

Opinion of BREYER, J.

SUPREME COURT OF THE UNITED STATES

No. 00–10666

WILLIAM JOSEPH HARRIS, PETITIONER *v.*
UNITED STATES

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

[June 24, 2002]

JUSTICE BREYER, concurring in part and concurring in the judgment.

I cannot easily distinguish *Apprendi v. New Jersey*, 530 U. S. 466 (2000), from this case in terms of logic. For that reason, I cannot agree with the plurality’s opinion insofar as it finds such a distinction. At the same time, I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here). And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join the Court’s judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.

In saying this, I do not mean to suggest my approval of mandatory minimum sentences as a matter of policy. During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike. See, *e.g.*, Remarks of Chief Justice William H. Rehnquist,

Opinion of BREYER, J.

Nat. Symposium on Drugs and Violence in America 9–11 (June 18, 1993); Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) (mandatory minimums are “imprudent, unwise and often an unjust mechanism for sentencing”); Breyer, *Federal Sentencing Guidelines Revisited*, 14 *Crim. Justice* 28 (Spring 1999); Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 *Wake Forest L. Rev.* 185, 192–196 (1993); Schulhofer, *Rethinking Mandatory Minimums*, 28 *Wake Forest L. Rev.* 199 (1993); Raeder, *Rethinking Sentencing and Correctional Policy for Nonviolent Drug Offenders*, 14 *Crim. Justice* 1, 53 (Summer 1999) (noting that the American Bar Association has opposed mandatory minimum sentences since 1974).

Mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. See *Melendez v. United States*, 518 U. S. 120, 132–133 (1996) (BREYER, J., concurring in part and dissenting in part); cf. *Koon v. United States*, 518 U. S. 81, 95–96 (1996). They rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug “kingpin” and a “mule” differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. U. S. Sentencing Comm’n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* i–iv, 31–33 (1991) (Sentencing

Opinion of BREYER, J.

Report); see also Schulhofer, *supra*, at 214–220. They rarely are based upon empirical study. See Rehnquist, *supra*, at 9–10; Hatch, *supra*, at 198. And there is evidence that they encourage subterfuge, leading to more frequent downward departures (on a random basis), thereby making them a comparatively ineffective means of guaranteeing tough sentences. See Sentencing Report 53.

Applying *Apprendi* in this case would not, however, lead Congress to abolish, or to modify, mandatory minimum sentencing statutes. Rather, it would simply require the prosecutor to charge, and the jury to find beyond a reasonable doubt, the existence of the “factor,” say, the amount of unlawful drugs, that triggers the mandatory minimum. In many cases, a defendant, claiming innocence and arguing, say, mistaken identity, will find it impossible simultaneously to argue to the jury that the prosecutor has overstated the drug amount. How, the jury might ask, could this “innocent” defendant know anything about that matter? The upshot is that in many such cases defendant and prosecutor will enter into a stipulation before trial as to drug amounts to be used at sentencing (if the jury finds the defendant guilty). To that extent, application of *Apprendi* would take from the judge the power to make a factual determination, while giving that power not to juries, but to prosecutors. And such consequences, when viewed through the prism of an open, fair sentencing system, are seriously adverse.

The legal consequences of extending *Apprendi* to the mandatory minimum sentencing context are also seriously adverse. Doing so would diminish further Congress’ otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases. I have discussed these matters fully in my *Apprendi* dissent. See 530 U. S., at 555. For the rea-

Opinion of BREYER, J.

sons set forth there, and in other opinions, see *Jones v. United States*, 526 U. S. 227, 254 (1999) (KENNEDY, J., dissenting); *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), I would not apply *Apprendi* in this case.

I consequently join Parts I, II, and IV of the Court's opinion and concur in its judgment.