarez-Torres v. United States*,[112] the Supreme Court further refined the constitutional limits on Congress's power to define a crime.[113] At issue in *Almendarez-Torres* was 8 U.S.C. § 1326, which made it a crime for a deported alien to return to the United States without permission.[114] Section 1326(a) authorized a sentence of up to two years in prison.[115] A sentence of up to twenty years imprisonment was authorized if the initial

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108. *Id.* at 91.

109. *Id.*

110. *Id.* at 92. The Court also reaffirmed its holding that there was no Sixth Amendment right to jury sentencing. *Id.* at 93.

111. *See generally* Almendarez-Torres v. Unites States, 523 U.S. 224 (1998).

112. 523 U.S. 224 (1998).

113. *See Almendarez-Torres*, 523 U.S. at 246 (allowing Congress to treat recidivism as a sentencing factor even though it significantly altered the maximum penalty for the crime).

114. *Id.* at 226; 8 U.S.C. § 1326 (2000). Section 1326 reads in relevant part:

> Reentry of removed alien;
>
> (a) In general.
>
> Subject to subsection (b) of this section, any alien who–
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) Criminal penalties for reentry of certain removed aliens
>
> Notwithstanding subsection (a) of the section, in the case of any alien described in such subsection-
>
> (1) Whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;
>
> (2) Whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

8 U.S.C. § 1326.

115. 8 U.S.C. § 1326(a).

deportation was the result of an aggravated felony conviction.[116] The petitioner argued that subsection (b) defined a separate crime that must be charged in the indictment and proven beyond a reasonable doubt.[117]

Even though § 1326(b) altered the maximum penalty for the crime charged, the Court found the statute to be constitutional.[118] The Court reasoned that § 1326(b) was a penalty provision and did not set forth a separate immigration-related offense.[119] In deciding whether § 1326(b) was a separate criminal offense, the Court set forth the factors that are relevant to whether a particular statute should be read as a sentencing factor or a separate criminal offense.[120] A court should look to a "statute's language, structure, subject matter, context, and history."[121] The Court used these factors a year later in *Jones v. United States*.[122]

3. *Jones v. United States*

In *Jones*, the Supreme Court decided whether 18 U.S.C. § 2119 defined three separate offenses, which needed to be charged in the indictment, brought before a jury, and proven beyond a reasonable doubt, or if the statute defined a single offense with a choice of three different maximum sentences depending on different sentencing factors.[123] The Court found that "[i]f a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done."[124] The Court concluded that Congress probably intended "serious

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116. *Id.* § 1326(b).

117. *See Almendarez-Torres*, 523 U.S. at 226 (stating that the question before the Court was whether subsection (b) defined a separate crime).

118. *See id.* at 243 (stating that "[w]e nonetheless conclude that these differences do not change the constitutional outcome for several basic reasons").

119. *Id.* at 235.

120. *Id.* at 228.

121. *Id.*

122. 526 U.S. 227 (1999).

123. *Jones*, 526 U.S. at 229. 18 U.S.C. § 2119 is the federal carjacking statute and reads in relevant part:

> Whoever, . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce 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, or sentenced to death.

18 U.S.C. § 2119 (2000) (emphasis added).

124. *Jones*, 526 U.S. at 234. The Court noted that although Congress had treated "serious bodily injury" as a sentencing factor in the past, it has customarily treated "serious bodily injury" as defining an element of the offense of aggravated robbery, and aggravated robbery is what

bodily injury" to be an element of a separate aggravated form o f carjacking.[125]

The Court then concluded that § 2119 established three different offenses "by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."[126] The Court reasoned that holding § 2119 to be a single offense with three different maximum penalties would "raise serious constitutional questions on which precedent is not dispositive."[127]

4. *Castillo v. United States*

In *Castillo v. United States*,[128] the Supreme Court once again decided whether a federal criminal statute created a separate element of a crime, which must be determined by a jury, or if the statute created a sentencing factor, which could be decided by a judge.[129] In *Castillo*, the defendants were convicted in a Texas federal court of various offenses, including using or carrying a firearm during a crime of violence.[130] The defendants were then sentenced under § 924(c), which provided that if a crime of violence was committed with a machinegun, the defendants should be sentenced to thirty years imprisonment.[131] The Fifth Circuit Court of Appeals affirmed the decision of the trial judge and concluded that statutory words such as "machinegun" created sentencing factors, not elements of a separate crime.[132]

Congress modeled § 2119 after. *See id.* at 235 (citing examples of statutes where Congress treated "serious bodily injury" as a sentencing factor).

125. *Id.* at 236.

126. *Id.* at 252.

127. *Id.* at 251. The Court relied on the rule that "where 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 [the Court's] duty is to adopt the latter." *Id.* at 239 (quoting United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)). The Court reasoned if it held that § 2119 defined a single offense, the statute would be in constitutional doubt in light of *Mullaney, Patterson,* and *McMillan*. *Id.* at 240-44.

128. 530 U.S. 120 (2000).

129. *Castillo*, 530 U.S. at 121.

130. *Id.* at 122.

131. *Id.*; 18 U.S.C. § 924(c)(1) provided in relevant part:

> Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle or a short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

18 U.S.C. § 924(c)(1) (Supp. V 1988) (amended 1998).

132. *Castillo*, 530 U.S. at 122-23.

The Supreme Court reversed the court of appeals decision and found that 18 U.S.C. § 924(c) used the term "machinegun" to state an element of a separate, aggravated crime that must be alleged in the indictment and proven beyond a reasonable doubt.[133] The Court reasoned that § 924(c)'s language, structure, context, and history all lead to the conclusion that the relevant words created separate, substantive crimes, not merely separate sentencing factors.[134]

The Court's holdings in *Mullaney, Patterson, McMillan, Almendarez-Torres, Jones*, and *Castillo* left the question of whether the Constitution mandates that any fact increasing the penalty for an offense beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt.[135] The Court would answer that question one year after *Jones* in *Apprendi*.[136]

5. *Apprendi v. New Jersey*

In *Apprendi*, the defendant pled guilty to possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon.[137] The offenses were punishable by a term of imprisonment between five and ten years.[138] The defendant was sentenced under a separate "hate crime law," which provided for an "extended term" of imprisonment if the trial judge found, by a preponderance of the evidence, that the crime was committed to intimidate an individual because of race.[139]

The question presented to the Court was whether the Due Process Clause required factual determinations that increased the maximum sentence for the crime from ten to twenty years to be made by the jury "on the

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133. *Id.* at 131. The Court also found that the other firearm related words such as "short-barreled shotgun" used in § 924(c) referred to elements of separate, aggravated crimes. *Id.*

134. *Id.* at 124.

135. King & Klein, *supra* note 37, at 1468-69.

136. *See generally* Apprendi v. New Jersey, 530 U.S. 466 (2000).

137. *Id.* at 469-70. The statutes that Apprendi violated were sections 2C:39-3a and 4a of New Jersey Statutes Annotated. *Id.* Apprendi fired several shots into the home of an African-American family that had just moved into a previously all-white neighborhood. *Id.* at 469. A grand jury returned a twenty-three-count indictment against Apprendi. *Id.* All but two of the charges were dropped when the parties entered into a plea agreement. *Id.* at 469-70.

138. *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

139. *Id.* The "hate crime law" authorized punishment for second-degree offenses between ten and twenty years imprisonment. *Id.* at 469. Possessing a firearm for an unlawful purpose was classified as a "second-degree" offense by the New Jersey Legislature. *Id.* at 468 (quoting N.J. STAT. ANN. § 2C:39-4(a) (West 1995)). After accepting Apprendi's guilty pleas, the trial judge held an evidentiary hearing on the issue of Apprendi's purpose for the shooting. *Id.* at 470. The trial judge found by a preponderance of the evidence that Apprendi's shooting was committed with the "purpose to intimidate," and the judge sentenced him to a twelve-year prison term and two "shorter concurrent sentences on the other two counts." *Id.* at 471.

basis of proof beyond a reasonable doubt."[140] The Court concluded that the Due Process Clause required the jury to determine whether "purpose to intimidate" was proven beyond a reasonable doubt.[141] Therefore, the New Jersey statute violated due process and could not stand.[142]

The Court reasoned that "[o]ther than the fact of 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."[143] The Court articulated this rule because it was unconstitutional for a legislature to remove from the jury the evaluation of facts, other than prior conviction, that increased the prearranged penalties to which a criminal defendant was exposed.[144] The Court concluded by saying, "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[145] The Court reversed the judgment of the New Jersey Supreme Court and remanded the case.[146]

The Court in *Apprendi* did not come to a decision on whether a sentencing judge could decide facts that increased the statutory minimum while not increasing the statutory maximum sentence imposed on a defendant.[147] Until *Harris v. United States*,[148] this question was a topic of much debate.[149]

III. ANALYSIS

Harris was decided by a five-to-four majority.[150] Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court with respect to parts one, two, and four, in which Chief Justice Rehnquist,

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140. *Id.* at 469.

141. *Id.* at 491-92.

142. *Id.*

143. *Id.* at 490. This rule has become known as the "*Apprendi* rule." King & Klein, *supra* note 37, at 1486.

144. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

145. *Id.* at 494.

146. *Id.* at 497.

147. *See id.* at 490 (finding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury).

148. 536 U.S. 545 (2002).

149. *See* King & Klein, *supra* note 37, at 1503; Analisa Swan, *Apprendi v. New Jersey, The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far is Too Far?*, 29 PEPP. L. REV. 729, 730 (2002); *see generally* Michael E. Raabe, *New Federal Limitations on State Sentencing Opens the Door to Appeals*, 44 ORANGE COUNTY LAW 14 (2002).

150. Harris v. United States, 536 U.S. 545, 548 (2002).

Justice O'Connor, Justice Scalia, and Justice Breyer joined.[151] Justice Kennedy also delivered an opinion with respect to part three, in which Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia joined.[152] Justice O'Connor filed a concurring opinion stating that both *Jones* and *Apprendi* were decided wrongly.[153] Justice Breyer filed an opinion concurring in part and concurring in the judgment, in which he agreed with the Court's application of *Apprendi* but voiced his distaste for mandatory minimum sentences.[154] Justice Thomas filed a dissenting opinion, in which Justice Stevens, Justice Souter, and Justice Ginsburg joined, disagreeing with the Court's view that *McMillan* and *Apprendi* were reconcilable.[155]

A. THE MAJORITY OPINION

The Court held that 18 U.S.C. § 924(c)(1)(A) defined a single offense, in which "brandished" was a sentencing factor to be found by the judge, not the jury.[156] The Court reasoned that as a matter of statutory construction, Congress made "brandished" a sentencing factor to be found by a judge.[157] The Court also reasoned that tradition and past congressional action pointed to the same conclusion.[158] The Court then rejected Harris' argument that the canon of constitutional avoidance mandated the Court to find "brandished" to be an element of the crime and not a sentencing factor.[159] The Court affirmed the decision of the Fourth Circuit Court of Appeals.[160]

1. *As a Matter of Statutory Construction*

The first question presented to the Court was whether Congress intended "brandished" to be an element of the crime or a sentencing factor.[161] The Government contended that "brandished" was merely a sentencing factor that could be decided by a judge after trial; while Harris

151. *Id.* at 549, 568.
152. *Id.* at 556.
153. *Id.* at 569 (O'Connor, J., concurring); *see also* Apprendi v. New Jersey, 530 U.S. 466, 523-54 (2000) (O'Connor, J., dissenting); Jones v. United States, 526 U.S. 227, 254-72 (1999) (Kennedy, J., dissenting).
154. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and in the judgment).
155. *Id.* at 572 (Thomas, J., dissenting).
156. *Id.* at 556.
157. *Id.* at 552-53.
158. *Id.* at 553-55.
159. *Id.* at 555-56.
160. *Id.* at 568.
161. *Id.* at 552.

contended that "brandished" was an element of the crime that had to be proven beyond a reasonable doubt.[162]

The Court pointed out that the structure of the statute suggested that "brandished" was a sentencing factor.[163] Federal statutes usually list all offense elements "in a single sentence" and separate sentencing factors "into subsections."[164] In § 924(c)(1)(A), the statute begins with a large paragraph stating the elements of the crime.[165] Following the word "shall" are three subsections that explain the minimum sentences required by the statute.[166] When a statute has a structure like § 924(c)(1)(A), the Court presumes that the statute's principal paragraph defines a single crime and its subsections define sentencing factors.[167] The text of a statute might still provide enough evidence to prove that numbered subsections are not just sentencing factors.[168]

2. *Tradition and Past Congressional Action*

The Court went on to say that "[t]he critical textual clues in this case, however, reinforce the single-offense interpretation implied by the statute's structure."[169] The Court pointed out that there was no federal tradition of treating "brandished" as an offense element.[170] The Court used *Castillo* as an example of its history of singling out "brandished" as a sentencing factor.[171]

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162. *Id.* at 551. If Harris was correct, the seven-year minimum sentence would not apply. *Id.*

163. *Id.* at 552.

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

165. 18 U.S.C. § 924(c)(1)(A) (2000). The principal paragraph reads 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 such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . ." *Id.*

166. *Id.*; Harris v. United States, 536 U.S. 545, 552 (2002). The word "shall" often divides "offense defining provisions" from provisions that define sentences. *Harris*, 536 U.S. at 552 (quoting Jones v. United States, 526 U.S. 227, 233 (1999)).

167. *Harris*, 536 U.S. at 553.

168. *Id.* The Court pointed out that was exactly what happened in *Jones*. *Id.* In *Jones*, a carjacking statute, which had a structure similar to § 924(c)(1)(A), was interpreted as setting out elements of separate offenses. *Jones*, 526 U.S. at 251-52; *see supra* notes 124-28 and accompanying text.

169. *Harris*, 536 U.S. at 553.

170. *Id.* The Court relied on tradition and past congressional practice in deciding a similar statutory question in *Jones*. *Id.*; *Jones*, 526 U.S. at 233-36.

171. *Harris*, 536 U.S. at 553; *see also* Castillo v. United States, 530 U.S. 120, 126 (2000) (stating that "[t]raditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out"). The Court in *Castillo* concluded the quote by using "brandishing a gun" as an example of a traditional sentencing factor. *Castillo*, 530 U.S. at 126.

The Court then pointed out that "brandished" also affects the sentence for many crimes under the Federal Sentencing Guidelines.[172] The sentencing guidelines seem to be the reason that "brandished" was used in § 924(c)(1)(A).[173] "Brandished" does not appear in any other federal statutory offense-defining provision.[174] The Court determined that it was likely that "brandished" was meant to serve the same function in § 924(c)(1)(A) as it was meant to serve under the Federal Sentencing Guidelines.[175]

Another reason the Court did not question the presumption that "brandished" was a sentencing factor was because the finding of "brandished" did not alter Harris' punishment in any way not usually associated with sentencing factors.[176] Relying on *Jones*, the Court took into account the amount the three subsections increased the defendant's penalties.[177] However, the Court found that § 924(c)(1)(A) had an effect on the defendant's sentence that was more consistent with traditional understandings about how sentencing factors operated.[178] The Court also found that § 924(c)(1)(A) did not authorize the judge to impose any higher penalty than he or she already had the power to do under the statute.[179] The Court reasoned that the changes in the mandatory minimum sentences found in § 924(c)(1)(A) were exactly what someone would expect to see in traditional sentencing factors meant for the judge to decide.[180] The Court concluded that nothing in the text or the history of the statute rebutted the presumption that the subsections were sentencing factors to be decided by a

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172. *Harris*, 536 U.S. at 553 (quoting 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)).

173. *See id.* at 553-54 (stating that "the Guidelines appear to have been the only antecedents for the statute's brandishing provision").

174. *Id.* at 554. The term "brandished" did not appear in § 924(c)(1)(A) until 1998. *Id.*

175. *Id.*

176. *Id.* The presumption that "brandished" was a sentencing factor stemmed from the structure of § 924(c)(1)(A). *See id.* at 553 (stating that when a statute has the same structure as § 924(c)(1)(A), the Court can presume that the statute's principle paragraph defines a single crime and its subsections identify sentencing factors).

177. *Id.* at 554; *see also* Jones v. United States, 526 U.S. 227, 233 (1999) (stating that "[i]t is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone 15 years to life, was meant to carry none of the process safeguards . . . for the defendant's benefit"). The two subsections of the statute in *Jones* increased the defendant's maximum sentence from fifteen years to twenty-five years for subsection (1) and to life for subsection (2). *Jones*, 526 U.S. at 230 (citing 18 U.S.C. § 2119 (Supp. V 1988) (amended 1998)).

178. Harris v. United States, 536 U.S. 545, 554 (2002).

179. *Id.* Under the statute, the judge may impose a sentence higher than seven years even if he or she does not find the defendant "brandished" the gun. *Id.* The sentence that is actually given to a defendant under the Federal Sentencing Guidelines directly relates to the minimum sentence prescribed under the statute. *See id.* at 578 n.4 (Thomas, J., dissenting).

180. *Id.* at 554. The subsections of § 924(c)(1)(A) increased the minimum mandatory sentence from five years to seven years to ten years. 18 U.S.C. § 924(c)(1)(A) (2000).

judge and not separate offenses that had to be proven beyond a reasonable doubt.[181]

3. *Canon of Constitutional Avoidance*

Harris argued that the Court should have adopted the view that § 924(c)(1)(A)(ii) was a separate offense by invoking the canon of constitutional avoidance.[182] The Court explained that under the doctrine, when a statute is susceptible of two different constructions, one of which doubtful constitutional questions arise and the other of which such questions are avoided, the Court's duty is to adopt the position where the constitutional questions are avoided.[183] Harris contended that it was an "open question" whether the Fifth and Sixth Amendments required a fact increasing a minimum mandatory sentence to be proven beyond a reasonable doubt, submitted to the jury, and alleged in an indictment.[184] He argued that the Court should avoid the constitutional question by reading § 924(c)(1)(A) as making "brandished" an element of a separate federal offense.[185]

The Court recognized that the canon of constitutional avoidance played a role in *Jones*.[186] However, the Court also determined that the canon had no role in *Harris*.[187] The Court reasoned that the canon only applies when there are serious concerns about a statute's constitutionality.[188] The Court found that there were no serious concerns about the constitutionality of § 924(c)(1)(A) because of the Court's holding in *McMillan*.[189] The Court

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181. *Harris*, 536 U.S. at 554.

182. *Id.* at 555.

183. *Id.* (quoting United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

184. *Id.*; *see also* U.S. CONST. amends. V-VI.

185. *Harris*, 536 U.S. at 555.

186. *Id.* A single offense interpretation in *Jones* implicated constitutional questions about whether all facts that increase a statutory maximum sentence must be charged in an indictment, submitted to a jury, and found beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 243 n.6 (1999). The Court found that if the statute was construed the way the Government would like it, the statute might be unconstitutional. *Id.* The principle which states any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt was not established, only suggested in prior cases. *Id.*; *see also supra* notes 124-28 and accompanying text. The Supreme Court later resolved this statutory question in *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt); *see also supra* notes 138-48 and accompanying text.

187. *Harris*, 536 U.S. at 555.

188. *Id.*

189. *Id.*; *see also* McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986) (rejecting the petitioner's argument that "visible possession" was actually a set of upgraded felonies that must be proven by at least clear and convincing evidence).

went on to say, "[P]etitioner'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*."[190]

Harris argued that to avoid deciding whether *McMillan* should be overruled, the Court should find that the statute set forth separate federal offenses.[191] The Court found Harris' argument to be unsound because *McMillan* was already decided when § 924(c)(1)(A) was enacted.[192] The Court then pointed out that the canon of constitutional avoidance rests on the Court's respect for Congress.[193] Congress relied on *McMillan* when it passed § 924(c)(1)(A), and Congress would not have had any reason to believe that it was "approaching the constitutional line."[194] The Court found that it would not further the goal of the canon of constitutional avoidance by adopting a reading different from the reading adopted in *McMillan* because Congress had adopted § 924(c)(1)(A) in reliance on the Court's decision.[195] The Court determined that if it interpreted § 924(c)(1)(A) as setting forth separate federal offenses to avoid deciding whether *McMillan* should be overruled or not, "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."[196]

4. *Summary of Majority Opinion*

The Court concluded that as a matter of statutory construction, § 924(c)(1)(A) defined a single offense.[197] The statute set forth "brandished" as a sentencing factor to be found by a judge, not a separate offense element that needed to be found by the jury.[198]

In part four of the Supreme Court's opinion, the Court reaffirmed *McMillan* and found § 924(c)(1)(A) to be constitutional.[199] Basing a two-

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190. *Harris*, 536 U.S. at 555.

191. *Id.* at 555-56.

192. *Id.* at 556. *McMillan* was decided in 1986 and § 924(c)(1)(A) was enacted in 1988. *McMillan*, 477 U.S. at 79; 18 U.S.C. § 924(c)(1)(A) (2000).

193. *Harris*, 536 U.S. at 556 (citing Rust v. Sullivan 500 U.S. 173, 191 (1991)). The Court assumes that Congress legislates within the boundaries set by the Constitution. *Id.*

194. *Id.*

195. *Id.* The goal of the canon of constitutional avoidance is to reduce friction between the judicial and legislative branch. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* "Discharging" was also found to be a sentencing factor that was to be determined by a judge. *Id.* "Discharging" was set forth in subsection (iii) of § 924(c)(1)(A). 18 U.S.C. § 924(c)(1)(A)(iii) (2000).

199. Harris v. United States, 536 U.S. 545, 568 (2002).

year increase of a mandatory minimum sentence on a judicial finding of "brandished" did not violate the Fifth and Sixth Amendments.[200] The Court reasoned that 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."[201]

The Court acknowledged that many people do not agree with mandatory minimum sentences.[202] However, it determined that the criticisms would still exist whether the judge or jury found the facts that increased a minimum sentence.[203] The Constitution permits the judge to find such a factor, and the Court left the questions about the wisdom of mandatory minimums to "Congress, the States, and the democratic processes."[204]

B. THE PLURALITY OPINION

In part three of the opinion, a plurality of the Court found that *McMillan* was still sound authority after *Apprendi*.[205] The plurality reasoned that the doctrine of stare decisis made it very difficult for the Court to overrule prior authority.[206] The plurality then found that *McMillan* and *Apprendi* were consistent because there was a fundamental distinction between their facts.[207] The plurality also pointed out that history led to the conclusion that § 924(c)(1)(A) was constitutional.[208] The plurality concluded that it was critical not to abandon the views set forth in *McMillan* because so many statutes had been written relying on it.[209]

The plurality first considered Harris' argument that § 924(c)(1)(A) was unconstitutional because *McMillan* was no longer sound authority.[210] The plurality pointed out that stare decisis is "of fundamental importance to the rule of law."[211] The Court needs a "special justification" to overrule prior precedent, even in constitutional cases.[212]

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200. *Id.*; *see also* U.S. CONST. amends. V-VI.

201. *Harris*, 536 U.S. at 568 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 89-90 (1986)).

202. *Id.*

203. *Id.*

204. *Id.* at 568-69.

205. *Id.* at 566-68.

206. *Id.* at 556-57.

207. *Id.* at 557.

208. *Id.* at 558-65.

209. *Id.* at 567.

210. *Id.* at 556. A majority of the Court refused to use the canon of constitutional avoidance to prevent answering whether *McMillan* was still sound authority. *Id.*

211. *Id.* at 556-57 (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987)). The definition of stare decisis is "[t]o abide by decided cases. Judicial doctrine that

Harris offered the Court's decision in *Apprendi* as the special justification for overruling *McMillan*.[213] The plurality did not find Harris' argument convincing.[214] It determined that *McMillan* and *Apprendi* were consistent because there was a fundamental distinction between the factual findings at issue in each case.[215] The Court found in *Apprendi* that any fact, other than prior convictions, that extended a defendant's sentence beyond the statutory maximum was an element of an aggravated crime that must be proven to the jury beyond a reasonable doubt,[216] while *McMillan* dealt with the imposition of statutory minimum sentences by finding certain facts.[217]

The plurality recognized that *McMillan* was not inconsistent with *Apprendi* because the statute in *McMillan* operated "solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it."[218] *McMillan* simply took one factor that had always been considered to bear on punishment and dictated the precise weight of that factor.[219]

At issue in *Apprendi*, by contrast, was a sentencing factor that expanded the penalty for the defendant above what the law had provided.[220] The plurality agreed with the Court in *Apprendi* that those facts that increase the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[221] Those facts were what the "[f]ramers had in mind when they spoke of 'crimes' and 'criminal prosecutions' in the Fifth and Sixth Amendments."[222]

The plurality concluded that *Apprendi* did not undermine the conclusions set forth in *McMillan*.[223] The Court in *Apprendi* specifically stated

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holds that legal precedent will not be set aside unless there is good cause to do so." GILBERT LAW SUMMARIES LAW DICTIONARY 314 (1997).

212. Harris v. United States, 536 U.S. 545, 557 (2002) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

213. *Id.* Harris asserted that *McMillan* and *Apprendi* could not be reconciled. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*; Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In *Apprendi*, there was a hate crime statute that authorized an increase of a defendant's maximum sentence when a judge found by a preponderance of the evidence that the defendant acted with a purpose to intimidate the victim based on particular characteristics. *Apprendi*, 530 U.S. at 469-70.

217. *Harris*, 536 U.S. at 557-58; McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986). The statute at issue in *McMillan* used "visible possession of a firearm" to invoke a minimum mandatory sentence of five years under Pennsylvania's Mandatory Minimum Sentencing Act. *Id.* at 80-81.

218. *Harris*, 536 U.S. at 559 (quoting *McMillan*, 477 U.S. at 87-88).

219. *Id.* (citing *McMillan*, 477 U.S. at 89-90).

220. *Id.* at 562.

221. *Id.* at 562-63 (citing *Apprendi*, 530 U.S. at 490).

222. *Id.* at 563 (quoting *Apprendi*, 530 U.S. at 483).

223. *Id.*

that its ruling did not affect *McMillan*.[224] The plurality noted that "[a]s its holding and the history on which it was based would suggest, the *Apprendi* Court's understanding of the Constitution [was] consistent with the holding in *McMillan*."[225] The plurality quoted *Apprendi* in saying, "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 statutory range*."[226] In both *Harris* and *McMillan*, the fact-finding by the judge did not expose the defendant to punishment outside the statutory limits.[227]

Harris then argued that the concerns underlying *Apprendi* should apply with more force to facts increasing a defendant's minimum sentence because those factual findings have a greater impact on the defendant.[228] Harris believed that this argument was evident 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.[229]

The plurality answered by stating that "a factual finding's practical effect cannot by itself control the constitutional analysis."[230] The Fifth and Sixth Amendments ensure that a defendant will never receive more punishment than "he bargained for" when he committed the crime, but they do not guarantee that the defendant will receive "anything less" than that.[231] A fact is not considered an element just because it affects a defendant's sentence.[232] The plurality determined that it was critical not to abandon this understanding of *McMillan* because so many statutes have been written relying on its conclusions.[233]

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224. *Id.* (citing *Apprendi*, 530 U.S. at 487 n.13) (stating, "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 . . . ").

225. *Id.* at 564.

226. *Id.* at 565 (quoting *Apprendi*, 530 U.S. at 481).

227. *Id.*; McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986).

228. Harris v. United States, 536 U.S. 545, 565-66 (2002).

229. *Id.* at 566 (citing Almendarez-Torres v. United States, 523 U.S. 224, 244-45 (1998)).

230. *Id.*

231. *Id.* (quoting *Apprendi*, 530 U.S. at 498).

232. *Id.*

233. *Id.* at 567-68 (citing ALA. CODE § 13A-5-6(a)(4) (1994); ALASKA STAT. § 12.55.125(b) (Michie 2000); 730 ILL. COMP. STAT. § 5/5-5-3(c)(2)(D) (2000); KAN. STAT. ANN. § 21-4618 (1995); MD. CODE. ANN., Art. 27, § 286 (Supp. 2000); MINN. STAT. ANN. § 609.11 (West Supp. 2002); N.J. STAT. ANN. §§ 2C:43-6(c)-(d) (West 1998); 42 PA. CONS. STAT. § 9717(a) (1998) (conditioning mandatory minimum sentences upon judicial findings)).

C. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor joined Justice Kennedy's opinion in its entirety.[234] She pointed out that it was easy to reject Harris' arguments because she believed that *Jones* and *Apprendi* were decided wrongly.[235] Even assuming that *Jones* and *Apprendi* were decided correctly, Justice O'Connor found Harris' argument "unavailing."[236]

D. JUSTICE BREYER'S CONCURRENCE

Justice Breyer could not distinguish *Harris* from *Apprendi* "in terms of logic."[237] He did not agree with the plurality's opinion insofar as it found a distinction between *Harris* and *Apprendi*.[238] Justice Breyer pointed out that the Sixth Amendment permits judges to apply sentencing factors, whether applying a sentence beyond the statutory maximum or applying a mandatory minimum sentence.[239] He believed that applying *Apprendi* to mandatory minimum sentences would have adverse practical and legal consequences.[240] This belief is why Justice Breyer joined the Court's opinion to the extent it held *Apprendi* did not apply to mandatory minimums.[241]

Justice Breyer voiced his disapproval of mandatory minimum sentences as a matter of policy.[242] He stated that mandatory minimum sentences are inconsistent with the use of the Federal Sentencing Guidelines.[243] This is because unlike sentencing guidelines, mandatory minimum sentences do not give the judge any power to depart downward.[244] Justice Breyer believed that the sentencing guidelines transfer power to prosecutors "who can determine sentences through the charges they decide to bring, and

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234. *Id.* at 569 (O'Connor, J., concurring).

235. *Id.*; *see also Apprendi*, 530 U.S. at 523-54 (O'Connor, J., dissenting); Jones v. United States, 526 U.S. 227, 254-72 (1999) (Kennedy, J., dissenting).

236. Harris v. United States, 536 U.S. 545, 569 (2002).

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

238. *Id.*

239. *Id.*

240. *Id.* Justice Breyer stated that application of *Apprendi* would take power away from a judge and give it to prosecutors instead of juries. *Id.* at 571. Justice Breyer also stated that application of *Apprendi* in this context "would diminish further Congress' otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases." *Id.* at 572.

241. *Id.* at 569-70.

242. *Id.* at 570-71.

243. *Id.* at 570.

244. *Id.* (citing Melendez v. United States, 518 U.S. 120, 132-33 (1996) (Breyer, J., concurring in part and dissenting in part)).

who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate."[245]

Justice Breyer concluded by saying that applying *Apprendi* in *Harris* would not lead Congress to abolish mandatory minimum sentences.[246] Applying *Apprendi* to *Harris* would merely take the power to make a factual determination away from the judge and give it to the prosecutor.[247]

E. JUSTICE THOMAS' DISSENT

Justice Thomas, who was joined by Justices Stevens, Souter, and Ginsburg, dissented.[248] Justice Thomas determined that *McMillan* conflicted with the Court's decision in *Apprendi*, and therefore *McMillan* should be overruled.[249] He stated that as a constitutional matter, "brandished" must be construed as an element of an aggravated offense.[250] He concluded that only a minority of the Court found a distinction between *Apprendi* and *McMillan*.[251] Therefore, Justice Thomas stated he would have reaffirmed *Apprendi*, overruled *McMillan*, and reversed the court of appeals.[252]

Justice Thomas started by pointing out that "[a]s with *Apprendi*, this case turns on the seemingly simple question of what constitutes a 'crime.'"[253] This question cannot be answered by looking at statutory construction alone.[254] The original understanding of what facts constituted elements of a crime was "expansive."[255] Justice Thomas went on to say that even if legislatures created a crime and then provided that the punishment would be increased upon the finding of certain "aggravating" facts, the "core crime and the aggravating facts together constitute an aggravated crime."[256] The Court need only look at what "kind, degree, or range of punishment" the prosecution may give for a particular set of

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245. *Id.* at 571.
246. *Id.*
247. *Id.*
248. *Id.* at 572 (Thomas, J., dissenting).
249. *Id.* at 572-73.
250. *Id.* at 576.
251. *Id.* at 581-82. Only a plurality of the Court embraced section three of the opinion. *Id.* at 548.
252. *Id.* at 573.
253. *Id.* at 575.
254. *Id.*
255. *Id.*
256. *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring)). Justice Thomas also stated that "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." *Id.* (quoting *Apprendi*, 530 U.S. at 501).

facts.[257] Each fact that is given an entitlement of a different punishment is an element of the crime.[258]

Justice Thomas recognized that when a defendant "brandished" a firearm it altered the prescribed range of punishment that the defendant was exposed to under § 924(c)(1)(A).[259] Because of this alteration, "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."[260]

Justice Thomas agreed with Justice Stevens' dissent in *McMillan* that the protections afforded by the Constitution come into play when a particular fact gives rise to "both a special stigma and to a special punishment."[261] The Court made clear in *Apprendi*, Justice Thomas pointed out, "that if a statute 'annexes a higher degree of punishment' 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."[262] That limitation would protect a defendant's constitutional right to know the circumstances that will determine his or her punishment.[263]

Justice Thomas argued that the majority's analysis was flawed.[264] An increased mandatory minimum sentence increases the loss of liberty and

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257. *Id.* (quoting *Apprendi*, 530 U.S. at 501).

258. *Id.* (citing *Apprendi*, 530 U.S. at 501).

259. *Id.* at 575-76. Without a finding of "brandished," the sentencing range that the defendant was exposed to was five years to life in prison. *Id.*; 18 U.S.C. § 924(c)(1)(A) (2000). With a finding that the defendant "brandished" a firearm, the defendant was exposed to between seven years and life in prison. Harris v. United States, 536 U.S. 545, 576 (2002); § 924(c)(1)(A)(ii). If the defendant was found to have "discharged" a firearm, the range that the defendant was exposed to is between ten years and life in prison. *Harris*, 536 U.S. at 576; § 924(c)(1)(A)(ii).

260. *Harris*, 536 U.S. at 576 (citing *Apprendi*, 530 U.S. at 483 n.10) (stating that the "[f]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense")).

261. *Id.* (quoting McMillan v. Pennsylvania, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting)).

262. *Id.* (quoting *Apprendi*, 530 U.S. at 480).

263. *Id.* at 577. The *Apprendi* Court stated:

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.

Apprendi, 530 U.S. at 484.

264. *Harris*, 536 U.S. at 577 (Thomas, J., dissenting). The analysis that Justice Thomas referred to was the majority's view that facts do not need to be alleged in the indictment, submitted to the jury, or proven beyond a reasonable doubt if they do not increase the punishment for the crime beyond the statutory maximum. *Id.*

stigma society attaches to the crime.[265] Because of this increase in stigma and loss of liberty, Justice Thomas noted: "[F]acts that trigger an increased mandatory minimum sentence warrant constitutional safeguards."[266]

Justice Thomas then argued that actual sentencing practices supported his conclusion.[267] He noted that even though theoretically anyone convicted of violating § 924(c)(1)(A) is eligible to receive a sentence as severe as life in prison, almost all people sentenced for violations have been sentenced to five, seven, or ten years in prison.[268] If the Court's view of sentencing factors prevails, the *Apprendi* holding could easily be avoided by statutory drafting.[269]

Justice Thomas then stated that even though *Apprendi* dealt with a fact that increased the punishment for a crime beyond a statutory maximum, the principles that the Court in *Apprendi* relied upon should be applied equally to facts that expose a defendant to a higher mandatory minimum sentence.[270] Justice Thomas recognized that "[w]hether 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."[271] Justice Thomas concluded that there were "no logical grounds" for treating facts that raised mandatory minimum sentences different than facts that raised statutory maximums.[272] "In either case the defendant cannot predict the judgment from the face of the felony, . . . and the absolute statutory limits of his punishment change, constituting an increased penalty."[273] Defendants should be afforded the protections of notice, jury trial, and proof beyond a reasonable doubt with respect to facts that expose them to higher penalties.[274]

Justice Thomas continued by arguing that the doctrine of stare decisis should also not dictate the outcome in *Harris*.[275] He believed that the stare decisis effect of *McMillan* was significantly weakened for many different

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265. *Id.* at 577-78.

266. *Id.* at 578.

267. *Id.*

268. *Id.* (citing UNITED STATES SENTENCING COMMISSION, 2001 DATAFILE, USSCFY01, TABLE 1 (2001)). "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." *Id.* at 578 n.4.

269. *Id.* at 579.

270. *Id.*

271. *Id.* "When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is 'by definition an 'element' of a separate legal offense.'" *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000)).

272. *Id.*

273. *Id.* at 579-80.

274. *Id.* at 580.

275. *Id.* at 581.

reasons.[276] First, when the Court has decided a constitutional question wrongly, the force of stare decisis is at its weakest.[277] It is essential that the Court uphold absolute devotion to the protections of the individual given by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.[278] Second, before the majority's decision in *Harris*, "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*."[279] The principle of stare decisis may yield when a prior decision's "underpinnings have been eroded, by subsequent decisions of this Court."[280] Justice Thomas added that only a minority of the Court found a distinction between *McMillan* and *Apprendi*, which further supported his conclusions.[281] Because he could not distinguish the issue in *Harris* from the doctrine underlying the Court's decision in *Apprendi*, Justice Thomas respectfully dissented.[282]

IV. IMPACT

A. IMPLICATIONS OF THE DECISION

The Supreme Court's decision in *Harris* clarified some questions about statutory construction left by *Apprendi*, but it left others still unanswered.[283] Despite the plurality's opinion reaffirming *McMillan*, a majority of the Court did not see a distinction between *McMillan* and *Apprendi*, which might still provide questions about the reasoning behind the Court's

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276. *Id.*

277. *Id.* (citing Ring v. Arizona, 536 U.S. 584, 608 (2002); Agostini v. Felton, 521 U.S. 203, 235 (1997)).

278. *Id.* at 581-82.

279. *Id.* at 582. Justice O'Connor agreed with Justice Thomas in her *Apprendi* dissent. Apprendi v. New Jersey, 530 U.S. 466, 533 (2000) (O'Connor, J., dissenting). "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*." *Id.*

280. Harris v. United States, 536 U.S. 545, 583 (2002) (Thomas, J., dissenting) (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

281. *Id.* Justice Breyer concurred in the judgment of the Court but did not find a distinction between *Apprendi* and *Harris*. *Id.* at 569 (Breyer, J., concurring).

282. *Id.* at 583.

283. *See* Swan, *supra* note 149 at 730 (stating that "[t]he new issue troubling courts throughout the nation is the breadth and scope of the *Apprendi* rule that any fact, other than prior conviction, used to extend a defendant's sentence over the statutory maximum, must be charged in an indictment, and proven to a jury beyond a reasonable doubt").

decision in *Harris*.[284] The Court's holding in *Apprendi* left three main questions to be answered by the Court in *Harris*.[285]

1. *Federal and State Sentencing Schemes*

One major question that the decision in *Harris* resolved was the scope of the *Apprendi* rule.[286] There was much debate on whether the Court's decision in *Apprendi* should be extended to facts that increased a defendant's mandatory minimum sentence but did not extend the defendant's sentence beyond the statutory maximum.[287] Although the circuits were unanimous in their view that *Apprendi* did not apply to sentencing factors that increased a defendant's mandatory minimum sentence,[288] the Court's

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284. *See Harris*, 536 U.S. at 583 (Thomas, J., dissenting) (pointing out that Justice Breyer could not find a distinction between *McMillan* and *Apprendi*).

285. *See* Swan, *supra* note 149, at 763 (stating that the holding in *Apprendi* threatens to upset sentencing schemes, capital punishment cases, and the Federal Sentencing Guidelines). Another question left open by *Apprendi* was the effect of the holding on felony drug cases. *Id.* at 771.

286. *Harris*, 536 U.S. at 562-65.

287. *See* Apprendi v. New Jersey, 530 U.S. 466, 544 (2000) (O'Connor, J., dissenting) (stating that the principle set forth by the majority not only would have to apply to increases in statutory maximum sentences, it would have to apply to "all determinate sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations"); Swan, *supra* note 149, at 768 (stating that "[a]lthough the majority declined to hold whether the Federal Sentencing Guidelines remained constitutional, the likely result of the Court's rule if applied broadly is that the Guidelines are invalid").

288. *See*, e.g., United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) (rejecting the petitioner's argument that *Apprendi* should be extended to *all* facts that impact the defendant's sentence, even if still within the statutory maximum); United States v. Garcia, 240 F.3d 180, 183 (2d Cir. 2001) (stating "[w]e see nothing in the Court's holding in *Apprendi* or its explication of the holding that alters a sentencing judge's traditional authority to determine those facts relevant to selection of an appropriate sentence within the statutory maximum"); United States v. Williams, 235 F.3d 858, 862-63 (3d Cir. 2000) (holding that *Apprendi* did not apply to the defendant's increase in sentence under the sentencing guidelines when the increase was within the statutory maximum); United States v. Promise, 255 F.3d 150, 156-57 (4th Cir. 2001) (holding that *Apprendi* did not apply to sentence increases within the statutory maximum); United States v. Doggett, 230 F.3d 160, 166 (5th Cir. 2000) (holding that the petitioner's sentence did not violate the Sixth Amendment or his due process rights under the Fifth Amendment because the district judge's finding of the amount of drugs simply assisted the judge in rendering the proper sentence within the statutory range already authorized by the jury's verdict); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000) (holding that *Apprendi* was not triggered because the defendant's murder sentence was within the twenty-year maximum); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000) (stating, "*Apprendi* does not affect application of the relevant-conduct rules under the Sentencing Guidelines to sentences that fall within a statutory cap"); United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000) (finding that a judge-found fact may alter a defendant's sentence within the range authorized by statute); United States v. Hernandez-Guardado, 228 F.3d 1017, 1026-27 (9th Cir. 2000) (stating that enhancing the defendant's sentence under the guidelines did not violate *Apprendi* because it was within the ten year maximum sentence); United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001) (holding that *Apprendi* did not apply to sentencing enhancements that were within the statutory maximum). *But see* United States v. Meshack, 225 F.3d 556, 576 (5th Cir. 2000), *overruled by* United States v. Cotton, 535 U.S. 625 (2002) (explained in United States v. Randle, 304 F.3d 373, 377 n.2 (5th Cir. 2002)). The court in *Meshack* stated, "*Apprendi* does not clearly resolve whether an

decision in *Harris* solidified the circuits' prior holdings.[289] Since many statutes, including the Federal Sentencing Guidelines, were drafted relying on the Court's decision in *McMillan*, the Court's decision in *Harris* should not cause widespread changes in statutory construction.[290] *Harris* made it clear that statutory schemes that allow a judge to decide facts that alter a defendant's sentence within the statutory range prescribed by law do not violate due process.[291]

2. *Capital Punishment Cases*

Apprendi left open questions about the constitutionality of the nation's capital punishment laws.[292] This concern was made moot by the Supreme Court's decision in *Ring v. Arizona*.[293] The Court in *Ring* held that capital defendants are entitled to a jury determination of any fact on which the legislature conditioned an increase in the maximum punishment.[294] This essentially eliminated the judge's role in handing down death sentences.[295]

3. *Felony Drug Cases*

Very similar to the concern about the constitutionality of state sentencing schemes was the concern about the constitutionality of the federal drug laws and their imposition under the Federal Sentencing Guidelines.[296] Just as it did sentencing schemes, the Court's opinion in *Harris* reaffirmed the view of the circuits.[297] Although the Court's opinion in *Harris* will not cause widespread changes in statutory construction, it

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enhancement which increases a sentence within the statutory range but which does not increase the sentence beyond that range must be proved to the jury." *Meshack*, 225 F.3d at 576.

289. *See Harris*, 536 U.S. at 556 (holding that the statute set forth a single offense in which "brandished" was a sentencing factor that could be found by the judge).

290. *See id.* at 567 (stating that "[l]egislatures 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"). The Court in *McMillan* ruled that Pennsylvania's Mandatory Minimum Sentencing Act violated due process by treating "visible possession of a firearm" as a sentencing factor instead of an element of the crime. McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986).

291. *See Harris*, 536 U.S. at 568 (reaffirming *McMillan* and finding 18 U.S.C. § 924(c)(1)(A) to be constitutional).

292. Swan, *supra* note 149, at 764-65. The Court's decision in *Apprendi* called into question the constitutionality of a sentencing judge increasing a sentence of life imprisonment to death. *Id.*

293. 536 U.S. 584 (2002).

294. *Ring*, 536 U.S. at 589.

295. *See id.* at 609 (holding that the Sixth Amendment right to a jury trial precludes a sentencing judge, sitting without a jury, from finding aggravating circumstances necessary for the imposition of the death penalty).

296. *See* Swan, *supra* note 149, at 771 (stating that "[m]any commentators have predicted *Apprendi* would result in a massive overhaul of sentencing schemes, especially in the realm of drug convictions").

297. *See supra* note 289; *see also* 21 U.S.C. § 841 (2000).

will give legislatures and lower courts much needed guidance in drafting and defining "what constitutes a crime."[298]

B. APPLICATION TO NORTH DAKOTA

The Court's opinion in *Harris* will also affect how judges in North Dakota sentence defendants.[299] The legislature in North Dakota can now draft statutes with confidence, knowing that judges may decide facts that increase a defendant's mandatory minimum sentence within the statutory range.[300]

There is one North Dakota decision that dealt particularly with *Apprendi* and the sentencing factor versus element distinction.[301] The petitioner in *Clark v. State*[302] argued that *Apprendi* applied to his fifteen-year incarceration because it was above the statutory maximum of ten years.[303] While affirming Clark's conviction on other grounds,[304] the North Dakota Supreme Court pointed out that section 12.1-32-09 of the North Dakota Century Code might not withstand constitutional challenge under the rule announced in *Apprendi*.[305] The court urged the legislature to address the constitutional concerns and make necessary amendments to bring the statute within *Apprendi's* constitutional requirements.[306] Because the Supreme Court of North Dakota recognized the *Apprendi* rule in *Clark*, it will not have to make many adjustments for the decision in *Harris*.[307]

Since the Supreme Court's decision in *Harris* did not overrule *McMillan* or *Apprendi*, the North Dakota statutory scheme can remained unchanged.[308] The North Dakota Uniform Controlled Substances Act increases sentencing ranges for each class of drug depending on the number

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298. *See generally* Harris v. United States, 536 U.S. 545 (2002).

299. *See generally* N.D. CENT. CODE § 19-03.1-01-44 (2001) (setting out North Dakota's sentencing scheme for controlled substances).

300. *See Harris*, 536 U.S. at 568 (stating that the Court saw no reason to overturn statutes that allowed a judge to increase a defendant's mandatory minimum sentence within the prescribed statutory range).

301. *See generally* Clark v. State, 2001 ND 9, 621 N.W.2d 576. In *Clark*, the defendant was found guilty of manslaughter, a class B felony under North Dakota law. *Id.* ¶ 2, 621 N.W.2d at 577. The trial court sentenced Clark to a ten-year maximum sentence and then sentenced Clark to an additional five years as a "dangerous special offender." *Id.*

302. 2001 ND 9, 621 N.W.2d 576.

303. *Clark*, ¶ 2, 621 N.W.2d at 577.

304. *See id.* ¶ 16, 621 N.W.2d at 581-82 (confirming the petitioner's conviction because even if *Apprendi* applied, the mistake by the trial court was harmless error).

305. *Id.* ¶ 11, 621 N.W.2d at 580 n.1.

306. *Id.*

307. *See id.* ¶ 11, 621 N.W.2d at 580 (adopting the rule set forth in *Apprendi*).

308. *See generally* N.D. CENT. CODE § 19-03.1-01-44 (2001) (setting out North Dakota's sentencing scheme for controlled substances).

of prior offenses by the defendant.[309] As long as a fact does not increase the possible penalty for a defendant above that statutory maximum, the judge may decide if the fact exists by a preponderance of the evidence.[310]

As the court pointed out in *Clark*, North Dakota's sentencing scheme possibly had a constitutional problem under section 12.1-32-09 of the North Dakota Century Code.[311] The legislature has since remedied the problem pointed out by the court.[312] Because the legislature has taken account of the Supreme Court's decision in *Apprendi*, the Court's decision in *Harris* should only clarify what the legislature is allowed to do in North Dakota.[313]

V. CONCLUSION

In *Harris v. United States*, the United States Supreme Court further defined what facts constitute elements of a crime.[314] The Court held that "brandished" a firearm is a sentencing factor rather than an element of a crime, and allowing a judge to find that factor did not violate Harris' constitutional rights.[315] By basing a two-year increase in Harris' minimum sentence on a judicial finding of brandishing, Congress simply took one factor that had always been considered by courts to bear on punishment and determined the precise weight to be given that factor.[316] The Court reaffirmed *McMillan* and *Apprendi* by holding that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum is an element of a crime, which must be submitted to a jury and proven beyond a reasonable doubt.[317] Judges and legislatures now

309. *See, e.g., id.* § 19-03.1-23(1)(a). If a defendant is found guilty of possessing a controlled substance classified as a narcotic drug or methamphetamine, the defendant is guilty of a class A felony and must be sentenced to at least five years for a second offense or to at least twenty years for a third or subsequent offense. *Id.* The same scheme is used for subsection (b) of the statute. *Id.* § 19-03.1-23(1)(b). Subsections (a)(1) and (b)(1) set forth the statutory minimum that a defendant must be sentenced to if he or she is found guilty under the statute; while subsections (a)(2) and (b)(2) set forth the statutory maximum that a defendant may be sentenced to under the statute. *Id.* § 19-03.1-23.

310. Harris v. United States, 536 U.S. 545, 558 (2002).

311. Clark v. State, 2001 ND 9, ¶ 11, 621 N.W.2d 576, 580 n.1.

312. *See* N.D. CENT. CODE § 12.1-32-09(4)(a) (stating that a hearing must be held in front of a jury if, before a sentence is imposed, it is alleged that the defendant is a dangerous special offender under subdivisions (a), (b), (d), or (e) of subsection (1)). The jury, or the court if the jury is waived, must find beyond a reasonable doubt that the defendant is a dangerous special offender. *Id.*

313. *See generally id.*

314. *Harris*, 536 U.S. at 557.

315. *Id.* at 556.

316. *Id.* at 568 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 89-90 (1986)).

317. *Id.*

know with more certainty what facts the judge can decide and what facts must go to the jury.[318]

Robert B. Stock[*]

318. *Id.*

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