IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM JOSEPH HARRIS, :

Petitioner :

v. : No. 00-10666

UNITED STATES. :

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Washington, D.C.

Monday, March 25, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

WILLIAM C. INGRAM, ESQ., First Assistant Federal Public Defender, Greensboro, North Carolina; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-10666, William Joseph Harris v. the United States.

Mr. Ingram.

ORAL ARGUMENT OF WILLIAM C. INGRAM

ON BEHALF OF THE PETITIONER

MR. INGRAM: Mr. Chief Justice, and may it please the Court:

The petitioner in this case is asking the Court to rule that the brandish clause of 18 United States Code, Section 924(c) is an element to be charged and proved beyond a reasonable doubt and not merely a sentencing enhancement, based on two separate and independent bases. The first is the statutory analysis under Jones v. United States, and the second basis is the constitutional analysis under Apprendi v. New Jersey. And I will address the Jones argument first.

The carjacking statute in Jones v. United States had, as additional elements, serious injury and death, which the Court held to be additional elements after the statutory analysis was completed. And the carjacking statute in that case and 18 United States Code, section 924(c) in this case are virtually mirror images of each

other structurally and grammatically.

The Court looked at the text of the statute, the legislative history behind those facts, and how legislatures historically had treated those facts in determining that serious injury and death were, in fact, elements to be proved and not merely sentencing enhancements.

Likewise, we contend that brandish, based on the -- the text of the statute, the -- how legislatures have typically treated that fact and the fact that it involves a mens rea element -- that is, brandish is -- is defined as displaying or making the presence known of a firearm in order to intimidate and -- and mens rea has traditionally been an element -- and then based on the legislative history that those statutes would lead the Court to conclude, based on the statutory analysis, that brandish is in fact an element to be proved and not merely a sentencing enhancement.

QUESTION: But it's not so -- it seems to me that -- I understand your argument, but it's not so clear as it was in Jones. I mean, the difference between use and brandish is -- is a -- is a smaller difference in degree. The difference in the penalties are smaller differences. It's just a couple of years, the difference between 5 and -- and 7, for example. And -- and I

understand how you can make the argument, but I don't see the argument as being sort of a slam dunk in the case.

MR. INGRAM: Your Honor, if I may address each of those concerns. The -- first of all, the -- the fact that the increase under the brandish statute goes from a mandatory minimum of 5 to a mandatory minimum of -- of 7 not being a steep increase, first of all, it does take the defendant 40 percent higher for brandishing from 5 to 7, and -- and it doubles the penalty 100 percent higher for discharging the firearm, which cannot be divorced from the brandishing element.

There are cases from this Court in the context of ex post facto challenges to application of sentences that were enacted after the defendant committed the crime, most particularly Miller v. Florida, the leading case which we cite in our brief, where the Court held that an increase in a sentence of anywhere from two to two and a half years substantially disadvantaged the defendant and foreclosed the defendant from asking for a lower sentence.

Likewise, in the case of Glover v. United States, which we do not cite in our brief -- that is at 531 U.S. 198 -- the Court held, in the context of a challenge of ineffective assistance of counsel, that an additional guideline sentence under the Federal sentencing guidelines of anywhere from 6 to 21 months meets the

substantial prejudice prong of the ineffective assistance of counsel claim. So, we contend that the increase from 5 to 7 years is in fact a -- a substantial difference.

The elements in question, comparing serious bodily injury and death to brandishing, are somewhat different in that the serious bodily injury and death are results, whereas brandish and discharge are conduct of the defendant. But we contend that the brandish and discharge being treated more seriously are seeking to address the same possible results; that is, if a defendant merely carries a firearm or possesses a firearm, it is far less likely that serious bodily injury or death will result than if the defendant brandishes or discharge -- discharges --

QUESTION: Can I -- can I go to Apprendi? Because the -- I want to just focus you a little bit, assuming you lose on this argument. I want to know -- and this is hard for me because I dissented in Apprendi. I want to know how you, as a person living with the case, understands it.

Imagine two statutes. I just want to know if you think Apprendi applies to the second of the two statutes. The first statute says the sentence is up to 10 years for robbery, but if a gun is discharged, up to 15. There's no question that Apprendi applies to that second.

Doesn't it?

MR. INGRAM: I agree with that.

QUESTION: That's what Apprendi is about.

Now, suppose I take that same statute and I just rewrite the words as follows. The maximum for this crime of robbery is 15, but unless a gun is discharged, you shall not sentence to more than 10. Now, is that second statute treated identically to the first in your understanding and the understanding of the bar? That's what I'm trying to get at.

MR. INGRAM: Yes. My understanding is that Apprendi would cover the --

QUESTION: Both.

MR. INGRAM: -- latter statute that you have described.

QUESTION: Both. So, the wording of it doesn't matter.

MR. INGRAM: No. I contend that it -- it does not.

QUESTION: All right. Now, if that's the case, I'd also like -- and this is my other -- only other question. I'd -- I'd like to get your understanding. The defense bar, I understand, of which you're an important part, wants this extended, and my question is why.

And this is my, why -- what I have trouble

seeing in this. It seems to me as a practical matter what's likely to happen is the prosecutor will come in, and it's primarily about drug cases. And they'll say, fine, we'll go to the jury. You want a trial? Fine. You say you were in Chicago? Fine. We say that there were two kilos of drugs, and then you have to get in front of the jury and argue my client was in Chicago, but just in case he happened to be around, there was only one kilo. Now, that's impossible for you to argue.

Now, given that kind of problem, why does the defense bar, why do you, and why does everyone else -- why are they so anxious to extend this case?

MR. INGRAM: Your Honor, that is not a problem that the defense bar does not already face. In -- in the context that you described in a drug case, in Federal court now the evidence presented at trial will involve both possession with intent to distribute evidence, as well as quantity evidence.

QUESTION: Yes, but still under the present law, if you have a good claim as to whether it's one kilo or two and the evidence is in dispute, you find the guilty verdict come in. At that point, you go to the judge and you say, now, judge, we want -- we want to go into the evidence here about how much drug there really was. You can't do that if you have to do it all at the same time in

front of the jury.

MR. INGRAM: As a practical matter, in Federal court, the -- the Federal judges at sentencing rely on the trial evidence. So, a defense attorney knows during trial that I am hearing evidence about quantity that I want to dispute because I know it's going to come up later in a sentencing hearing, but I don't dare do that here because I am telling the jury that there was no possession at all. So, it is a dilemma that we face now and -- and faces attorneys, for example, in cases where you admit my client did kill someone, but not with malice aforethought. Quite often you do have to negate additional elements, and you do have that dilemma already. This would not create any new dilemma for us.

QUESTION: Well, let me rephrase Justice Breyer's question slightly or -- or make the point that I think underlies part of his question.

Apprendi is not a -- true or false? Apprendi is not an unmixed blessing for the defense bar.

MR. INGRAM: I think it can create some problems, as we just described, but they're not problems that we don't face in other areas and on other --

QUESTION: Well, given Apprendi, of course, you face the problem. But looking at Apprendi as an original matter, which we cannot -- which I think we're unlikely to

do, it -- it has -- it imposes some real disadvantages on defendants, does it not?

MR. INGRAM: I do not think they're real disadvantages. I think they're just -- they're just some -- some difficulties that defense attorneys face all the time.

QUESTION: Well, but the case Justice Breyer puts to you shows a very real difficulty.

MR. INGRAM: And as I've described, that is a difficulty that we face already. And -- and the important --

QUESTION: Because of Apprendi.

MR. INGRAM: No, Your Honor. Before Apprendi. That problem faced defense attorneys in -- in a number of contexts. And -- and we're really more concerned here not so much with the problems it creates, because they're not new problems, but with -- with the fact that mandatory minimums add additional deprivations of liberty that should be addressed by the jury and found beyond a reasonable doubt and not -- not left to the discretion of trial judges, based on the case law of this Court, including Apprendi itself.

We are relying on the constitutional rule announced in Apprendi. Prior to Apprendi, in -- in McMillan and Patterson, the Court had acknowledged that

there were some limits, some constitutional limits to what a legislature could do in defining the elements of a crime. But it -- the Court had never announced exactly what those limits are.

Now, it is true that Apprendi was limited to an increase in statutory maximums because that is what the case was about. Those were the facts of the case. But the constitutional rule that was the underpinning of the Apprendi holding was that as -- as stated by the majority in endorsing the concurring opinions in Jones as follows, it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed, and equally clear that they must be proved beyond a reasonable doubt.

So, the constitutional rule of Apprendi was any fact that increases the range, either the floor or the ceiling, of the prescribed penalties are constitutionally elements that must be alleged by the defendant -- by the prosecution in the charging document and must be proved.

QUESTION: What about things like the Federal Sentencing Guidelines which also have the effect of increasing the range of the penalty within certain limits? There are lots of factors there that under the guidelines the judge would still decide. Under your argument,

Apprendi would throw all those out. It has to go to the jury.

MR. INGRAM: I disagree, Your Honor, and --

QUESTION: Why?

MR. INGRAM: -- and I do agree with your statement that there are lots of things that the guidelines allow the judges to consider.

First of all, mandatory minimums are just that. They are mandatory. They do not allow a judge to consider any mitigating factor, however strongly the judge may -- may believe in those mitigating factors, to go below. The sentencing guidelines, first of all, expressly allow the judge to consider a number of aggravating and mitigating factors.

QUESTION: But they may be unconstitutional under your theory.

MR. INGRAM: They are not because we contend that the guidelines, unlike mandatory minimums, still leave the judge with lots of discretion. In Koon v. United States, this Court --

QUESTION: The question is under your theory of Apprendi, which imposes constitutional limits on discretion for judges, that can be given to judges, how many of the sentencing factors are going to fall by the wayside?

MR. INGRAM: I -- I submit that none of them will because none of those factors mandate a particular penalty to the exclusion of any mitigating offense. For example, under the drug guideline, if the defendant possessed a firearm, then in a sense a two-level increase is mandated or called for, but that nevertheless still allows the judge, without a Koon discretionary departure --

QUESTION: Well, that's exactly the kind of thing that presumably under your argument would have to go to the jury, whether he possessed a firearm, or the quantity of drugs involved.

MR. INGRAM: No, it is not, Your Honor, because the judge in such a case would still have the ability to depart, or first of all, to reduce the offense level for other mitigating facts in the case.

QUESTION: You're -- you're saying that just the level is kind of inchoate until the sentence comes out because there are other factors that could be applied?

MR. INGRAM: The -- the sentencing guideline range, once established, is mandatory unless and until the judge determines that there is a legally permissible basis to depart downward or upward. And Koon recognized that there are innumerable bases for allowing the judge to exercise that discretion.

QUESTION: So long as -- so long as the upward or downward departure is there, you say Apprendi doesn't cover it.

MR. INGRAM: That's correct.

QUESTION: Or downward, anyway.

QUESTION: Oh, I see now.

QUESTION: Downward or upward? Or upward?

QUESTION: I said upward or downward.

QUESTION: I know. And he agreed.

(Laughter.)

QUESTION: I'm surprised that he agrees. I -- I would think you would -- you would say that -- that it's only the downward that -- that saves the guidelines.

MR. INGRAM: Well, I think it is in this case. The -- the fact that the judge can depart downward --

QUESTION: I mean, suppose a judge could not depart downward under the guidelines, could only -- only depart upward, you'd have a mandatory minimum, wouldn't you?

MR. INGRAM: You would have. But that -- that --

QUESTION: Okay. So -- so, what you agree with is that so long as the judge, under the guidelines, has the option of departing downward, you wouldn't -- this case would not necessarily decide the guidelines.

MR. INGRAM: That is correct.

QUESTION: Suppose --

QUESTION: How -- how does a judge have the opportunity to depart downward under the guideline if the guideline says if he had a gun, you're supposed to go up? I just don't understand your argument at all.

MR. INGRAM: Because that --

QUESTION: -- purpose is if he has a gun, you increase it. Why isn't that an Apprendi thing under your theory?

MR. INGRAM: Because the judge still -- that -- that does not bind the judge at that level. The judge still --

QUESTION: Suppose -- suppose the judge says, now, it's the policy in this court and in this jurisdiction, counsel, that if you come in and your defendant has a gun or has brandished a gun, I'm going to go upward. I want you to know that. Then the case is decided, and he said, you know, I would have given your counsel -- your client six months if he hadn't brandished the gun, but he brandished that gun: 5 years. And you contend he didn't brandish the gun. Why shouldn't Apprendi control that?

MR. INGRAM: Because the -- the constitutional rule announced by the Court is that if a legislature

mandates an increase in the prescribed range of penalties. In the case you've described, Your Honor, the judge, although he says I would still -- I will always go up, he -- he still has the freedom to not go up.

QUESTION: So --

MR. INGRAM: And -- and he is subject to an abuse of discretion standard on appeal.

QUESTION: So -- so, in your view, Apprendi stands for the proposition that legislatures cannot control judges in the sentencing process.

MR. INGRAM: No. My -- my -- in a sense that is true. My position is constitutionally that legislatures have the power to determine what conduct they're going to criminalize and to define the elements and the prescribed punishment for those elements as long as it is not cruel and unusual.

QUESTION: Well, I -- I think Apprendi is clearly binding here, and -- and we have to decide how -- how it should be applied.

I -- I do have some problems in -- in this case because of the fact that I think the statute is a little bit different than Jones. I -- I don't agree that it's structurally the same. And I really don't see why this shouldn't apply where judges have discretion.

MR. INGRAM: Is your question why would this --

why would the Apprendi doctrine not apply where the judge has discretion?

QUESTION: That's part of my concern, yes.

MR. INGRAM: Well, I think the answer to that is that constitutionally the -- the rule announced in Apprendi is that where a legislature mandates a particular mandatory minimum or maximum, then that is where the constitutional demands that the -- those facts be tried by beyond a reasonable doubt --

QUESTION: Where -- where a judge has discretion, I suppose no single fact requires a certain sentence. Isn't that right?

MR. INGRAM: That's correct.

QUESTION: By definition, where the judge has discretion, no single fact requires a certain sentence.

MR. INGRAM: That is correct.

QUESTION: But as a practical matter, even in -- in this, suppose this judge thought that the -- Harris should not have gotten more than 5 years. So, he says, well, the evidence of brandishing could go either way, so I want to give him 5 years. I'll find -- I won't find brandishing. That kind of discretion you -- the prosecutor I suppose couldn't say anything about.

A judge -- a judge has that discretion no matter what the legislature rules are. He can say, it's a close

question whether brandishing exists. Therefore, I will not find brandishing. That will bring him down to the 5-year level. Right?

MR. INGRAM: That is true. If he -- if he --

QUESTION: It's true? A judge -- a judge has discretion, when he's making factual findings, to say what is false? Even though he thinks one -- one fact is true, he has discretion to say that it's not true?

MR. INGRAM: No. Your Honor, I don't mean to say that he has discretion to make fact finding. That -- that is always --

QUESTION: That was the question. Does the judge have discretion to say, even though I know there was brandishing, I'm going to say there wasn't brandishing. He doesn't have the kind of discretion.

MR. INGRAM: No, he does not, and I misunderstood the question then.

QUESTION: No. I didn't say that even if he knew. I said if the judge said, well, it's a -- it's a tough question, so I'm not going to -- I'm not going to make up my mind on it.

MR. INGRAM: Our position is once the judge does conclude, by a preponderance of the evidence, that brandishing exists, he has no authority to give anything less than the mandatory minimum, no matter what other

mitigating facts he may conclude may be present in the case.

QUESTION: What you're saying is he has to --

MR. INGRAM: He is bound by that.

QUESTION: What you're saying is he has to be honest when he decides the brandishing issue.

MR. INGRAM: Yes.

QUESTION: Okay.

QUESTION: And I suppose he has to confront the brandishing issue. He can't say, it's a tough question, so you know, I'm not going to -- I'm not going to face it. The law requires him to -- to decide whether there's been brandishing or not, doesn't it?

MR. INGRAM: Yes, it does, by a preponderance of the evidence standard. And we contend where the -- under the constitutional rule in Apprendi, that increasing the mandatory minimum makes that fact an element that must be found not by a preponderance of the evidence, but by the fact finder at trial beyond a reasonable doubt. All the more important, because in this case, the judge noted that it was a close case, and therefore the standard of review becomes all the more important in -- as illustrated by this case that --

QUESTION: Close on brandishing. But he also said, I would have given this guy 7 years no matter what;

Apprendi, without Apprendi, 7 years is what I think is right for him. Isn't --

MR. INGRAM: That is what -- that is what he at least implied strongly. But he cannot do that -- if -- if we prevail here and we go back for a resentencing, the judge is not going to be able to give more than 5 years. That is the -- the guideline sentence. There's no guideline range for this. The guideline is the mandatory minimum sentence.

The judge will not be allowed to give more than 5 years unless he identifies a legally permissible basis for an upward departure. And in that case, he can increase above the 5-year mandatory minimum.

QUESTION: Suppose on -- on remand, if you prevail here, -- well, I guess there would have to be a new -- a new trial on the sentencing point. But suppose the judge says, you know, the jury has found there's no brandishing because he displayed it but they didn't think that was brandishing under my instructions. But he did have a gun and he did show it, and even if that isn't brandishing, I'm going to up it to 7 years. He can do that?

MR. INGRAM: If I understand Your Honor's question, then yes. If a jury concluded that the defendant --

QUESTION: No brandishing.

MR. INGRAM: -- did not brandish -- that is, if it was considered to be an element and the jury determined that he did not brandish -- then first of all, he would be not guilty of the crime, because that would be an element that must be proved, and any element that is not proved beyond a reasonable doubt means that he would be not guilty of the crime.

But if there, for example, was some accompanying charge that the defendant was found guilty of and not the brandishing, then certainly the judge would have the discretion to consider whether the firearm was brandished or discharged.

QUESTION: Are you saying that if he were charged with this offense and charged specifically with brandishing, and the jury found him not to have brandished, he would have to be acquitted?

MR. INGRAM: That is correct.

QUESTION: Wouldn't -- wouldn't there be a lesser included offense of everything in the statute except brandishing?

MR. INGRAM: Well, that is true. By saying he would be acquitted and found not guilty, it would be of the separate offense of brandishing the firearm.

QUESTION: But -- but the prosecution would be

entitled to a charge on a lesser included offense.

MR. INGRAM: That is correct. That is correct.

QUESTION: But -- but wait. But you would allow the judge to increase his sentence on the basis of the judge's belief that he was brandishing?

MR. INGRAM: Yes. That -- that is -- although I do not agree with --

QUESTION: Well --

MR. INGRAM: -- with that policy, nevertheless that is -- that is the case under the status of the law now. Where a defendant is found not guilty, for example, of substantive drug offenses, at sentencing, the judge is allowed to conclude beyond -- by a preponderance of the evidence that those quantities were possessed and, in fact, should count against the defendant for sentencing purposes.

QUESTION: Well, I'm quite surprised at that. I -- I tried to phrase my -- my question to get around that. I said the judge accepts the jury finding that there was no brandishing, but everybody agrees that he did at least have a gun and so he's going to increase it for that. That was my hypothetical. But in answer to Justice Scalia, you said the judge could say I think there's brandishing by a preponderance of the evidence. I'm surprised at that.

MR. INGRAM: We are suggesting that brandishing must be proved --

QUESTION: That's this Court's case I take it --

QUESTION: That -- that -- I --

QUESTION: -- which maybe we should reconsider.

QUESTION: Why don't you let him answer? Answer Justice Kennedy's question.

MR. INGRAM: By -- by saying that the brandish must be an element to be proved beyond a reasonable doubt, we are not contending that if the jury finds the defendant not guilty on that particular element, that the judge might not be able to consider, by a preponderance of the evidence, that fact, in -- in addition to any other number of mitigating and aggravating facts, in -- in determining the appropriate sentence.

QUESTION: I'm surprised at that.

QUESTION: But the appropriate sentence within his discretion.

MR. INGRAM: That is correct. That is correct. He could not --

QUESTION: And -- and it is true that under the guidelines a judge can find something that the jury didn't find because the standards are different, beyond a reasonable doubt in the one case, and the judge said, well, I'm -- I would think, too, it wasn't proved beyond a

reasonable doubt, but there is a preponderance of the evidence. Therefore, I find it, for purposes of my guideline calculation. That's -- that's quite common, isn't it?

MR. INGRAM: It is -- it is quite common that the judge finds by a preponderance of the evidence both conduct that was not even charged and conduct that was charged and -- of which the defendant was found not guilty, because of the difference in the standard of proof.

QUESTION: So -- so --

MR. INGRAM: That is -- that is -- I'm not happy with that either, but that is the case law and that is the law as -- as it stands.

QUESTION: So, what have you accomplished if -- if they just rewrite the guidelines to say you get 5 years for brandishing?

MR. INGRAM: What we will have accomplished --

QUESTION: The consequence will be that even if the jury finds no brandishing as an element of the crime, the -- the judge may -- and indeed, under the guidelines, must -- add 5 years for brandishing if he thinks, by a preponderance of the evidence, there was brandishing, which is the situation you're in now.

QUESTION: And if I can pile onto Justice

Scalia's question, you now have the worst of both worlds because you have the disadvantages we referred to at first, and yet the judge can still go upward.

MR. INGRAM: No, Your Honor, it does not. If this is an element to be proved at trial, and the finder of fact determines beyond a reasonable doubt that the -- the Government has failed to find beyond a reasonable doubt that he brandished, then he can only be sentenced for the carry and use phase or possession of the statute. And -- and that only mandates a 5-year mandatory minimum.

Therefore, brandish cannot under those circumstances increase the range. It cannot increase the mandatory minimum. It cannot increase the maximum. The judge can still sentence within the mandatory 5 to life. He simply cannot and is not bound by a determination that the defendant brandished and therefore he must give a higher sentence. He -- he can in considering that, along with any other aggravating and mitigating factors.

QUESTION: But the guidelines can require him to give a higher sentence. If the same higher sentence of 5 years were mandated in the guidelines, you say that's okay. Right?

MR. INGRAM: It would not be mandated in the same sense. A mandatory minimum is just that. The judge has no longer any discretion to go below. The -- the

defendant has no right to ask the judge to go below. The prosecution is empowered to insist that the judge give the higher mandatory minimum sentence. The defendant is not precluded under the guidelines from asking the Court to depart downward on any number of legal bases for downward departures that take his case outside the heartland of cases under Koon v. United States.

If there are no further questions, I will reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Ingram.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

This Court's decision in McMillan v. Pennsylvania forms the backdrop for both the statutory and the constitutional questions in this case.

As a matter of statutory interpretation, the amended section 924(c) creates one crime with a minimum of 5 years and a maximum of life in prison and then gives the sentencing court additional guidance as to where the penalty shall be set within that 5-year-to-life range. The increase in the mandatory minimums does not run afoul of the Apprendi rule and is, in fact, specifically

endorsed by this Court's decision in McMillan.

And on the constitutional question, this Court's decision in McMillan 16 years ago established that it does not violate the Constitution for a legislature to choose one fact that has historically borne on the appropriate penalty to be assessed at sentencing and give the judge guidance as to what that sentence shall be.

QUESTION: Well -- well, given the precedent of Apprendi, suppose the judge says, now, you know, the jury finds an enhancement because of harassment, and the judge says, well, under -- let me begin again.

Under your theory of the case, the jury doesn't -- the judge said, you know, I would ordinarily give you 6 months, but I -- I find there's a harassment here -- or pardon me -- brandishing here, and so I'm going to give you 5 to 7 years. True, it's a mandatory minimum. True, that's different than Apprendi. But it certainly seems to me that the concerns Apprendi -- of Apprendi are fully applicable here.

MR. DREEBEN: Justice Kennedy, there are several significant differences between the issue in a case like this and the issue in a case like Apprendi. In Apprendi, the judge could not go above the jury's verdict based on the Court's constitutional analysis. In other words, the jury sets the outermost limit that the judge can do, and

in the sense of protecting the jury trial right, the Apprendi rule tracks onto what the jury must find.

Here, regardless of what the jury finds, the judge has the discretion and the authority to sentence the defendant between 5 years and life in prison. What the mandatory minimum takes away is not a jury trial right, but a right to judicial discretion to give a lower sentence than the mandatory minimum calls for.

But Apprendi was not about protecting judicial discretion. Apprendi, in fact, limited judicial discretion and said that the judge cannot go above the maximum that the jury's facts have determined. Here the judge is not doing anything that he could not do based on the jury's verdict anyway. All that is happening is that he is losing the discretionary power to give less, and that judicial discretion interest is not the interest that was at stake in Apprendi.

That's reinforced by the fact that the history that this Court relied on, as one of its key determinants in the Apprendi decision, is not present in this case. The history in Apprendi, the Court concluded, showed that it has been the rule down centuries into the common law that the judge cannot give a higher sentence than based on the facts that the jury has determined. But there is no comparable historical rule that would support a preclusion

of judicial discretion within the otherwise applicable range.

The history of sentencing in this country shows that within the maximum sentence established by the jury verdict, judges have been often given tremendous amounts of discretion on what sentence they should impose. But the history of sentencing also reveals that legislatures have frequently intervened in order to establish more precise rules to govern that discretion. And the -- therefore, there is no broad historical rule that is contradicted by a statute like the one in this case and the one that was at issue in McMillan.

QUESTION: But if that's so, do you -- do you accept what -- what your -- what the petitioner said in respect to my second statute, if you remember it? The second statute is, Congress passes a law and it says the maximum for robbery is 15 years, but if there is no injury, then it's 7 or 5. Now, does Apprendi apply to that?

MR. DREEBEN: It --

QUESTION: Or if there is -- if the gun isn't discharged. Does Apprendi apply to that?

MR. DREEBEN: It might, Justice Breyer. The crucial question is whether that statute has created an affirmative defense.

QUESTION: No, no, no. There is no doubt that the statute I'm talking about intends the fact of discharge to be a sentencing factor. There is no doubt. I mean, I can write it in such a way that that's clear.

MR. DREEBEN: If it's --

QUESTION: Now, at that point, Apprendi is a constitutional rule, and therefore does the discharger not have to be presented to the jury?

MR. DREEBEN: As I understand Apprendi, it would.

QUESTION: All right. If that's so, then what did you say in your first answer? You've had two parts. You had a -- a purposive part and you had a historical part.

All right. Now, did you say anything, other than saying eloquently and in several different ways, that Apprendi concerned a maximum and this case concerns a minimum, which I am sure that the petitioners would concede?

MR. DREEBEN: The significance of it concerning a minimum is that under this statute, once the jury returns a verdict of guilty, using or carrying a firearm during in relation to an underlying drug trafficking offense, the judge has the authority by virtue of that jury verdict to sentence from 5 years to life in prison.

That's what the statute means.

What the mandatory minimum provision does is say, within that range, we want this defendant sentenced to not less than 7.

QUESTION: All right. That's certainly true. But what's bothering me about it is every factor in Apprendi -- and I was against Apprendi. I dissented. But having that now being the law, it seems to me every factor, other than the fact that this is a minimum and that's a maximum, applies a fortiori in this case.

MR. DREEBEN: Well, the two most significant factors, as I've tried to say -- and I'll try one more time -- is that in Apprendi, the defendant could not have gotten a sentence above 10 years based on the jury's verdict alone. It took an additional finding by the judge to send him into the realm where the maximum was now 20, and then he -- Apprendi got 12.

In this case, once the jury or, as it happens, the judge -- the defendant waived a jury trial -- assigned a finding of guilt to the defendant, the statute said, your sentence, Mr. Harris, is between 5 years and life in prison. And the statute comes along and doesn't give the judge the authority to do something that he could not have done before.

QUESTION: So, Apprendi is just a draftsmanship

problem, really. So, I mean, it's bad if -- if the legislature says, for this crime you get 20 years, but if you brandish a weapon, you get another 5. That's bad. So, the legislature, that's okay.

I'm sorry. For -- for this crime you get 1 to 20, but if you brandish, you get -- you get 25.

So, I say, okay, we'll revise it in light of Apprendi. For this crime, you get -- you get 1 to 25, but if you brandish a weapon, it shall be 25. That's okay, although the other one wasn't okay. And -- and it's up to the judge to find whether it's brandishing or not.

MR. DREEBEN: The difference in that statute, Justice Scalia -- and I agree that that would not trigger the rule that this Court announced in Apprendi -- is that as the Court's opinion in Apprendi notes, if Congress writes the second kind of statute and says the range is 1 to 25, it is exposing all defendants who are sentenced under that statute to a possible sentence of 25 years. And the Court said that structural democratic constraints exist to deter legislatures from enacting statutes with more draconian maximum penalties than they think are appropriate for the worst of the worst who are going to be sentenced under that statute.

Now, here when Congress amended section 924(c), it went from a statute that had determinate sentences.

Previously whatever you did under 924(c), the judge had no sentencing discretion at all. It was just 5 years or 20 years or 30 years. Congress changed that and said this is a more serious crime. This is a crime which, if you're convicted of it, you're going to get at least 5 years with an implied maximum all the way up to life in prison.

By virtue of doing that, Congress envisioned that there would a spectrum of offenders under section 924(c), some of whom are going to be at the bottom of the tier and are just the least worst offenders under that statute. They'll get 5 years. Others are going to be the worst of the worst. They are going to get a sentence that will be closer to the top of the statute. Within that range, Congress gave to the sentencing judge additional guide points of how to exercise that discretion. For someone who brandishes, that's a little worse than simply using; he should get at least 7 years. For someone who discharges -- that's an increment worse yet -- it's 10 years.

But there's still all of the head room up to life in prison that Congress established for this offense. It doesn't violate the Eighth Amendment for Congress to say that someone who brings a gun into a drug or a violent crime has committed a serious offense. We want the judge to have up to life in prison.

QUESTION: So, if you tell the --

QUESTION: May I ask you a question on -- on a different topic? Because I think we understand your argument here and I -- Justice O'Connor asked your opponent, in essence, to what extent he thought the sentencing guidelines were implicated by this case. Would you comment on that subject? Tell us what you think the impact of this decision will have on the sentencing guidelines.

MR. DREEBEN: Justice Stevens, it's unclear what impact this decision will have on the sentencing guidelines, I assume on the assumption that the Court extends Apprendi to mandatory minimums.

The sentencing guidelines are like mandatory minimums in certain respects. They provide ranges, once the judge has determined by a preponderance of the evidence, the defendant's conduct and criminal history, that by statute the judge is to give a sentence within. But they differ from mandatory minimums in that the statute further says that the judge can depart from the guidelines sentence based on an aggravating or a mitigating fact that distinguishes the case from the kinds that the guidelines' drafters had in mind.

Now, the guidelines are -- are different primarily in that there is a broader range of discretion

available for the judge to depart than there is under a mandatory minimum.

I emphasize that this is a question of degree rather than one of kind because even these mandatory minimums under section 924(c) can be departed from. If the Government makes a motion that says the defendant has rendered substantial assistance to the Government in the prosecution of others, that authorizes the judge to depart from what is otherwise a mandatory minimum. That same ground for departure also exists within the guidelines, and it accounts for more than half of the departures that exist in the guidelines.

Now, the guidelines do, of course, provide a further zone of less guided discretion to the judge in when he can depart. And if this Court rules against the Government in this case, we will be back saying that that zone of discretion distinguishes the guidelines. Whether the Court agrees with that or not will be an open question.

QUESTION: Right. I understand, but at least the -- at least the argument that your opponent made would be available to the Government. There's a difference because of the amount of discretion --

MR. DREEBEN: That's correct.

QUESTION: -- under the guideline.

I did not understand. I want to be sure I don't miss this point that you made in your answer. Do you argue that in this case it's really not a mandatory minimum because there is the discretion in -- in the prosecutor to ask for -- for a deviation from the statute?

MR. DREEBEN: No, not in the sense that Your Honor is asking the question.

But I -- I do wish to underscore that there is -- there is a range of ways that Congress can draft statutes and the States can draft statutes. Under the drug statutes, for example, there's not only the substantial assistance departure that I've mentioned, but there's also a departure for first-time offenders called the safety valve. Now, that adds an additional amount of discretion to the judge.

And any constitutional rule that this Court develops for mandatory minimums is going to have to be very careful in articulating how much discretion is enough in order to make the mandatory minimum no longer mandatory and no longer minimum. It could be that the availability of the substantial assistance departure is enough to take it out of a rule that says never means never, and if -- if Congress says never, then the judge can't make the finding.

That is precisely why we urge the Court to

adhere to McMillan v. Pennsylvania which held 16 years ago that it is permissible for -- for the legislature to provide additional guidance. And the Court left open the possibility that particular statutes may fall under a constitutional rule, but it didn't prescribe the sort of rigid rule that petitioner is advocating in this case.

QUESTION: Mr. Dreeben, apart from one being within the jury zone and the other not, is there a rational distinction between saying, judge, you can't add on 2 years at the top and saying you can't subtract 2 years at the bottom?

MR. DREEBEN: The rational distinction, Justice Ginsburg, is that in the former case, the defendant has a right to a jury trial that has to find him guilty on all the facts that are going to determine the longest possible time that he can spend in prison.

Under this statute, even if he does have a jury trial right to brandishing -- just suppose that he did; suppose that Congress gave it to him so we eliminate the constitutional question -- the jury could find him not guilty. And the judge could still say, well, I think by a preponderance of the evidence, you did brandish, and exercising my discretion, I'm going to give you exactly the same 7 years that the statute called for.

The fact that that can happen shows, I think,

that the right that's in play here is not a right to a jury trial that will protect the defendant against the possibility of this increased punishment. It is the right to have a judge with unlimited discretion not to impose the mandatory minimum even if he finds brandishing, because that is the distinction that I think both petitioner and I draw between the sentencing guidelines and this mandatory minimum. And the right to judicial discretion is simply not the Apprendi right. It's not a right that's been historically recognized.

And if this Court were to accept respondent's -- or petitioner's analysis of the constitutional rules that govern here as being drawn from the ex post facto cases, which is essentially what he relied on in his reply brief and in this Court, the Court would have to fashion a far more sweeping constitutional rule than would address merely mandatory minimums, because the ex post facto cases are triggered by any substantial disadvantage to the defendant. It doesn't have to be a substantial disadvantage that can only be proved as an element of the crime. The ex post facto cases apply to the withdrawal of good-time credits. They apply to the sentencing guidelines, as the Court held in Miller v. Florida. They would presumably apply to the withdrawal of an affirmative defense after the defendant committed his crime.

And petitioner, by relying on that test, essentially says, I want a rule that means that anytime I am substantially disadvantaged by one aspect or another of the criminal laws of a State, the jury must find those facts. All facts that are germane to my punishment --

QUESTION: Is that the implication of Apprendi?

MR. DREEBEN: That is the --

QUESTION: Is that where we're headed, in your view?

MR. DREEBEN: I hope not, Justice O'Connor, because I think that the Apprendi rule, as bounded by the history that the Court relied on and the explicit statements of its holding, coupled with the Court's recognition that, yes, legislatures can write statutes that will achieve similar results to Apprendi but will do it in an acceptable form, all of those things suggest that the Court did not have a broad ruling on it.

QUESTION: Do you have a sense of how the application of Apprendi is working out in the system now? I mean, how is it being applied? What's happening? What has changed as a result?

MR. DREEBEN: Well, retrospectively Apprendi has caused a considerable amount of judicial chaos as courts have attempted to sort out harmless error, plain error, and retroactivity considerations, one of which is before

the Court next month in the Cotton case.

Prospectively, the United States has responded to Apprendi by having facts that raise the -- the maximum be submitted to the jury. And it does, as a matter of practice, cause some complications in particularly intricate conspiracy cases where the jury has to make separate determinations as to each conspirator.

It also creates the kinds of issues that Justice Breyer was talking about for defendants who are hampered to some extent in their ability to present dual alternative defenses of the nature, I wasn't involved in this conspiracy, but if I was, I'm only accountable for a certain amount of drugs, because the jury is being asked to make that determination. Once the jury makes it affirmatively, the judge is not going to be in a position at sentencing to second guess that.

So, Apprendi does -- does restrict the -- the defendant's ability to make a defense --

QUESTION: -- defense bar complained about that, have they?

MR. DREEBEN: The defense bar has been --

QUESTION: I'm -- I'm unaware that they are -- are keen on getting rid of Apprendi.

MR. DREEBEN: Their primary desire to date so far, Justice Scalia, has been to get all of the old

sentences in the pre-Apprendi regime overturned. And when they've finished with that agenda, maybe they'll turn to trying to get different proceedings at trial.

QUESTION: But as far as you're concerned --

QUESTION: To get it expanded.

MR. DREEBEN: As cases like this reveal, there's been an effort to expand Apprendi to what could be viewed as its widest logical implications, because although I've presented a theory for why Apprendi should be read narrowly to avoid disrupting the traditional ability of legislatures to structure sentencing, there is obviously within the opinion the seeds of a much more fundamental change in the --

QUESTION: Yes, but those are extensions -- extensions on the -- on the basis that you've said, which I now understand, is you say, well, there has to be a jury finding for anything that will lead to a longer maximum term, the highest possible term. And they say, yes, but if that's so, you also have to have a jury finding for the shortest mandatory term, because the shortest mandatory term is far more important to any individual defendant than the highest theoretical possible term. And I think that's what their argument rests upon, and that sounds basically true. And it doesn't lead you down the path you're talking about.

MR. DREEBEN: I don't think that it would be true for a defendant like the defendant in Jones who was convicted by the jury of a crime that carried a 15-year penalty.

QUESTION: No, there are some -- there are some exceptions, but they're saying in general. And -- but what's -- I want to be sure I -- I'm in a slight dilemma because I think Apprendi was not right. But still, there it is.

And the -- but the -- the question -- I want to be sure you finished Justice O'Connor's question. My understanding is prospectively a ruling against you here would not give the Government a lot of trouble. Prospectively what you would do is you would simply charge in the indictment every factor related to mandatory minimums and go and prove it. And that's not herculean. That isn't some tremendously difficult thing to do, or not?

MR. DREEBEN: The Government could do that.

QUESTION: They could do it.

MR. DREEBEN: The States have a much wider range of mandatory minimum sentencing programs. They've filed an amicus brief in this case that itemizes the far greater number and wider range of State mandatory minimum programs. I'm not in a position --

QUESTION: Well, having read those, do you have any impression in respect to the practicalities of it?

MR. DREEBEN: I think that the States will suffer increased practical problems compared to the Federal Government because in the Federal Government, the mandatory minimums are in relatively specific areas and we could, indeed, go forward and charge and prove them to a jury.

The more fundamental implication of an extension of Apprendi within the maximum term is that it does raise greater questions about the constitutionality of schemes such as the sentencing guidelines. Those are, of course, not only on the Federal level but prevalent throughout the States as well. And -- and the process of drawing lines between whether mandatory minimums are mandatory enough to trigger any constitutional rule, versus sentencing guidelines not being, is going to require a process of adjudication, and there's no way to predict where that will end up. It will largely depend on how broadly this Court interprets the rule that it announced in Apprendi and then if it applies it here, how it applies it.

If there --

QUESTION: May I ask you just a short -- so I don't lose the point? In our discussion a little earlier, you mentioned a statute that makes the mandatory minimum

not 100 percent mandatory because the Government may ask for a -- a departure. What is the statutory authority for the Government to make such a motion?

MR. DREEBEN: Under 18 U.S.C., section 3553(e).

QUESTION: 3553.

MR. DREEBEN: Yes. The Government can file a motion for substantial assistance of the defendant in the prosecution of others, and upon that motion, the judge can go below. This Court analyzed that statute in Melendez v. United States several years ago, a case which I believe is cited in our brief.

QUESTION: Mr. Dreeben, are you going to say anything before you get done about the statutory construction question? Because I'm -- if we said the statute is like Jones, wouldn't that be the end of it?

MR. DREEBEN: Correct. And, Justice Ginsburg, I -- I agree with the suggestion of Justice Souter earlier that this statute is not identical to the Jones statute and shouldn't be construed identically to it.

First and most fundamentally, in Jones and again unanimously in Castillo, the Court commented that a statute that's written, as section 924(c) is written, has the look of the creation of sentencing factors when you start off looking at it. In Jones, the Court then went on to analyze a number of structural features that suggested

that the initial look was unreliable.

Here the initial look is reliable. Unlike in Jones where the additional factors, serious bodily injury and death, took the penalty from 15 years, first to 25 years, and then to life in prison, here the initial range of the statute is 5 years to life, and the mandatory minimums are fairly modest incremental increases in the minimum sentence of 5 years and 7 years.

But most importantly, what is different from the statute in Jones, the carjacking statute and the statute here, section 924(c), is in Jones the carjacking statute was modeled on three Federal robbery statutes. Two of those Federal robbery statutes contained serious bodily injury or putting somebody in jeopardy of serious bodily injury that were clearly offense elements, and the Court commented that it could see no reason -- and the Government was unable to adduce a reason -- why Congress would have departed from the explicit models on which it relied in drafting the carjacking statute. So you had a firmer basis for concluding in the carjacking statute that Congress probably intended an element.

Here not only do you not have that feature, because there was no Federal antecedent for section 924(c), but you have the very important consideration that there's no constitutional doubt that should be applied to

the construction of section 924(c). Unlike in Jones where the Court held that a series of cases over 25 years had raised constitutional questions about increasing the maximum, here the relevant precedent, of which Congress is presumed to be aware, is McMillan v. Pennsylvania which gave the legislature fair warning that it could provide for the kind of statute that it's provided here.

And for those reasons, we think that the Fourth Circuit and every other court of appeals that's analyzed the question is correct in concluding that Congress's approach in section 924(c) was a sentencing factor approach. The question then becomes whether that is a constitutional approach.

QUESTION: May I just ask another -- another question about the history and the length of the history? I particularly have in mind Justice Thomas's concurring opinion in Apprendi. Other than the McMillan case itself, are you aware of any long line of cases prior to McMillan reaching the same result?

MR. DREEBEN: No, Justice Stevens. And the reason for that is that the history of sentencing in this country moved from early statutes which were wholly determinate.

QUESTION: Right.

MR. DREEBEN: Then in the 19th century, the

legislatures and Congress and the State adopted a -- a policy of having wide ranges and judicial discretion within them. Then later, legislatures moved to a system of parole boards and -- and indeterminate sentencing in many States.

And it was as a result of those processes that in the mid-20th century and late 20th century, a variety of commentators began to decide that this sentencing scheme that gives so much discretion to various actors in the system was not acceptable because it produced unwarranted disparities against similarly situated offenders. And at that point, to promote transparency, meaning we know what -- why the judge is doing what he's doing, and uniformity, namely, similar offenders will get the same sentence, schemes came along like mandatory minimums and guideline sentencing. But I believe that they were understood to be directions to limit judicial discretion, not to wholly supplant it or to be the type of statute that the Court invalidated in Apprendi.

And it's really the petitioner's burden in this case to show that these sentencing innovations are unconstitutional. In Apprendi, the defendant was able to carry that burden by pointing to a long line of consistent judicial decisions. Here neither party can point to a long line of consistent decisions. What each of us does

is argue from the background baseline tradition.

Our submission is that judges have always had a wide range of discretion. Defendants have never been able to rely on not getting a stiffer sentence within the maximum authorized ranges. Legislatures have relied on this Court's decision in McMillan, saying that it's constitutional for the legislature to structure that discretion, and we believe that the Court should adhere to that position today.

Thank you.

QUESTION: Thank you, Mr. Dreeben.

Mr. Ingram, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM C. INGRAM

ON BEHALF OF THE PETITIONER

MR. INGRAM: Responding to the questions about the effect that a ruling in our favor will have on the lower courts, first of all, as noted, there will be no prospective impact. The Government in the Federal context is already alleging drug amounts, is already alleging brandish and discharge, and it's a very simple matter for the Government and the prosecution, either the State or the Federal courts, to allege and -- and prove these additional facts.

Retroactively, there will be some cases that will be sent back. They will not be sent back to set

aside guilty verdicts or guilty pleas. They will simply be sent back for resentencing, consistent with the opinion in this case, just like they were with Apprendi. There's not nearly the flood of remands on Apprendi, and Bailey for that matter, as the Government contends, but in any event, however many there are, if the Constitution demands it, then so be it.

The Government is concerned that a ruling in our favor will undermine legislatures' concerns about limiting judicial discretion in sentencing by enacting mandatory minimums. Those statutes, the statute in this case in particular, and any statutes enacting mandatory minimums in -- in the State courts will not go away with a ruling in our favor. The only difference is that the Government will simply have to allege and prove the additional fact, further limiting the judge's discretion, whereas currently the judge has discretion to determine, by a preponderance of the evidence, whether or not a fact exists or not. Once a jury finds beyond a reasonable doubt that it does, the judge has no more discretion and must impose the mandatory minimum.

And as has been pointed out and we point out in our brief and reply brief, we contend that mandatory minimums, as a practical matter, are far more important increases at the bottom level than the possible increases

at the top of a sentencing scheme would be.

And finally, we are not asking the Court to extend the constitutional rule announced in Apprendi. Apprendi was limited by its facts, but the constitutional rule announced was that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increased the prescribed range of penalties. A mandatory minimum increases the prescribed range of penalties. We are simply asking the Court to apply the constitutional rule announced in Apprendi to the facts of our case and -- and ask the Court to rule in our favor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ingram.

The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)