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THE MEANING OF FIFTH AND SIXTH AMENDMENT RIGHTS: SENTENCING IN FEDERAL DRUG CASES AFTER APPRENDI v. NEW JERSEY AND HARRIS v. UNITED STATES

INTRODUCTION

In June of 2000, the U.S. Supreme Court dramatically altered the sentencing practices of both state and federal courts for many offenses with its five-to-four decision in Apprendi v. New Jersey. Commentators hailed the decision as revolutionary and speculated about the effect it would have on sentencing in a broad range of cases. In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi joined a long line of cases in which the Court has struggled to give meaning to the word "crime" and what constitutes its elements. More specifically, the case seemingly "put to rest" the debate over the legislature's power to diminish criminal defendants' constitutional rights through labeling certain findings as "sentencing factors." However, the Court left open several loopholes through which legislatures could evade Apprendi's constitutional protections by creatively redrafting

3. Apprendi, 530 U.S. at 490.
4. See Nancy J. King & Susan R. Klein, Essential Elements, 54 VAND. L. REV. 1467, 1468 (2001); Hoffmann, supra note 1, at 255.
5. See King & Klein, supra note 4, at 1468-69.
statutes. For example, Justice O’Connor argued in her dissent in *Apprendi* that legislatures could circumvent the rule simply by redrafting statutes to include higher *maximum* penalties and utilizing mandatory *minimums* to control the judge’s discretion.

Almost two years later, in *Harris v. United States*, the Court was presented with an opportunity to close the very loophole Justice O’Connor spoke of by extending *Apprendi* to mandatory minimum sentences, thus overturning its pre-*Apprendi* decision in *McMillan v. Pennsylvania* in the process. In *McMillan*, the Court held that it was constitutionally permissible for a judge to find at sentencing, by a preponderance of the evidence, the facts necessary for imposition of the mandatory minimum sentence. In *Harris*, however, the Court refused to extend the scope of *Apprendi* to mandatory minimum sentences and limited *Apprendi*’s application to the letter of its holding; thus, the Court arguably rejected a logical extension of *Apprendi* and allowed this particular loophole to remain open.

Regardless of whether *Apprendi*, as understood in light of *Harris*, has proven to be as revolutionary as some expected, its effect on sentencing in federal drug cases under 21 U.S.C. § 841 is

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6. See *Apprendi*, 530 U.S. at 539-41 (O’Connor, J., dissenting) (arguing that the majority’s rule was “meaningless formalism” that could easily be made irrelevant by legislatures through redrafting statutes); King & Klein, *supra* note 4, at 1469.

7. The [Court in *Apprendi*] recognized the possibility that in order to avoid the adjudication of sentence-enhancing facts in a full-blown trial, legislatures might simply amend some of the many criminal statutes affected by [the] rule. Suggesting that efforts to avoid the consequences of the rule in *Apprendi* by redrafting criminal statutes will be subject to “constitutional scrutiny,” the Court has invited litigation over the constitutionality of substantive criminal law.

12. *Harris*, 536 U.S. at 545 (plurality opinion).

Id. (footnote omitted). *But see Apprendi*, 530 U.S. at 490 n.16 (recognizing only the hypothetical possibility that legislatures could do so and warning that such actions might be found unconstitutional).
undeniable. Section 841 functions well as a case study because it contains sentencing factors that implicate increases in both the maximum sentence and the mandatory minimums. The statute is one of graduated sentences; it creates a base offense and punishment and then increases the punishment based upon aggravating circumstances.

The structure of the statute is as follows: Section 841(a)(1) makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 841(b)(1)(C) sets "[t]he default maximum prison term ... for [most] Schedules I and II controlled substances [at 20] years," meaning that the judge, guided by the Federal Sentencing Guidelines, may sentence an offender for only up to 20 years without a finding of (1) the type and quantity of the drug possessed, (2) serious injury caused by the drug, or (3) certain prior convictions. The default maximum prison term for possession of marijuana, hashish, and similar drugs, as well as most Schedule III drugs, is five years under § 841(b)(1)(D).

13. 21 U.S.C. § 841 (2000); see John Kenneth Zwerling, Comprendes Apprendi?, 38 AM. CRIM. L. REV. 309, 313-15 (2001). For an idea of what effect Apprendi could have had if the Court had decided Harris differently, contrast the Sixth Circuit’s approach to Apprendi questions under § 841 before Harris, in United States v. Flowal, 234 F.3d 932 (6th Cir. 2000), and after Harris, in United States v. Leachman, 309 F.3d 377 (6th Cir. 2002). Of course, Apprendi has impacted other areas of federal and state law as well. See King & Klein, supra note 4, at 1547-55 (listing examples of federal and state statutes with sentencing schemes that Apprendi could alter). For a discussion on Apprendi and its progeny’s controversial impact on death penalty cases, see John Gibeaut, States Revisit Death Sentence Cases: Prosecutors Look to Preserve Capital Rulings in Wake of High Court Decision, 25 A.B.A. J. E-REPORT 2 (2002) (discussing post-Apprendi death penalty challenges in various states).


15. See id. § 841(b).

16. Id. § 841(a)(1).

17. United States v. Rodgers, 245 F.3d 961, 965 (7th Cir. 2001).

18. 21 U.S.C. § 841(b)(1)(C); see also United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001) (explaining that the defendant could not be sentenced above the limit set in § 841(b)(1)(C) without a finding of quantity). The statute defines Schedule I controlled substances as follows: "(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1). Schedule I drugs include, inter alia, heroin and lysergic acid diethylamide (LSD). Id. § 812(c). The statute defines Schedule II controlled substances as follows: "(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has a currently accepted medical use in treatment in the United States ... (C) Abuse ... may lead to severe psychological or physical dependence." Id. § 812(b)(2). These drugs include, inter alia, opium and cocaine. Id. § 812(c).

19. 21 U.S.C. § 841(b)(1)(D). Examples of Schedule III controlled substances include anabolic steroids and anabolic steroids. Id. § 812(c). Though classified with Schedule II drugs for sentencing purposes,
paragraph (3) set out the maximum penalties for Schedule IV controlled substances\textsuperscript{20} and Schedule V controlled substances.\textsuperscript{21} Under § 841(b)(1)(A) to subparagraph (D), as well as subsection (b)(2) to paragraph (3), the convicted offender can receive more prison time based on three factors: the type and quantity of the drug possessed,\textsuperscript{22} a prior conviction for a "felony drug offense,"\textsuperscript{23} or serious injury to another person caused by the drug.\textsuperscript{24}

"Prior to Apprendi, the circuit courts consistently held that the sentencing schemes set out in § 841 were 'sentencing enhancements' and not elements of the offense."\textsuperscript{25} Thus, the jury only had to find beyond a reasonable doubt "whether the defendant [had] possessed, manufactured, or distributed a controlled substance," and the judge could determine, by a preponderance of the evidence, the type and quantity of the drug.\textsuperscript{26}

For example, assume a defendant had a prior felony drug conviction and the government believed that the defendant had possessed with intent to distribute one kilogram of heroin. Assume further that the person to whom the defendant distributed the heroin died as a result of taking it. Applying the pre-Apprendi law under § 841, the following could happen: (1) The jury convicts the defendant of possession with intent to distribute a Schedule I controlled substance, meaning that the maximum time the defendant could
spend in prison without additional findings is 20 years;\(^27\) (2) The judge finds by a preponderance of the evidence that the defendant possessed one kilogram of heroin invoking the § 841(b)(1)(A) range of ten years to life in prison;\(^28\) (3) The judge finds by a preponderance of the evidence that the defendant had a previous felony conviction, which raises the minimum to 20 years;\(^29\) or (4) Finally, the judge determines by a preponderance of the evidence that the defendant’s customer died after taking the defendant’s drugs, which invokes a mandatory life sentence.\(^30\) Consequently, the defendant went from a maximum of 20 years in prison to a mandatory life sentence without the benefit of a jury finding or a finding based on a beyond a reasonable doubt standard.\(^31\)

This Note explores the importance of the issue of legislative labeling of sentencing factors and elements, and the Court’s attempts alternately to control it and expand it through constitutional and statutory interpretation, especially in the recent cases of Apprendi and Harris. This Note illustrates the issue by examining how courts have applied these decisions to sentencing under § 841 and how sentencing practices changed after Apprendi and Harris. Part I will review the pre-Apprendi cases that continue to affect the Court’s policy on sentencing factors in general, by illustrating the Court’s dynamic view of the discretion legislatures should be given in defining elements of crimes.\(^32\) Part II will examine Apprendi itself and the approaches taken in applying it to drug cases in the Federal Courts of Appeals.\(^33\) Part III will briefly look at two recent post-Apprendi

\(^28\) id. § 841(b)(1)(A). A finding of type and quantity is important because the punishment is not identical for the same amount of different drugs, even within the same schedule. E.g., id. In our example, one kilogram of heroin is the minimum amount needed to invoke the penalties of § 841(b)(1)(A). id. If the drug had been marijuana (like heroin, a Schedule I controlled substance), then the amount possessed would have had to be 1000 kilograms to invoke the penalties of the same section. id. If the drug possessed had been LSD (also Schedule I), only ten grams of the drug would have been necessary to invoke § 841(b)(1)(A). id.
\(^29\) id.
\(^30\) id.
\(^31\) See supra notes 27-30 and accompanying text; Cotton, 535 U.S. at 627-28.
\(^32\) See discussion infra Part I.
\(^33\) See discussion infra Part I.
decisions, *Ring v. Arizona* and *United States v. Cotton*, leading up to a discussion in Part IV of *Harris v. United States* and its controversial, contradictory, and important holding. Part IV will also observe the impact *Apprendi* and its progeny have had on sentencing under § 841 after *Harris*, as well as what impact these cases could have had if the Court had decided *Harris* differently. This Note will conclude that *Apprendi* fundamentally changed sentencing in federal drug cases, but the Court’s later decision in *Harris* weakened the impact.

I. BEFORE *APPRENDI*: WINSHIP TO JONES

A. Laying the Foundation: The Due Process Clause, In re Winship, and the Problem of Legislative Labeling

The Fifth Amendment to the United States Constitution guaranties that “*n*o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law.” The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Exactly what these constitutional guarantees mean to sentencing has been a source of controversy in the Court for decades.

Every discussion of Supreme Court sentencing jurisprudence must begin with *In re Winship*, which began as a simple juvenile court.

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34. 536 U.S. 584 (2002).
36. *See* discussion *infra* Parts III-IV.
37. *See* discussion *infra* Part IV.
38. *See* discussion *infra* Conclusion.
39. U.S. CONST. amend. V. Because this Note involves a federal statute, the issues discussed here implicate the Fifth Amendment indictment and due process requirements. See *Harris v. United States*, 536 U.S. 545, 549-50 (2002). Several of the cases discussed in this Note, including *Apprendi*, concerned state statutes, which implicated the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV. The Fourteenth Amendment incorporates the Sixth Amendment’s right to a jury trial but does not incorporate the Fifth Amendment’s guarantee to a Grand Jury indictment. *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000).
40. U.S. CONST. amend. VI.
41. *See* King & Klein, *supra* note 4, at 1468-69.
The question presented in Winship was whether the law entitles a juvenile to proof of delinquency beyond a reasonable doubt when the act charged "would constitute a crime if committed by an adult." However, before holding that the law entitles a juvenile to such a finding, Justice Brennan, writing for the majority, found it necessary to erase any doubt as to the constitutional importance of the beyond a reasonable doubt standard. The Court explicitly held that "the Due Process Clause of the Fourteenth Amendment 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." This was the first time that the Court explicitly held that the Constitution required the beyond a reasonable doubt standard.

After Winship, a question remained as to what extent a legislature could circumvent the Winship rule by redefining via statute what constitutes a "fact necessary to constitute [a] crime." The Court weighed in on this question in Mullaney v. Wilbur. There, the Court unanimously struck down a Maine statute that created a base offense of "homicide" and a presumption that any intentional homicide the defendant committed was with "malice aforethought," and therefore murder, unless the defendant could prove that he committed it "in the heat of passion on sudden provocation," in which case the crime is manslaughter. The State argued that Winship should be limited to

43. Id.; see Hoffmann, supra note 1, at 268-69 (discussing the history behind the Apprendi decision and observing that "[t]he story of Apprendi can be traced directly back to . . . the landmark case of In re Winship").
44. Winship, 397 U.S. at 359.
45. Id. at 364.
46. Id.
47. See id. at 377 (Black, J., dissenting) ("The Court has never clearly held . . . that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution.").
48. See id. at 364; see also King & Klein, supra note 4, at 1468-69 ("[L]abeling a fact an 'affirmative defense' or a 'sentencing factor' instead of an 'element' of an offense may allow the government to bypass . . . certain procedures that the Constitution requires . . . , namely, proof beyond a reasonable doubt, inclusion in the indictment, and trial by jury."); see also Mullaney v. Wilbur, 421 U.S. 684, 684-86 (1975) (describing one state's attempt to avoid having to prove an element of murder—malice aforethought—by shifting the burden to the defendant to prove "heat of passion on sudden provocation").
50. Id. at 688, 704.
facts that were required for the defendant to be guilty of any crime, not facts that simply raised or lowered the level of the offense. The Court characterized the State’s argument as reducing Winship to “formalism.” The Court recognized the constitutional problems with allowing legislatures free reign to decide what are essential elements, saying that “a State could undermine many of the interests [Winship] sought to protect without effecting any substantive change in its law.” Justice Rehnquist wrote a concurring opinion, joined by Chief Justice Burger, in which he agreed with the Court’s holding but pointed out that it should not be understood to overturn the Court’s previous decisions that allowed the legislature to place the burden of proving certain defenses, like insanity, on the defendant.

The Court was presented with the chance to address that very question two years later in Patterson v. New York. Patterson challenged the scope of Mullaney, and almost as quickly as it had begun to close its due process loopholes, the Court began to reopen them and “retreat from Winship.” The state charged the defendant in Patterson with second-degree murder, which has two statutory elements: “(1) ‘intent to cause the death of another person’; and (2) ‘caus(ing) the death of such person or of a third person.’” The statute further allows defendants to assert as an affirmative defense that they “acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse.” If the defendant convinces the jury, by a preponderance of the evidence that the defendant acted under “extreme emotional disturbance,” the jury

51. See id. at 697.
52. See id. at 699.
53. See id. at 698.
54. See id. at 705-06 (Rehnquist, J., concurring); see also Leland v. Oregon, 343 U.S. 790 (1952) (upholding a statute requiring the defendant to prove affirmatively the insanity defense).
56. See id. at 227-28 (Powell, J., dissenting).
57. Id. at 198 (majority opinion) (alteration in original) (quoting N.Y. PENAL LAW § 125.25 (McKinney 1975)).
58. Id. at 198 n.2 (quoting N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975)).
can return a verdict of guilty for manslaughter as opposed to murder. 59

Relying on Mullaney, the defendant challenged the requirement that the defense prove extreme emotional disturbance. 60 Writing for a five-to-three majority, Justice White held the statute at issue distinguishable from the statute at issue in Mullaney, because, unlike Mullaney, where the statute presumed malice aforethought, “nothing was presumed or implied against Patterson.” 61 The Court stated as a general principle that it will not disturb a state’s choice in how to define crimes within its borders “under the Due Process Clause unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” 62

The Court found no due process problem and declined to hold that “a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.” 63 Instead, the Court chose to clarify its earlier holdings in order to give explicit deference to legislatures: “[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.” 64

Justice Powell, the author of the Court’s opinion in Mullaney, 65 along with two other justices, dissented. 66 He accused the majority of robbing Winship “of much of its vitality” by “surrender[ing] to the legislative branch a significant part of its responsibility to protect the presumption of innocence.” 67 Calling the decision “indefensibly formalistic,” the dissent predicted that the decision would “allow[] a legislature to shift, virtually at will, the burden of persuasion with

59. See id. at 200; see also id. at 198 n.2 (quoting N.Y. PENAL LAW § 125.20(2) (McKinney 1975)) (“The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree . . . .”).
60. Id. at 200-01.
62. Id. at 201-02 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).
63. Id. at 210.
64. Id. (emphasis added).
66. Patterson, 432 U.S. at 216 (Powell, J., dissenting). Not surprisingly, the two Justices who joined the dissent were Marshall and Brennan. Id.
67. Id. (Powell, J., dissenting).
respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." After Patterson, it appeared as if, at least concerning affirmative defenses, the Court would limit Winship and Mullaney to the letter of their holdings and allow legislatures great latitude in determining what constitutes essential elements.

B. McMillan v. Pennsylvania

The Court continued its trend of deferring to legislatures by its five-to-four decision in McMillan v. Pennsylvania. In McMillan, the Court "coin[ed] the term 'sentencing factor'" and upheld a statute that imposed the mandatory minimum sentence of five years on certain felonies where the "judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." Writing for the Court, Justice Rehnquist explained that the Patterson decision gives ample deference to the legislature's definition of elements of the crime. The Court noted that Patterson did recognize some limits on this power but that the statute at issue did not give any "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." The Court stressed that the Pennsylvania legislature was not trying to subvert the Due Process Clause but was simply giving the trial court guidance on how to sentence within the statutory limits.

68. Id. at 223-24 (Powell, J., dissenting). Justice Powell went on to suggest that instead of the majority's bright-line rule, the Court should apply "a Winship/Mullaney" balancing test regardless of whether the legislature classified the fact involved as an affirmative defense or element, to determine if the statute could transfer the burden of proving the fact to the defendant. Id. at 225-28 (Powell, J., dissenting). The test had two prongs: (1) does "the presence or absence of [the fact in question make] a substantial difference in punishment of the offender and in the stigma associated with the conviction"; and (2) what "level of importance" has the factor in question held historically in the "Anglo-American legal tradition?" Id. at 226 (Powell, J., dissenting).

69. See Patterson, 432 U.S. at 223 (Powell, J., dissenting).


71. Hoffmann, supra note 1, at 263.


73. See id. at 86.

74. Id. at 86, 88.

75. Id. at 89-90. The Court explained:
Justice Stevens wrote a dissent in *McMillan* arguing that “if a state provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a ‘fact necessary to constitute the crime’ within the meaning of [the Court’s] holding in *In re Winship.*”\(^{76}\) He argued that the majority’s standard allows legislatures to evade the constitutional requirements of the Court’s previous cases by simply declaring “that prohibited conduct is not an ‘element’ of the crime.”\(^{77}\)

Justice Stevens also argued that *Patterson* did not demand the Court’s decision; he read *Patterson* to merely hold that mitigating circumstances, such as affirmative defenses, do not fall under the same constitutional protections as aggravating circumstances, such as elements.\(^{78}\) Justice Stevens pointed to the fact that the Court’s bright-line rule allowing mandatory minimums to escape constitutional scrutiny could have the unjust result of allowing a legislature to mandate a much higher penalty for a crime than the judge would have given without the minimum, all without either a jury finding or the beyond a reasonable doubt standard.\(^{79}\) Justice Marshall wrote a

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The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm.

*Id.* The Court went on to point out that even if it applied the historical test of the dissent in *Patterson*, see discussion *supra* note 68, the holding would remain the same, as “visible possession of a firearm” had not “historically been treated ‘in the Anglo-American legal tradition’ as requiring proof beyond a reasonable doubt.” *Id.* at 90 (quoting *Patterson v. New York*, 432 U.S. 197, 226 (1977) (Powell, J., dissenting)). Interestingly, Justice Powell, the author of the dissent in *Patterson*, did, in fact, join in the majority opinion here. *Id.* at 80.

77. *Id.* at 102 (Stevens, J., dissenting).
78. *Id.* at 98-99 (Stevens, J., dissenting). Justice Stevens explained: *Patterson* thus clarified that the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendant to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties—even if such reductions are conditioned on a prosecutor’s failure to prove a fact by a preponderance of the evidence or on proof supplied by the criminal defendant.
79. *See id.* at 95 (Stevens, J., dissenting). In fact, Justice Stevens used the facts of *McMillan* to illustrate his point. *Id.* The Court convicted one of the petitioners in *McMillan*, a 73 year-old man, of aggravated assault against a person he believed stole money from his home. *Id.* Though finding the petitioner brandished a gun during the crime, the trial judge, believing the mandatory minimums to be unconstitutional, sentenced the petitioner to only 11 1/2 to 23 months. *Id.* Under the Court’s holding, the
separate dissent, joined by Justices Brennan and Blackmun, in which he agreed with the basic premise of Justice Stevens’ argument but rejected the “formalistic distinction between aggravating and mitigating [circumstances].”\(^{80}\)

The Court slowed, if not reversed, the trend of limiting legislative discretion in determining what constitutes elements of a crime.\(^{81}\) At the time of the *McMillan* decision, a slim majority of the Court favored deference to the legislature in determining which facts constitute elements of an offense and which are simply sentencing factors, allowing only for judicial intervention when it offends a fundamental principle of justice.\(^{82}\) A substantial minority of the Court, however, favored less deference to legislatures in exchange for a standard applying *Winship* to all facts that give rise to “stigma” or “special punishment.”\(^{83}\)

C. Walton v. Arizona and Almendarez-Torres v. United States

The systematic narrowing of *Mullaney*’s holding by narrow majorities of the Court continued with two cases in the 1990s.\(^{84}\) In *Walton v. Arizona*,\(^ {85}\) Justice White’s plurality opinion upheld an Arizona statute against Sixth, Eighth, and Fourteenth Amendment challenges; the statute required the judge to make findings of aggravating facts at sentencing to determine whether the court should impose the death sentence.\(^ {86}\) A fifth Justice joined the judgment of the Court and the portion of the opinion dealing with the Sixth
Amendment challenge.\textsuperscript{87} Justice Stevens argued in his dissent that the Court was further extending \textit{McMillan} into an area that had traditionally been within the province of the jury.\textsuperscript{88}

In \textit{Almendarez-Torres v. United States},\textsuperscript{89} the Court held, five-to-four, that the Fifth and Sixth Amendments did not require that the government allege prior convictions in the indictment or that a jury find the existence of prior convictions beyond a reasonable doubt for the Court to consider them aggravating circumstances.\textsuperscript{90} \textit{Almendarez-Torres} represented an unprecedented extension of \textit{McMillan}: for the first time, a majority of the Court explicitly sanctioned a statute that allowed a judge to increase a sentence beyond the statutory maximum.\textsuperscript{91} Justice Breyer, writing for the majority, viewed \textit{McMillan} not as a formalistic rule, but as a balancing test, with the increased maximum punishment issue being only one, nondispositive factor.\textsuperscript{92} The five factors of Justice Breyer’s test are as follows:

\begin{enumerate}
\item [(1)] [Whether] the statute “\ldots transgress[es] the limits expressly set out in \textit{Patterson}”;  
\item [(2)] [Whether] the defendant face[d] “a differential in sentencing ranging from a nominal fine to a mandatory life sentence”;  
\item [(3)] [Whether] the statute “alte[red] the maximum penalty for the crime” \ldots;  
\item [(4)] [Whether] the statute “creat[ed] a separate offense calling for a separate penalty”; and  
\item [(5)] [Whether] the statute gave “[any] impression of
\end{enumerate}

\begin{footnotesize}
\textsuperscript{87} See \textit{id.} at 657 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia’s opinion focused entirely on the defendant’s Eighth Amendment claim, \textit{id.} at 656-74, but he joined with the plurality in the section discussing the Sixth Amendment. \textit{id.} at 657.

\textsuperscript{88} See \textit{id.} at 708-14 (Stevens, J., dissenting). The other two dissenting opinions focused on Eighth Amendment challenges to the statute. \textit{id.} at 674-77 (Brennan, J., dissenting); \textit{id.} at 677-708 (Blackmun, J., dissenting).

\textsuperscript{89} 523 U.S. 224 (1998).

\textsuperscript{90} See \textit{id.} at 226-27, 239.


\textsuperscript{92} See \textit{Almendarez-Torres}, 523 U.S. at 243.
\end{footnotesize}
having been tailored to permit the [fact at issue] to be a tail which wags the dog of the substantive offense"... 93

Furthermore, Justice Breyer reasserted that the Court should give deference to the legislature in determining which facts are elements and which are mere sentencing factors. 94

Justice Scalia, writing in dissent for four members of the Court, argued that McMillan was not a multi-factor analysis but that the "determinative element" in the Court's "validation [of that] statute was the fact that it merely limited the sentencing judge's discretion within the range of sentences available, rather than substantially increasing the available sentence." 95 Justice Scalia made the following prophetic statement, which anticipated Apprendi: "[I]t is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject..." 96

D. Jones v. United States

Sentencing factors, first recognized as distinct from elements by the Court in McMillan, represented a loophole in Fifth and Sixth Amendment jurisprudence and made their way into numerous federal and state statutes, like § 841. 97 In Jones v. United States, 98 which was decided only one year prior to Apprendi, the Court took its first major step to control legislative use of sentencing factors. 99 A jury

93. Id. at 242-43 (citations omitted) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986)).
94. See id. at 228 ("[T]he question of which factors are which is normally a matter for Congress.").
95. See id. at 256 (Scalia, J., dissenting). Interestingly, three more liberal members of the Court joined Justice Scalia's opinion: Justices Stevens, Souter, and Ginsburg. Id. at 248 (Scalia, J., dissenting). These four justices, together with the defecting Justice Thomas, would make up the majority in Apprendi. Apprendi v. New Jersey, 530 U.S. 466, 468 (2000).
96. Almendarez-Torres, 523 U.S. at 251 (Scalia, J., dissenting).
97. See Laurence A. Benner et al., Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999 - October 1, 2000), 37 CATH. W. L. REV. 239, 301-02 (2001); Hoffmann, supra note 1, at 263. See generally King & Klein, supra note 4, at 1547-55 (listing examples of federal and state statutes containing sentencing factors which implicate Apprendi).
99. See id.; see also B. Patrick Costello, Jr., Comment, Apprendi v. New Jersey: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature Is Constitutionally Free to
convicted Jones under a federal car-jacking statute, which included a provision increasing the maximum sentence from 15 to 25 years “if serious bodily injury . . . results.” The defendant’s indictment and jury verdict of guilty said nothing of serious bodily injury, but the judge found at sentencing that serious bodily injury had occurred and sentenced the defendant to 25 years. The government argued that the serious bodily injury provision was a sentencing factor as opposed to an element of the crime, but the Supreme Court disagreed and held it was actually an element. As such, the Constitution required the government to charge serious bodily injury in the indictment and to prove it to a jury beyond a reasonable doubt. The Court characterized its decision as one of statutory interpretation but stated that “grave and doubtful constitutional questions” would be raised by any other interpretation.

While finding it unnecessary to the holding, Justice Souter, writing for the Court, anticipated the Apprendi holding in a footnote, saying that:

under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum

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101. Id. at 231-32.
102. Id.
103. Jones, 526 U.S. at 251-52. Because of similarities between the statute in Jones and the federal drug statute, compare 18 U.S.C. § 2119 (2000), with 21 U.S.C. § 841 (2000), defendants in federal drug cases have argued that Jones should apply to the sentencing enhancements in § 841. See, e.g., United States v. Grimaldo, 214 F.3d 967, 970 (8th Cir. 2000). However, prior to Apprendi, the United States Courts of Appeals uniformly rejected such arguments, holding that the upgraded sentences in § 841 should be viewed as sentencing enhancements. See United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001); United States v. Promise, 255 F.3d 150, 176 (4th Cir. 2001) (Luttig, J., concurring); see also, e.g., Grimaldo, 214 F.3d at 972.
104. Jones, 526 U.S. at 239.
105. Yet again, Jones was a five-to-four decision, and among the ranks of the majority were all of the dissenters from Almendares-Torres (Justices Souter, Ginsburg, Scalia, and Stevens), together with Justice Thomas. Id. at 229.
penalty for a crime must be charged in an indictment, submitted
to a jury, and proven beyond a reasonable doubt.\(^{106}\)

Justice Kennedy, writing for the four dissenters, disagreed with the
Court’s statutory interpretation and was livid about the Court’s
constitutional analysis.\(^{107}\) In the dissenters’ view, *Almendarez-Torres*
controlled the case, and the Court was blatantly violating *stare
decisis* without explanation.\(^ {108}\)

II. *APPRENDI V. NEW JERSEY*

A. *The Case*

No one should have been surprised by the *Apprendi* decision after
*Jones*, as the majority opinion and the two concurrences in that case
made it apparent that the wing of the Court that favored less
legislative deference once again commanded a majority.\(^{109}\)

1. *The Facts and the State Court Opinions*

Charles C. Apprendi was a white man accused of firing a gun on
four separate occasions into the house of an African-American family
in his otherwise all-white neighborhood.\(^{110}\) Apprendi pled guilty to
two counts of unlawful possession of a firearm and one count of
unlawful possession of an anti-personnel bomb.\(^ {111}\) Under the plea
agreement, the sentence for the last count would run concurrently
with the sentences on the first two counts, making Apprendi’s

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\(^{106}\) *Id.* at 243 n. 6. Both concurring opinions advocated the adoption of this rule. *Id.* at 252-53
(Stevens, J., concurring) ("[I]t is unconstitutional for a legislature to remove from the jury the
assessment of facts that increase the prescribed range of penalties to which a criminal defendant is
exposed."); *id.* at 253 (Scalia, J., concurring) (expressing an almost identical view). Justice Stevens went
as far as calling for a reconsideration of *Walton* and *McMillan*, believing the rule should also apply to
mandatory minimums. *Id.* at 253.

\(^{107}\) *See id.* at 254, 264 (Kennedy, J., dissenting). Chief Justice Rehnquist, Justice O’Connor, and
Justice Breyer joined Justice Kennedy’s opinion. *Id.* at 254 (Kennedy, J., dissenting).

\(^{108}\) *See id.* at 254, 272 (Kennedy, J., dissenting).

\(^{109}\) *See Jones v. United States*, 526 U.S. 227, 229-52; *id.* at 252-53 (Stevens, J., concurring); *id.* at
253 (Scalia, J., concurring).


\(^{111}\) *Id.* at 469-70.
possible prison time ten years on each of the first two counts, up to 20 years total. However, the prosecutor reserved the right to ask for a sentence enhancement under a different New Jersey statute: the state’s “hate crime” law. At sentencing, the judge found “by a preponderance of the evidence” that Apprendi acted “with a purpose to intimidate” and, applying the hate crime statute, sentenced Apprendi to 12 years on the first count and shorter sentences on the other two to run concurrently. Apprendi appealed on grounds that the sentencing violated his rights under the Due Process Clause.

The New Jersey Superior Court, Appellate Division, affirmed based on the Supreme Court’s decision in McMillan. Though the statute did expose the defendant to “greater and additional punishment” based on a judicial finding, the court held that this alone was not enough to invalidate the statute. The New Jersey Supreme Court also found no constitutional problem. Applying the multi-factor test of Almendarez-Torres and McMillan, the court found that “the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor.”

2. The Supreme Court Decision

The Court reversed. Justice Stevens, writing for the Court in an opinion that Justices Souter, Ginsburg, Scalia, and Thomas joined, framed the “narrow” issue as “whether Apprendi had a constitutional right to have a jury find [racial] bias on the basis of proof beyond a reasonable doubt . . . .” The Court accepted the state courts’

112. Id. at 470.
113. Id.; see also N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (authorizing enhanced sentences for defendants that commit crime “with a purpose to intimidate, an individual or group of individuals because of race”) (deleted by amendment P.L. 2001, c. 443).
114. Apprendi, 530 U.S. at 471.
115. Id.
117. Id. at 1269 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).
119. Id. at 494-95.
121. Id. at 475-76.
holdings that the statute consisted of a “sentence enhancement” and not an “element” but held that this did not make a difference, in a constitutional sense. 122 The Court conducted an extensive historical survey, concluding that all facts that could increase a defendant’s sentence were historically pled in an indictment and submitted to the jury. 123 The Court distinguished McMillan and “limit[ed] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum.” 124 Further, the Court distinguished Walton by quoting language from Justice Scalia’s dissent in Almendarez-Torres, stating that the Court’s capital punishment cases upheld only statutes that allowed the judge to impose the maximum penalty of death after the jury had found all the elements of the capital offense. 125 The Court characterized Almendarez-Torres as “an exceptional departure from the historic[al] practice” that the Court arguably “incorrectly decided.” 126 Ultimately, however, the Court declined to overrule these cases and instead adopted almost word-for-word its tailored statement from Jones: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 127 The Court further adopted language from Justice Stevens’ concurrence in Jones but qualified the concurrence by the limits of the Court’s explicit holding: “‘[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties . . .’” 128

122. See id. at 476.
123. See id. at 476-85.
124. Id. at 487 n.13.
125. See id. at 496-97 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).
126. Apprendi, 530 U.S. at 487, 489.
127. Id. at 490.
128. Id. (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).
3. *The Concurring Opinions*

Justice Scalia wrote a concurring opinion, as did Justice Thomas, with which Justice Scalia joined.\(^{129}\) Justice Scalia was brief, devoting his opinion to dispelling dissent arguments.\(^{130}\) He reasoned that a criminal defendant should never get more “than he bargained for when he [committed] the crime.”\(^{131}\) He concluded that the Sixth Amendment’s guarantee to a trial by jury “has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.”\(^{132}\)

In contrast, Justice Thomas’ opinion was long and much more expansive.\(^{133}\) Like the majority, Justice Thomas began with a historical review, concluding that “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment . . . .”\(^{134}\) Justice Thomas did what the majority refused to do and advocated overturning *McMillan* and *Almendarez-Torres*, even admitting that he was wrong to join the Court’s opinion in *Almendarez-Torres*.\(^{135}\) Justice Thomas argued that the common-law rule he articulated applied equally to mandatory minimums as increases in maximum penalties, and equally to findings of prior convictions, as to findings of bias.\(^{136}\) Moreover, he suggested that the Court reconsider *Walton* because the statute in that case subjected the defendant to the death penalty, a greater punishment than the defendant would have received without the judicial finding of aggravated circumstances.\(^{137}\)

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129. *Id.* at 498 (Scalia, J., concurring); *Id.* at 499 (Thomas, J., concurring).
130. *See id.* at 498-99 (Scalia, J., concurring).
131. *Id.* at 498 (Scalia, J., concurring).
132. *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring).
133. *See id.* at 499-523 (Thomas, J., concurring); see also *Morrow*, supra note 91, at 1075 (“Justice Thomas . . . argued for a more expansive rule than that articulated by the majority.”).
135. *See id.* at 518-22 (Thomas, J., concurring).
136. *See id.* at 520-22 (Thomas, J., concurring).
4. The Dissenting Opinions

Justice O’Connor wrote a lengthy dissent that Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer joined. Like Justices Stevens and Thomas, Justice O’Connor began by surveying the history of the subject, but her review led to the conclusion that, not only was the Court’s decision inconsistent with history, but it was also “a watershed change in constitutional law.” Justice O’Connor repeated the view of the Court in McMillan, Almendarez-Torres, and Patterson that “the ‘legislature’s definition of the elements of the offense is usually dispositive.’” She chided the Court for relying on misinterpreted history and dissenting opinions, while ignoring binding precedent, that is, for reading Mullaney broadly, which Patterson rejected. Furthermore, Justice O’Connor accused the Court of “overruling McMillan” through its adoption of the concept that a jury must find all of the facts that alter the “prescribed range of penalties to which a criminal defendant is exposed.”

Besides ignoring Patterson and overruling McMillan, Justice O’Connor accused the Court of overruling Almendarez-Torres and Walton. Justice O’Connor pointed out that the defendant in Almendarez-Torres argued for adoption of the very rule that was adopted in Apprendi, but the Court there had rejected that argument: “Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional ‘elements’ requirement. . . . [W]e believe the Constitution, as interpreted in McMillan and earlier cases, does not impose that requirement.” Additionally, Justice O’Connor referred to the Court’s distinction of Walton as “baffling”
and "demonstrably untrue." She noted that despite the majority's contention that the jury in *Walton* made all of the findings necessary for imposition of the death penalty, the statute did not allow the imposition of the death penalty unless the judge made a factual finding that at least one of certain statutory aggravating factors existed.

In light of these dubious distinctions, Justice O'Connor characterized the Court's opinion as "meaningless formalism" and gave examples of how legislatures could easily subvert its constitutional principles. She cautioned that the decision, if interpreted to its logical extreme, particularly if the Court followed Justice Thomas' concurrence, put in jeopardy all recent reforms in sentencing, including the Federal Sentencing Guidelines.

Justice Breyer also dissented, joined by Chief Justice Rehnquist, focusing on the importance of the judge's traditional role in sentencing. He pointed out that the use of sentencing guidelines is a relatively new phenomenon, which represents an attempt to limit the judge's discretion in sentencing, concluding that the Court's bright-line rule would encourage legislatures to further increase a judge's discretion in sentencing. Justice Breyer argued that mandatory minimums were much more oppressive to defendants, and by not including them in its holding, the Court was "encouraging[ing] any legislature interested in asserting control over the sentencing process to do so by creating [mandatory] minimums," actually making the system worse on defendants and less equitable.

145. *Id.* at 538.
146. *Id.*
147. *See id.* at 539-42 (O'Connor, J., dissenting) (explaining, as one example, that legislatures could increase the maximum penalty and use mandatory minimums to achieve the same result as the statute that was being struck down).
148. *Id.* at 549-52 (O'Connor, J., dissenting).
149. *See id.* at 555-66 (Breyer, J., dissenting).
150. *See Apprendi,* 530 U.S. at 555-58 (Breyer, J., dissenting).
151. *See id.* at 563-64 (Breyer, J., dissenting) ("That result would mean significantly less procedural fairness, not more."). Justice Breyer further explained the point:

I do not understand why, when a legislature authorizes [through a sentencing factor] a judge to impose a higher penalty [for a crime, based on an aggravating fact], a new crime is born; but where a legislature requires a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not.
B. The Fallout: § 841 After Apprendi

After the Apprendi decision, the Court began granting certiorari and vacating sentences in case after case, most of them involving drugs.152 However, the task of applying Apprendi to these cases fell on the United States Courts of Appeals.153 Title 21, United States Code § 841 contains three basic types of sentencing enhancements: (1) type and quantity of the drug;154 (2) prior convictions of the defendant;155 and (3) serious injury or death caused by the drug.156 Every circuit applying Apprendi to § 841 required sentence enhancements based on type and quantity of the drug or serious injury or death157 to be treated as elements of the crime and, thus, be pled in the indictment and proved to a jury beyond a reasonable doubt when the enhancements take the defendant’s sentence above the 20-year maximum.158 However, some differences arose in Apprendi’s

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152. See, e.g., Collazo-Aponte v. United States, 532 U.S. 1036 (2001); Valensia v. United States, 532 U.S. 901 (2001); see also Zwerling, supra note 13, at 314 ("Following its decision in Apprendi . . . the Supreme Court has vacated and remanded numerous cases to the circuit courts for 'further consideration in light of Apprendi.'"); Morrow, supra note 91, at 1089.

153. See, e.g., United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001) (applying Apprendi to § 841).


155. See id. § 841(b)(1)(A)-(D); id. § 841(b)(2)-(3).

156. See id. § 841(b)(1)(A)-(C).

157. Of course, Apprendi, by its terms, did not apply to sentence enhancements based on prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction . . .").

158. See Promise, 255 F.3d at 157 ("In concluding that drug quantity must be treated as an element of the offense, we join every circuit that has applied Apprendi to § 841 in this context."); see, e.g., United States v. Minore, 292 F.3d 1109 (9th Cir. 2002) (drug quantity); United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (drug quantity); United States v. Flowal, 234 F.3d 932 (6th Cir. 2001) (drug quantity), overruled by United States v. Leachman, 308 F.3d 377 (2002); United States v. Bailey, 270 F.3d 83 (1st Cir. 2001) (drug quantity); United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001) (drug quantity); United States v. Rodgers, 245 F.3d 961 (7th Cir. 2001) (drug quantity); United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001) (drug quantity); United States v. Williams, 235 F.3d 858 (3rd Cir. 2000) (drug type and quantity); United States v. Hishaw, 235 F.3d 565 (10th Cir. 2000) (drug quantity); United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000) (serious injury or death), overruled by United States v. Leachman, 309 F.3d 377 (2002). While never commanding a majority, some circuit judges believed Apprendi did not apply to § 841 because the maximum authorized by the statute was life in prison under § 841(b)(1)(A), and courts did not have to treat any fact that did not extend the penalty higher than the maximum as an element of the crime. See, e.g., Promise, 255 F.3d at 168-69 (Luttig, J., concurring in the judgment) ("I believe that, in interpreting 21 U.S.C. § 841, this court, and every other Court of Appeals . . . fundamentally misunderstood the Supreme Court's decisions in Almendarez-Torres, Jones, and Apprendi. . . . I would hold that the statutory maximum sentence for commission of these offenses . . . is life imprisonment . . ."). (citations omitted)); id. at 167 (Niemeyer, J., concurring in the judgment) ("The only rational reading of 21 U.S.C. § 841 is that elements of the offense are stated in § 841(a) and the sentencing factors are provided in § 841(b).")); id. at 165 (Wilkinson, C. J., concurring in part, and concurring in the judgment) ("I share Judge Luttig's view that 21 U.S.C. §
application to cases involving § 841 when the sentences did not go above the statutory maximum because the Federal Courts of Appeals had some difficulty deciding how to apply Apprendi and the Court’s earlier decisions at the same time. 159 This problem arose because the statute contains sentencing factors that increase maximums (implicating Apprendi), increase minimums (implicating McMillan), and increase both based on prior convictions (implicating Almendarez-Torres). 160

1. The Majority Approach

The majority of circuits held that the statutory maximum for Apprendi purposes was § 841(b)(1)(C), which authorized a penalty of 20 years in prison for a first-time offender or 30 years in prison for someone with a previous felony drug offense for possessing most Schedule I and II drugs. 161 Section 841(b)(1)(D), which authorized five years for the first-timer and ten years for the recidivist, was the maximum for violations involving marijuana, hashish, and most Schedule III drugs. 162 Furthermore, these circuits attempted to apply both Apprendi and McMillan by refusing to reverse sentences obtained in violation of Apprendi unless the ultimate sentences were more than the statutory maximum and not if the circumstances had merely increased the minimum. 163 Thus, a judge could still determine quantity and use it as a sentencing factor, as long as the ultimate sentence was below the maximum set out by the statute. 164

841(b) is a graduated sentencing scheme in which life imprisonment constitutes the maximum penalty."

159. See, e.g., Promise, 255 F.3d at 158-60 (discussing the “perplexing” distinction the Court made between Apprendi and Walton, but concluding it had to follow both of them); United States v. De Los Santos, 47 Fed. Appx. 132, 133 (3d Cir. 2002) (discussing the uncertainty of the continued validity of Almendarez-Torres) (unpublished, non-precedential opinion).


161. See, e.g., Promise, 255 F.3d at 156.

162. See, e.g., Bailey, 270 F.3d at 88.

163. Compare id. at 89-90 (reversing conviction based on Apprendi error when sentence was beyond default maximum), with United States v. Sanchez, 269 F.3d 1250, 1288-89 (11th Cir. 2001) (declining to reverse conviction when ultimate sentence was below the statutory maximum).

164. See Lewis, supra note 2, at 619.
In *United States v. Promise*, the Fourth Circuit found plain error in the district court’s failure to submit the question of the quantity of cocaine to the jury. The government indicted and convicted the defendant, Marion Promise, for “conspiracy to possess with the intent to distribute ‘a quantity of cocaine and cocaine base.’” After Promise’s conviction, the district judge found that he was responsible for 1.5 kilograms of the cocaine and sentenced him to 30 years in prison. Before the judge’s finding of quantity, the maximum penalty the judge could impose on Promise was 20 years in prison, under § 841(b)(1)(C). However, the judge’s finding of a quantity greater than 50 grams of cocaine base mandated that the court sentence Promise according to § 841(b)(1)(A), which provides for a sentence of ten years to life in prison.

Promise, relying on *Jones* and *Apprendi*, argued that his constitutional rights were violated because § 841 treats quantity as an element of the offense. The court, reviewing under the plain error standard, noted that courts could impose a sentence such as Promise’s, which exceeded 20 years, “only upon an additional finding that the offense involved a specific threshold quantity” of the drug. Thus, the court held that *Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury

165. 255 F.3d 150 (4th Cir. 2001).
166. *Id.* at 152. The court, however, did not overturn the conviction, refusing to exercise its discretion and notice the error because “[t]here simply can be no doubt that had the indictment included the [necessary quantity of cocaine], the jury would have found Promise guilty beyond a reasonable doubt.” *Id.* at 164.
167. *Id.* at 152. Though 21 U.S.C. § 841 does not speak explicitly to conspiracy, courts sentence defendants, like Promise, convicted under the federal drug conspiracy statute for conspiracies involving distribution or possession with intent to distribute a controlled substance, under 21 U.S.C. § 841. *See id.; see also* 21 U.S.C. § 846 (2000) (“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).
170. *Id.* § 841(b)(1)(A).
171. *See Promise*, 255 F.3d at 153. Promise’s conviction pre-dated the *Apprendi* decision; thus, his initial appeal cited *Jones* and the court affirmed his conviction. *Id.* However, Promise petitioned for, and the court granted, this en banc rehearing after *Apprendi*. *Id.*
172. *Id.* at 156.
finding of . . . quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, [that is], charged in the indictment and proved to the jury beyond a reasonable doubt.\textsuperscript{173}

Applying the same standard, the Seventh Circuit, relying on \textit{McMillan}, found no \textit{Appendi} error in the similar case of \textit{United States v. Rodgers}.\textsuperscript{174} The defendant, Leander Rodgers, was convicted of conspiracy to possess with intent to distribute cocaine and cocaine base.\textsuperscript{175} The judge found by a preponderance of the evidence that the amount of the drugs was 250 grams of cocaine base and 349 grams of powder cocaine.\textsuperscript{176} Because cocaine is a Schedule II narcotic,\textsuperscript{177} this finding placed the offense within § 841(b)(1)(A), allowing for a possible punishment of ten years to life.\textsuperscript{178} If sentenced under § 841(b)(1)(C), as the law would have required without the judge’s finding, the law would have subjected Rogers to a maximum of 20 years in prison with no mandatory minimum.\textsuperscript{179} The judge determined the appropriate sentence under the Federal Sentencing Guidelines was 97 to 121 months; however, because of the mandatory minimum in the statute, the judge sentenced Rodgers to the minimum of ten years in prison.\textsuperscript{180}

Like the Fourth Circuit in \textit{Promise}, the Seventh Circuit held that \textit{Appendi} applied to § 841 and that the default maximum penalty for possession with intent to distribute cocaine was 20 years as found in § 841(b)(1)(C).\textsuperscript{181} Accordingly, “because the jury in Rodgers’ case was never asked to find him responsible for any particular drug

\textsuperscript{173} \textit{Id.} at 156-57 (footnote omitted); \textit{accord United States v. Bailey}, 270 F.3d 83, 85 (1st Cir. 2001) (vacating the defendant’s sentence under § 841 when the judge did not submit quantity to the jury and sentenced the defendant above the default statutory maximum for possession with intent to distribute marijuana under § 841(b)(1)(D)); \textit{United States v. Baptiste}, 264 F.3d 578, 592-94 (5th Cir. 2001) (vacating defendants’ sentences because they exceeded the statutory maximums in violation of \textit{Appendi}).

\textsuperscript{174} 245 F.3d 961 (7th Cir. 2001).

\textsuperscript{175} \textit{Id.} at 964.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.} at 965; 21 U.S.C. § 812(c)(a)(4) (2000).

\textsuperscript{178} \textit{Rodgers}, 245 F.3d at 967; 21 U.S.C. § 841(b)(1)(A).

\textsuperscript{179} \textit{Rodgers}, 245 F.3d at 965; 21 U.S.C. § 841(b)(1)(C).

\textsuperscript{180} \textit{Rodgers}, 245 F.3d at 964.

\textsuperscript{181} \textit{Id.} at 965.
amount, [20 years] is the maximum prison term to which he could be sentenced."182 The court recognized the significant impact the judge’s finding had on Rodgers’ sentence: “Absent the statutory minimum triggered by that finding, Rodgers could have been sentenced to a term as short as 97 months . . . . Once [§] 841(b)(1)(A) came into play, however, a sentence of at least 120 months—nearly two years greater than the low end of the Guidelines range—was compulsory.”183 However, the court observed that McMillan was still good law after Apprendi, and consequently, imposition of mandatory minimums did not require a jury finding.184 Therefore, because Rodgers’ sentence was below the default maximum, the imposition of the minimum under § 841(b)(1)(A) was not a violation of Rodgers’ constitutional rights.185

2. The Rogue Sixth Circuit

Apprendi and Rodgers illustrate the problems of applying Apprendi and McMillan at the same time.186 The majority in Apprendi adopted as part of its reasoning the idea that “[i]t is unconstitutional for a legislature to remove from the jury the assessments of facts that increase the prescribed range of penalties.”187 In both cases, however, the courts’ findings undeniably altered the defendants’ prescribed range of penalties.188 In Rodgers, the range of sentences went from 0 to 20 years to 10 to 20 years; this was constitutionally permissible under McMillan, but this arguably increases the “prescribed range of penalties.”189

This dichotomy was apparently too much for the Sixth Circuit in its application of Apprendi.190 In United States v. Flowal,191 citing

182. Id.
183. Id. at 967.
184. See id.
185. See id.
186. See discussion supra Part II.B.1.
188. See discussion supra Part II.B.1.
189. Apprendi, 530 U.S. at 490; Rodgers, 245 F.3d at 967.
190. See United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001); United States v. Flowal, 234 F.3d 932, 937 (6th Cir. 2000).
191. 234 F.3d 932 (6th Cir. 2000).
but not even mentioning *McMillan*, the court struck down a sentence under § 841 in which the judge found a fact that required imposition of a mandatory minimum life sentence.\(^{192}\) Police stopped the defendant, Michael Angelo Flowal, in an airport on suspicion of carrying narcotics and eventually searched his luggage and found cocaine.\(^{193}\) A jury found Flowal guilty of "possession with intent to distribute cocaine."\(^{194}\) Because Flowal had two previous felony convictions, his possible range of sentences under the default maximum statute, § 841(b)(1)(C), was up to 30 years without a minimum.\(^{195}\) If the court had found that the quantity of the cocaine was more than 500 grams, but less than five kilograms, the possible range of sentences would have been ten years to life.\(^{196}\) However, the judge found that Flowal had possessed five kilograms of cocaine, which, combined with the previous convictions, mandated a life sentence without the possibility of release.\(^{197}\)

The Sixth Circuit reversed his sentence.\(^{198}\) The court pointed out that Flowal's sentence was above the maximum (30 years) that would have been possible without the finding of quantity.\(^{199}\) However, the government argued that the only disputed issue was whether Flowal possessed 4.997 kilograms or more than 5 kilograms of cocaine, and even if the judge had determined that the drugs weighed the smaller amount, Flowal's sentence could have been life in prison.\(^{200}\) The court's answer to this argument, relying heavily on Justice Thomas' concurring opinion from *Apprendi*,\(^{201}\) departed from the other circuits:


\(^{192}\) *Id.* at 938.

\(^{193}\) *Id.* at 933-34.

\(^{194}\) *Id.* at 934.

\(^{195}\) *Id.* at 936; 21 U.S.C. § 841(b)(1)(C) (2000).


\(^{197}\) *See Flowal*, 234 F.3d at 934; 21 U.S.C. § 841(b)(1)(A).

\(^{198}\) *Flowal*, 234 F.3d at 933.

\(^{199}\) *See id.* at 936.

\(^{200}\) *See id.* at 937.

\(^{201}\) *See id.* at 937-38.
in noting that a repeat offender who possesses 4,997 kilograms of cocaine can receive life imprisonment under 21 U.S.C. § 841(b)(1)(B). However, such a penalty is not mandatory under the latter provision. This difference is significant in this case because the trial judge’s determination of the weight of the drugs took away any discretion in terms of imposing a shorter sentence. . . . The judge’s determination effectively limited the range of applicable penalties and deprived Flowal of the opportunity to receive less than life imprisonment without the possibility of release.202

In essence, the court was applying Apprendi to an increase in a minimum sentence without even mentioning McMillan.203

One could dismiss the previously quoted language as dicta were it not for later decisions in which the Sixth Circuit clarified its position on mandatory minimums.204 In United States v. Ramirez,205 the court sentenced the defendant to 20 years in prison after a jury convicted him of “conspiracy to distribute cocaine,” and the judge found the quantity of cocaine to be greater than five kilograms.206 The Sixth Circuit reversed the conviction, reasoning that without the judge’s finding, there was no minimum sentence, but after the finding, there was a 20 year minimum sentence.207 The court characterized Apprendi as having two holdings:

[F]irst, that courts must count any “fact” that increases the “penalty beyond the prescribed statutory maximum” as an element of the offense . . . and second, that it “is unconstitutional for a legislature” to treat “facts that increase the prescribed range

202. Id. at 937.
203. See id. at 936-38; see also United States v. Leachman, 309 F.3d 377, 382 (6th Cir. 2002) (“In Flowal [this court] applied Apprendi to mandatory minimum sentences . . . .”).
204. See Leachman, 309 F.3d at 383; United States v. Ramirez, 242 F.3d 348, 351-52 (6th Cir. 2001).
205. 242 F.3d 348 (6th Cir. 2001).
206. Id. at 350.
207. See id.
of penalties to which a criminal defendant is exposed” as mere sentencing factors . . . .

The court went on to hold that under its decision in Flowal, Apprendi applied to mandatory minimums and that “[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved.” Judge Siler’s brief concurrence questioned the ruling in light of McMillan and recognized that other circuits had decided the question differently.

III. THE SUPREME COURT BETWEEN APPRENDI AND HARRIS: COTTON AND RING

A. United States v. Cotton

The first of the post-Apprendi Supreme Court cases that is significant for the purposes of this Note is United States v. Cotton. In Cotton, notable primarily because it overturned Ex parte Bain, the Court recognized Apprendi’s applicability to § 841 but held that omission of drug quantity from the indictment did not deprive the district court of jurisdiction. There were several defendants in Cotton, all charged with involvement in a drug conspiracy. The final indictment charged all of them with “conspir[ing] to distribute and to possess with intent to distribute” cocaine and cocaine base, without charging the defendants with any amount that would...
implicate the enhanced sentences in the statute. The judge charged the jury that "the amounts involved [were] not important," and the jury returned verdicts of guilty as to all defendants. The district court subsequently found that the amount of cocaine base attributable to each respondent, except one, was 1.5 kilograms and sentenced all of them, except two, to life imprisonment pursuant to § 841(b)(1)(A). The Fourth Circuit Court of Appeals reversed the sentences, holding that the imposition of enhanced sentences violated Apprendi and was plain error. Furthermore, under Bain, the omission of quantity from the indictment divested the Court of jurisdiction to impose the sentences.

The Court unanimously reversed. Justice Rehnquist, writing for the Court, began by discussing Bain, concluding that it was no longer a valid decision, and holding that "indictment defects are [not] 'jurisdictional.'" The Court then applied the plain error analysis to this case and determined that, while failing to charge and submit drug quantity to the jury was plain error under Apprendi, it did not affect the substantive rights of the defendants because of "'overwhelming' and 'essentially uncontroverted'" evidence of the quantity of the drugs.

B. Ring v. Arizona

The dissent in Apprendi accused the majority of overruling at least three prior decisions: McMillan, Almendarez-Torres, and Walton. In 2002, in two cases decided on the same day, the Court was

215. Id.
216. Id.
217. Respondent Hall was found responsible only for 500 grams, implicating § 841(b)(1)(B). Id. at 628.
218. Respondents Hall and Powell were sentenced to 30 years in prison. Id.
219. See Cotton, 535 U.S. at 628-29. As the district court sentenced the defendants before the Court decided Apprendi, the defendants did not object to the judge's determination of quantity; therefore, the Fourth Circuit proceeded under the plain error analysis. Id.
220. See id. at 629.
221. See id. at 629.
222. See id. at 634.
223. See id. at 629-31.
224. See id. at 632-34.
presented with the opportunity to distinguish or overrule these cases or to limit *Apprendi* to avoid conflict.\textsuperscript{226} One of the cases was *Ring v. Arizona*, in which the issue was whether *Walton* remained good law after *Apprendi*.\textsuperscript{227} In *Ring*, a jury convicted defendant Timothy Ring of felony murder; pursuant to the same Arizona statute at issue in *Walton*, the judge sentenced Ring to death after finding aggravated circumstances by a preponderance of the evidence.\textsuperscript{228} On appeal, Ring argued that the Arizona statute violated his Sixth and Fourteenth Amendment rights in light of *Apprendi*.\textsuperscript{229} The Arizona Supreme Court examined the *Apprendi* decision and expressed doubt that the statute was consistent with the opinion.\textsuperscript{230} The Arizona court compared the attempt to distinguish *Walton* by the majority in *Apprendi* with the construction of the statute by the dissent in *Apprendi*, concluding that the dissent correctly constructed the statute.\textsuperscript{231} The maximum penalty a defendant could receive under the statute after a jury verdict of guilty was life imprisonment, unless the judge made additional factual findings of aggravated circumstances.\textsuperscript{232} However, the court recognized that *Walton* was still the law because the Court had expressly declined to overrule it.\textsuperscript{233} Therefore, believing that precedent and the Supremacy Clause bound its decision, the court affirmed Ring’s conviction.\textsuperscript{234}

On appeal, the Court, in an opinion by Justice Ginsburg, reversed the Arizona Supreme Court’s decision in *Ring* and overruled its own decision in *Walton*.\textsuperscript{235} The Court recognized that the Arizona court’s construction of Arizona law bound its decision; thus, the Court had to


\textsuperscript{227} See *Ring*, 536 U.S. at 589.

\textsuperscript{228} See id. at 588, 591-94; see also *ARIZ. REV. STAT.* §§ 13-1105, 13-703 (2002) (allowing the imposition of a death sentence for murder only upon a finding of at least one of certain aggravating circumstances).

\textsuperscript{229} See *Ring*, 536 U.S. at 595.


\textsuperscript{231} See id. at 1151; see also supra text accompanying notes 118-19 and 138-39 (discussing the interpretations of the statute by the majority in *Apprendi* and the dissent in *Apprendi*, respectively).

\textsuperscript{232} *Ring*, 25 P.3d at 1151.

\textsuperscript{233} Id. at 1151-52.

\textsuperscript{234} Id. at 1152, 1156.

\textsuperscript{235} *Ring*, 536 U.S. at 589. The final vote on the judgment was seven to two, with Justice Ginsburg’s majority opinion joined by Justices Stevens, Scalia, Kennedy, Souter, and Thomas. *Id.* at 587. Justice Breyer concurred only in the judgment, and Justice O’Connor, joined by Chief Justice Rehnquist, dissented. *Id.*
view the statute as allowing a judge to find facts that raise the punishment above the maximum allowed by the jury verdict. The Court found no reason to treat death penalty cases differently from non-capital cases and re-established the constitutional rule from Apprendi that the same constitutional requirements that apply to the elements apply to the sentencing factors. The Court concluded: "Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 238

Justice Scalia, joined by Justice Thomas, concurred separately, objecting to Justice Breyer’s and previous case law’s interpretation of the Eighth Amendment but fully joining the Court’s opinion on Sixth Amendment grounds. 239 He stated:

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt. 240

Justice Kennedy wrote a concurring opinion expressing his view that Apprendi “was wrongly decided, [but it] is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of Apprendi would allow [Walton] to stand.” 241 Justice Breyer concurred in the judgment on Eighth Amendment grounds but stated his belief that the Court wrongly decided Apprendi. 242 Justice O’Connor, joined by Chief Justice

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236. Id. at 603.
237. See id. at 604-08.
238. Ring, 536 U.S. at 609.
239. See id. at 610-13 (Scalia, J., concurring).
240. Id. at 610 (Scalia, J., concurring).
241. Id. at 613 (Kennedy, J., concurring).
242. See id. at 613-14 (Breyer, J., concurring in the judgment).
Rehnquist, dissented, arguing that the Court should have overruled *Apprendi*, not *Walton*.243

IV. *HARRIS v. UNITED STATES*

A. *The Case*

The Court in *Ring* chose to overrule *Walton* in light of *Apprendi* instead of allowing two inconsistent opinions to stand.244 One might expect that, given the opportunity, the Court would do the same for *McMillan*, considering that "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*."245 One would be wrong. The Court in *Harris* refused to overrule *McMillan*, even though only four members of the Court expressed a belief that *McMillan* was consistent with *Apprendi*.246 Perhaps the Court did so to avoid the broad consequences that overruling *McMillan* could have had, which would have affected sentencing practices throughout the country.247

1. *The Facts and the Court of Appeal Opinion*

The defendant, William Joseph Harris, operated a pawnshop and routinely carried a gun on his person while there.248 He was arrested and charged with distributing marijuana and "carrying a firearm ‘in
relation to’ a drug trafficking crime.” Title 18, United States Code § 924(c)(1)(A) provides additional punishments, above the sentence of the crime itself, for anyone who, “during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” The statute continues by setting up mandatory minimum sentences starting at five years for simply carrying the firearm, increasing it to seven years for “brandish[ing]” the firearm, and then increasing it to ten years “if the firearm is discharged.”

The indictment alleged only that Harris had carried a firearm, and the judge convicted him at a bench trial. After the trial, the judge found, by a preponderance of the evidence, that Harris had brandished the gun, invoking the mandatory seven-year sentence. The Fourth Circuit affirmed the conviction and the sentence. The court held that the statute set up one crime, possessing a firearm in relation to a crime, and brandishing was a sentencing factor. The court cited McMillan in rejecting any constitutional problem with the statute.

249. Id. at 573 (Thomas, J., dissenting); see also 18 U.S.C. § 924(c)(1)(A) (2000) (setting mandatory minimum penalties for drug offenders who “use[] or carry[] a firearm . . . in furtherance” of a violent or drug crime).
251. Id. § 924(c)(1)(A)(i).
252. Id. § 924(c)(1)(A)(ii).
253. Id. § 924(c)(1)(A)(iii).
254. See Harris, 536 U.S. at 573 (Thomas, J., dissenting). Harris pled guilty to the drug charge but disputed that he carried the gun “in relation to” the drug crime. Id. (Thomas, J., dissenting). The sentence on the drug charge would have been zero to six months based on the presentence report. Id. at 573 n.2 (Thomas, J., dissenting).
255. See id. at 551. Illustrating the importance of the distinction between the “beyond a reasonable doubt” and “by a preponderance of the evidence” standards, the judge, at sentencing, “acknowledged that it was a ‘close question’ whether Harris ‘brandished’ a firearm.” Id. at 573 (Thomas, J., dissenting). Presumably, if the Court had applied the beyond a reasonable doubt standard, the defendant would have been sentenced to five years, instead of seven years. See id. (Thomas, J., dissenting); 18 U.S.C. § 924(c)(1)(A) (2000).
256. Harris, 243 F.3d at 812.
257. See id.
258. See id. at 809.
2. The Plurality Opinion

The Court affirmed the Fourth Circuit's ruling. Justice Kennedy wrote for the Court, joined by Chief Justice Rehnquist, by Justices O'Connor and Scalia, and in part by Justice Breyer. Justice Kennedy began by restating the basic proposition that not all facts that "have a substantial impact on the sentence" are elements that the government must prove to a jury. After restating the holdings of McMillan and Apprendi, the Court framed "[t]he principal question before [it as] whether McMillan stands after Apprendi." First, the Court examined whether "brandishing" was an element of a separate crime under § 924(c)(1)(A) or simply a sentencing factor to which the statute has given a pre-assigned level of weight. The Court concluded that "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury."

Justice Kennedy further stated, in a section of the opinion not joined by Justice Breyer and thus not representing a majority of the Court, that "McMillan and Apprendi are consistent because there is a fundamental distinction between the factual findings that were at

259. Harris, 536 U.S. at 552.
260. See id. at 548. Justice Scalia, perhaps the deciding vote in Harris, cast a vote that was perplexing considering his votes in previous cases. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Thomas, J., concurring). Only two years prior to Harris, in Apprendi, Justice Scalia joined Justice Thomas's concurrence, which advocated overruling McMillan. Id. at 499, 518-22. Although Justice Scalia did not join Part III of that opinion, Justice Thomas stated that "[t]he consequence of the above discussion for our decision[] in ... McMillan should be plain enough ... [T]he fact triggering the mandatory minimum is part of 'the punishment sought to be inflicted,' it undoubtedly 'enters into the punishment' so as to aggravate it." Id. (citation omitted). Justice Scalia's own opinions seem to suggest it would have been more consistent for him to vote the other way. See Jones v. United States, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) ("It is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." (emphasis added)); see also Monge v. California, 524 U.S. 721, 737-41 (1998) (Scalia, J., dissenting) (expressing similar sentiments); cf. Jones, 526 U.S. at 268 (Kennedy, J., dissenting) ("By its terms, Justice Scalia's view ... would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to [the] holding in McMillan."). Yet, Justice Scalia chose to join the plurality in upholding McMillan, without even writing a separate opinion to explain his change of heart. See Harris, 536 U.S. at 549.
261. Harris, 536 U.S. at 549.
262. Id. at 550.
263. See id. at 552-56.
264. Id. at 556.
issue in those two cases." Justice Kennedy summarized this "fundamental distinction" as the fact that, unlike increases in the statutory maximum, the jury "has authorized the judge to impose the minimum with or without a finding." Justice Kennedy reviewed the historical findings of the Court in *McMillan* and concluded that judges always possessed discretion in sentencing based on facts that the jury did not find. Justice Kennedy reasoned that these facts do not become elements simply because the legislatures assign the given weight to the fact through mandatory minimums. In contrast, *Apprendi* involved a situation where the judge found a fact that authorized taking the punishment above that authorized by the jury. Justice Kennedy found this distinction constitutionally dispositive. He found support for this conclusion in that "the Court in both *Apprendi* and *Jones* insisted that they were consistent with *McMillan*—and that a distinction could be drawn between facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum." In the next section of the opinion, with Justice Breyer back on board to secure a majority, the Court reaffirmed *McMillan* and concluded that § 924(c)(1)(A) was constitutional.

3. The Concurring Opinions

The two concurring opinions are brief but noteworthy. Justice O'Connor wrote a one-paragraph concurrence reaffirming her belief

265. *Harris*, 536 U.S. at 557 (plurality opinion).
266. *Id.* (plurality opinion).
267. *See id.* at 558 (plurality opinion).
268. *Id.* at 560 (plurality opinion).
269. *Id.* at 562 (plurality opinion).
270. *See id.* at 565-67 (plurality opinion).
271. *Harris*, 536 U.S. at 556 (plurality opinion). Of course, while recognizing the distinction Justice Kennedy makes, the Court in *Apprendi* also expressed some doubt as to the validity of *McMillan*, but "reserve[d] for another day" reconsideration of the case. *See Apprendi v. New Jersey*, 530 U.S. 466, 487 n.13 (2000). Additionally, noticeably missing from Justice Kennedy's account is any reference to Justice O'Connor's dissent in *Apprendi*, which Justice Kennedy and Chief Justice Rehnquist joined, in which she insisted that *Apprendi* was overruling *McMillan*. *See id.* at 533 (O'Connor, J., dissenting).
272. *Harris*, 536 U.S. at 568.
273. *Id.* at 569 (O'Connor, J., concurring); *id.* at 569-72 (Breyer, J., concurring in part and concurring in the judgment).
that Jones and Apprendi were wrongly decided. However, "[e]ven assuming [their] validity," she agreed with the Court that Apprendi and Jones did not dictate a different result.

Justice Breyer wrote separately, concurring only in part and concurring in the judgment. He explained that he did not join the part of the plurality opinion distinguishing Apprendi and McMillan because he could not distinguish Apprendi "from this case in terms of logic." Justice Breyer expressed his belief that the Court wrongly decided Apprendi and that he joined in the judgment of the Court in order to avoid the "adverse practical, as well as legal, consequences" that would result from applying Apprendi to mandatory minimums. He decided this, not because of any love for mandatory minimums, but because the contrary result 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."

4. The Dissenting Opinion

Justice Thomas wrote the dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg, in which he argued that the Court should treat brandishing a firearm under § 924(c)(1)(A)(ii) as an "aggravating fact [that] is an element of [an] aggravated crime." In Justice Thomas' view, limiting Apprendi strictly to its terms undermined one of the basic premises on which it was based:

274. Id. at 569 (O'Connor, J., concurring).
275. Id. (O'Connor, J., concurring). As with Justice Kennedy's opinion, missing here is any reference to her own dissent from Apprendi where she emphatically stated, "The essential holding of McMillan conflicts with at least two of the several formulations the Court gives to the rule it announces . . . . [It] is incumbent on the Court . . . to admit that it is overruling McMillan [and] to explain why such a course of action is appropriate . . . . " Apprendi, 530 U.S. at 533 (O'Connor, J., dissenting).
276. Harris, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment).
277. Id. (Breyer, J., concurring in part and concurring in the judgment).
278. See id. at 569-70 (Breyer, J., concurring in part and concurring in the judgment).
279. In fact, Justice Breyer spends two full paragraphs of his five-paragraph opinion explaining why mandatory minimums are a bad idea as a matter of policy. Id. at 570-71 (Breyer, J., concurring in part and concurring in the judgment).
280. Id. at 572 (Breyer, J., concurring in part and concurring in the judgment).
When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is “by definition [an] ‘element[t]’ of a separate legal offense.” Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.\(^{282}\)

Justice Thomas characterized his view as “common sense” because “an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense.”\(^{283}\) He argued that drawing “[s]uch fine distinctions” as between increases in minimums and maximums basically gives the legislature a license to easily avoid \textit{Apprendi} simply through “clever statutory drafting.”\(^{284}\) Justice Thomas noted that only a minority of the Court found a significant distinction between \textit{McMillan} and \textit{Apprendi} and that most of the Court’s members could not “logically distinguish the issue here from the principles underlying the Court’s decision in \textit{Apprendi}.”\(^{285}\) Finding “no logical grounds for treating” increases in mandatory minimums and maximums differently, Justice Thomas argued that the Court should overrule \textit{McMillan}.\(^{286}\)

\textbf{B. The Fallout, Part Two: § 841 After Harris}

\textit{Harris} seemingly endorsed the majority view with respect to § 841 of applying \textit{Apprendi} and \textit{McMillan}.\(^{287}\) That is, by refusing to overrule \textit{McMillan}, the Court indicated to the courts of appeals that, when dealing with statutes that contain sentencing factors which operate as mandatory minimums and increases in maximums, like § 841, courts must apply the \textit{Apprendi} holding to sentencing factors

\begin{thebibliography}{9}
\bibitem{282} \textit{Id.} at 579 (Thomas, J., dissenting) (citation omitted) (quoting \textit{Apprendi}, 530 U.S. at 483 n.10).
\bibitem{283} \textit{Harris}, 536 U.S. at 577-78 (Thomas, J., dissenting). Justice Thomas further illustrated this point by pointing out that judges very rarely depart upward from the mandatory minimums of § 924(c)(1)(A), meaning that the finding by the court of the aggravated circumstance usually determines the length of the sentence. \textit{See id.} at 578 n.4 (Thomas, J., dissenting).
\bibitem{284} \textit{Id.} at 574, 579 (Thomas, J., dissenting).
\bibitem{285} \textit{See id.} at 583 (Thomas, J., dissenting).
\bibitem{286} \textit{See id.} at 579-80 (Thomas, J., dissenting).
\bibitem{287} \textit{See id.} at 577-79 (Thomas, J., dissenting); \textit{see also supra} Part II.B.1.
\end{thebibliography}
that increase the maximum penalty but not to the same sentencing factors if they only increase the minimum penalty.\textsuperscript{288} If the Court had decided \textit{Harris} differently, anticipating the effect it would have had on sentencing under the statute is hard, but it seems, at the very least, the Sixth Circuit view of the statute would have become the rule, that is, that the government must charge drug quantity and death or serious injury in the indictment and prove them to a jury beyond a reasonable doubt regardless of whether the sentencing factors raise the maximum or the minimum penalty to which the defendant is subject.\textsuperscript{289} After the Court’s decision in \textit{Harris}, however, it was the Sixth Circuit that had to reconsider.\textsuperscript{290}

The Sixth Circuit opinion in \textit{United States v. Copeland}\textsuperscript{291} demonstrates the current standard that courts in the Sixth Circuit and elsewhere will likely apply after \textit{Harris}.\textsuperscript{292} In \textit{Copeland}, the government charged and convicted the two defendants, Copeland and Hartwell, both of whom had prior drug convictions, with conspiracy to distribute cocaine and marijuana.\textsuperscript{293} The indictment did not mention, and the jury did not find, the quantity of the drugs involved.\textsuperscript{294} The judge found that the conspiracy involved more than five grams of crack cocaine and, pursuant to § 841(b)(1)(B), sentenced Copeland to 30 years.\textsuperscript{295} On the other hand, he sentenced Hartwell, also under § 841(b)(1)(B), to life in prison.\textsuperscript{296}

The court discussed the expansive view the Sixth Circuit took of \textit{Apprendi} prior to \textit{Harris}: \textit{Apprendi} required “that where a defendant is sentenced under the higher tiers of this scheme, that is, §[[]

\textsuperscript{288} See \textit{Harris}, 536 U.S. at 577-79 (Thomas, J., dissenting); see also supra Part II.B. Compare \textit{United States v. Ramirez}, 242 F.3d 348 (6th Cir. 2001) (applying \textit{Apprendi} to § 841 before \textit{Harris}), with \textit{United States v. Copeland}, 304 F.3d 533 (6th Cir. 2002) (applying \textit{Apprendi} to § 841 after \textit{Harris}).


\textsuperscript{291} \textit{Copeland}, 304 F.3d at 533.

\textsuperscript{292} Id.

\textsuperscript{293} Id. at 539-41.

\textsuperscript{294} Id. at 539, 554.

\textsuperscript{295} Id. 554; see also \textit{21 U.S.C. § 841(b)(1)(B)} (2000) (authorizing a sentence of ten years to life for prior felons convicted of an offense involving five grams or more of crack “mixture[s] . . . contain[ing] cocaine base”).

\textsuperscript{296} \textit{Copeland}, 304 F.3d at 555.
841(b)(1)(A) and [subparagraph] (B), the quantity of drugs involved must be charged in the indictment and proved beyond a reasonable doubt; otherwise, the defendant should be sentenced to the lower sentencing range of § 841(b)(1)(C).”

The court had applied this rule to increases in both minimum and maximum sentences. However, the court recognized that Harris made Apprendi inapplicable to mandatory minimums. The court thus held that “where a defendant is made subject to a higher range of punishment under §[] 841(b)(1)(A) and [subparagraph] (B) but is nonetheless sentenced within the confines of § 841(b)(1)(C), his rights under Apprendi are not violated.”

The court then applied this new rule to Copeland and Hartwell’s cases. As to Copeland, the court noted that his sentence was within the limits of § 841(b)(1)(C) for someone with prior convictions, and Copeland’s case did not implicate Apprendi. As to Hartwell, however, his sentence exceeded the 30-year limit of § 841(b)(1)(C), and therefore, Apprendi was violated. Thus, despite the fact that both defendants were actually sentenced under § 841(b)(1)(B), based on a finding of quantity made by preponderance of the evidence by the judge at sentencing, only one sentence violated Apprendi.

CONCLUSION

The Supreme Court has dealt with the problem of how much deference to give legislative labeling of “elements,” “sentencing factors,” and “affirmative offenses” at least since Winship. This area of Supreme Court jurisprudence has been a dynamic one, as the Court has been split between those Justices who favor giving great

297. Id. at 552.
298. See Copeland, 304 F.3d at 552.
299. Id. at 553.
300. Id.
301. Id. at 554-55.
302. Id. at 555; see also 21 U.S.C. § 841(b)(1)(C) (2000) (authorizing a sentence up to 30 years under such circumstances).
303. Copeland, 304 F.3d at 555. However, the court did uphold Hartwell’s sentence, finding the error to be harmless. Id. at 556.
304. See id. at 554-56.
305. See discussion supra Part I.
deference to legislatures and those who believe the Constitution strictly limits such action.\(^ {306}\) Ultimately, the remaining questions are important ones: (1) What do the constitutional guarantees to a jury trial, the beyond a reasonable doubt standard, a grand jury indictment in federal court, and due process in general really mean in the real world on sentencing?\(^ {307}\) (2) The Court informed us of our right to have every fact that constitutes every element proven beyond a reasonable doubt,\(^ {308}\) but what constitutes an element of a crime?\(^ {309}\) Apprendi and the line of cases both before and after it were the Court’s attempts to answer these questions, but it has had somewhat inconsistent results.\(^ {310}\)

In few places has the full force of Apprendi been felt more than in the federal drug statute, 21 U.S.C. § 841.\(^ {311}\) After Apprendi, some doubt existed in the courts of appeals as to how to apply it to § 841 and still remain true to other Supreme Court precedent.\(^ {312}\) However, most circuits came to agree that Apprendi applied whenever a finding of drug quantity or serious injury raised the sentence over the default maximums of § 841(b)(1)(C) or (D), but it did not apply when the maximum did not exceed the levels in those sections, even if a minimum was applied.\(^ {313}\) The Sixth Circuit, however, viewed Apprendi more expansively and applied it to situations where the range of sentences was in any way affected, even by a mandatory minimum.\(^ {314}\)

The Supreme Court’s decision in Harris seemingly settled the question of how to apply Apprendi to § 841.\(^ {315}\) By refusing to overrule McMillan, the Court clarified that Apprendi did not apply to mandatory minimums.\(^ {316}\) Thus, even the Sixth Circuit had to agree that Apprendi did not apply to § 841 unless the facts found by the

\(^ {306}\) See discussion supra Parts I-IV.
\(^ {307}\) See discussion supra Part I.
\(^ {309}\) See discussion supra Part I.
\(^ {310}\) See discussion supra Parts I-IV.
\(^ {311}\) See discussion supra Part II.B.
\(^ {312}\) See discussion supra Part II.B.
\(^ {313}\) See discussion supra Part II.B.1.
\(^ {314}\) See discussion supra Part II.B.2.
\(^ {315}\) See discussion supra Part IV.
\(^ {316}\) See discussion supra Part IV.
judge caused the elevation of the sentence above the default maximums.\textsuperscript{317} In the process, the Court in \textit{Harris} issued an opinion distinguishing two cases that the majority of the Court did not believe could be logically distinguished.\textsuperscript{318} Arguably, the Court has reduced \textit{Apprendi} to "meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate\textsuperscript{319}" by making "fine distinctions with regard to [a] vital constitutional libert[y]," which, in turn, could allow legislatures to avoid \textit{Apprendi}'s requirements "by clever statutory drafting."\textsuperscript{320}

\textit{Derrick Bingham}