SUPREME COURT OF THE UNITED STATES

No. 08–1569

UNITED STATES, PETITIONER *v.* MARTIN O'BRIEN AND ARTHUR BURGESS

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

[May 24, 2010]

JUSTICE STEVENS, concurring.

A "sentencing factor" may serve two very different functions. As a historical matter, the term has described a fact that a trial judge might rely upon when choosing a specific sentence within the range authorized by the legislature. In that setting, the judge has broad discretion in determining both the significance of the factor and whether it has been established by reliable evidence.

In the 1970's and 1980's, as part of a national effort to enact tougher sentences,[1] a new type of "sentencing factor" emerged. Since then the term has been used to describe facts, found by the judge by a preponderance of the evidence, that have the effect of imposing mandatory limits on a sentencing judge's discretion. When used as an element of a mandatory sentencing scheme, a sentencing factor is the functional equivalent of an element of the

[1] "By 1990, forty-six states had enacted mandatory sentence enhancement laws, and most states had a wide variety of these provisions." Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Cal. L. Rev. 61, 64–65 (1993) (footnote omitted); see also *id.*, at 69 ("[M]ost of the current mandatory enhancement laws did not appear until the 1970s"); Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 200–201 (1993) (discussing history of federal mandatory minimum sentencing regime).

criminal offense itself. In these circumstances, I continue to believe the Constitution requires proof beyond a reasonable doubt of this "factor."

I

We first encountered the use of a "sentencing factor" in the mandatory minimum context in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), when we examined the constitutionality of Pennsylvania's 1982 Mandatory Minimum Sentencing Act (Act).[2] The Pennsylvania statute subjected anyone convicted of a specified felony to a mandatory minimum 5-year sentence if the trial judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. See *id.*, at 81–82. In four prosecutions under the Act, the trial judges had each held that the statute was unconstitutional and imposed sentences lower than the 5-year mandatory minimum, presumably because they recognized that the statute treated the visible possession of a firearm as the functional equivalent of an offense element. *Id.*, at 82. On appeal, the Pennsylvania Supreme Court consolidated the four cases and reversed.[3] *Id.*, at 83. It reasoned that because visible possession of a firearm was a mere "sentencing factor," rather than an element of any of the specified offenses defined by the legislature, the protections afforded by cases like *In re Winship*, 397 U. S. 358 (1970),[4] did not apply.

A bare majority of the *McMillan* Court endorsed this

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[2] See *Apprendi* v. *New Jersey*, 530 U. S. 466, 485 (2000) ("It was in *McMillan* . . . that this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge").

[3] *Commonwealth* v. *Wright*, 508 Pa. 25, 494 A. 2d 354 (1985).

[4] In *Winship*, the Court "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." 397 U. S., at 364.

novel use of the sentencing factor concept. Five Justices concluded that the prerequisite for a mandatory sentence is just a "sentencing factor," rather than an "element of the offense," because the factor does not "alte[r] the maximum penalty for the crime" and merely "limit[s] the sentencing court's discretion in selecting a penalty within the range already available to it." 477 U. S., at 87–88. Yet, although the Pennsylvania Act's 5-year mandatory sentence for visible possession of a firearm during the commission of an offense did not exceed the statutory maximum that otherwise applied for the crimes of conviction, a positive finding on the so-called sentencing factor mandated the imposition of a sentence that exceeded the punishment the defendant would have otherwise received. See *id.*, at 103–104 (STEVENS, J., dissenting).

The majority opinion in *McMillan* can fairly be described as pathmarking, but unlike one of its predecessors, *Winship*, it pointed in the wrong direction. For reasons set forth in the opinions joined by the four dissenting Justices in *McMillan*, I continue to believe that *McMillan* was incorrectly decided. See *id.*, at 93–94 (Marshall, J., dissenting); *id.*, at 95–104 (STEVENS, J., dissenting).

II

Not only was *McMillan* wrong the day it was decided, but its reasoning has been substantially undermined—if not eviscerated—by the development of our Sixth Amendment jurisprudence in more recent years. We now understand that "'[i]t is unconstitutional [under the Sixth Amendment] for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000) (quoting *Jones* v. *United States*, 526 U. S. 227, 252–253 (1999) (STEVENS, J., concurring)). Harmonizing *Apprendi* with our existing Sixth Amendment jurisprudence, we ex-

plained that "any fact that increases the penalty for a crime *beyond* the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490 (emphasis added). In other words, we narrowed our holding to those facts that effectively raised the ceiling on the offense, but did not then consider whether the logic of our holding applied also to those facts necessary to set the floor of a particular sentence.

As JUSTICE THOMAS eloquently explained in his dissent in *Harris* v. *United States*, 536 U. S. 545, 572 (2002), the reasoning in our decision in *Apprendi* applies with equal force in the context of mandatory minimums. There is, quite simply, no reason to distinguish between facts that trigger punishment in excess of the statutory maximum and facts that trigger a mandatory minimum. This case vividly illustrates the point. It is quite plain that there is a world of difference between the 8½-year sentence and the 7-year sentence the judge imposed on the defendants in this case and the 30-year sentence mandated by the machinegun finding under 18 U. S. C. §924(c)(1)(B).

Mandatory minimums may have a particularly acute practical effect in this type of statutory scheme which contains an *implied* statutory maximum of life, see *ante*, at 10. There is, in this type of case, no ceiling; there is only a floor below which a sentence cannot fall. Furthermore, absent a positive finding on one of §924(c)(1)'s enumerated factors, it is quite clear that no judge would impose a sentence as great as the sentences commanded by the provision at issue in this case. Indeed, it appears that, but for those subject to the 30-year mandatory minimum, no defendant has *ever* been sentenced to a sentence anywhere near 30 years for a §924(c) offense. See Brief for Respondent O'Brien 46–47, and n. 15.

Apprendi should have signaled the end of *McMillan*, just as it signaled the unconstitutionality of state and

federal determinate sentencing schemes in *Blakely* v. *Washington*, 542 U. S. 296 (2004), and *United States* v. *Booker*, 543 U. S. 220 (2005). But thanks to an unpersuasive attempt to distinguish *Apprendi*,[5] and a reluctant *Apprendi* dissenter, *McMillan* survived over the protest of four Members of the Court. See *Harris*, 536 U. S., at 569–570 (BREYER, J., concurring in part and concurring in judgment) ("I cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction. At the same time . . . I cannot yet accept [*Apprendi*'s] rule"). It appears, however, that the reluctant *Apprendi* dissenter may no longer be reluctant.[6]

I am therefore in full agreement with JUSTICE THOMAS' separate writing today, *post*, at 1–2, as I was with his *Harris* dissent. *McMillan* and *Harris* should be overruled, at least to the extent that they authorize judicial factfinding on a preponderance of the evidence standard of facts that "expos[e] a defendant to [a] greater punishment than what is otherwise legally prescribed . . ." *Harris*, 536 U. S., at 579 (THOMAS, J., dissenting). Any such fact is the functional equivalent of an element of the offense.

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[5] Consistent with the attempt in *Harris* v. *United States*, 536 U. S. 545 (2002), to distinguish *Apprendi*, JUSTICE KENNEDY's fine opinion for the Court today employs some of the same acrobatics to distinguish *Harris* from the present case. *Harris* also involved §924(c)(1), though a different subsection; its reading of the mandatory minimum for "brandishing" a firearm contained in 18 U. S. C. §924(c)(1)(A) as a sentencing factor is not so easily distinguished from the nearly identical mandatory minimum for possessing a "machinegun" under §924(c)(1)(B).

[6] "But in *Harris*, I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time. So if . . . if that should become an issue about whether mandatory minimums are treated like the maximums for *Apprendi* purposes, should we reset the case for argument?" Tr. of Oral Arg. 20 (question by BREYER, J.).

III

In my view, the simplest, and most correct, solution to the case before us would be to recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense. The unanimity of our decision today does not imply that *McMillan* is safe from a direct challenge to its foundation.