

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM JOSEPH HARRIS,                   :

4                   Petitioner                   :

5                   v.                   :   No. 00-10666

6   UNITED STATES.                   :

7   - - - - -X

8                   Washington, D.C.

9                   Monday, March 25, 2002

10                   The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States at

12   11:03 a.m.

13   APPEARANCES:

14   WILLIAM C. INGRAM, ESQ., First Assistant Federal Public

15   Defender, Greensboro, North Carolina; on behalf of

16   the Petitioner.

17   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf

19   of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

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

Mr. Ingram.

ORAL ARGUMENT OF WILLIAM C. INGRAM  
ON BEHALF OF THE PETITIONER

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

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

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

1 other structurally and grammatically.

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

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

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

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

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

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

20 Likewise, in the case of Glover v. United  
21 States, which we do not cite in our brief -- that is at  
22 531 U.S. 198 -- the Court held, in the context of a  
23 challenge of ineffective assistance of counsel, that an  
24 additional guideline sentence under the Federal sentencing  
25 guidelines of anywhere from 6 to 21 months meets the

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

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

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

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

1 Doesn't it?

2 MR. INGRAM: I agree with that.

3 QUESTION: That's what Appendi is about.

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

11 MR. INGRAM: Yes. My understanding is that  
12 Appendi would cover the --

13 QUESTION: Both.

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

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

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

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

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

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

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

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

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



1 front of the jury.

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

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

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

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

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

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

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

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

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

12 QUESTION: Because of Apprendi.

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

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

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

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

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

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

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

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

4 QUESTION: Why?

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

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

15 QUESTION: But they may be unconstitutional  
16 under your theory.

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

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

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

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

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

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

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

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

4           MR. INGRAM: That's correct.

5           QUESTION: Or downward, anyway.

6           QUESTION: Oh, I see now.

7           QUESTION: Downward or upward? Or upward?

8           QUESTION: I said upward or downward.

9           QUESTION: I know. And he agreed.

10          (Laughter.)

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

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

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

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

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

1 MR. INGRAM: That is correct.

2 QUESTION: Suppose --

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

7 MR. INGRAM: Because that --

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

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

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

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

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

5 QUESTION: So --

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

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

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

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

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

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



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

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

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

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

13            MR. INGRAM: That's correct.

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

16            MR. INGRAM: That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. INGRAM: He is bound by that.

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

7 MR. INGRAM: Yes.

8 QUESTION: Okay.

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

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

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

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

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

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

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

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

1 QUESTION: No brandishing.

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

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

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

18 MR. INGRAM: That is correct.

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

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

25 QUESTION: But -- but the prosecution would be

1 entitled to a charge on a lesser included offense.

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

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

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

8 QUESTION: Well --

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

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

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

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

4           QUESTION: That -- that -- I --

5           QUESTION: -- which maybe we should reconsider.

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

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

16          QUESTION: I'm surprised at that.

17          QUESTION: But the appropriate sentence within  
18 his discretion.

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

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

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

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

11 QUESTION: So -- so --

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

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

18 MR. INGRAM: What we will have accomplished --

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

25 QUESTION: And if I can pile onto Justice



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

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

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

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

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

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

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

10 QUESTION: Very well, Mr. Ingram.

11 Mr. Dreeben, we'll hear from you.

12 ORAL ARGUMENT OF MICHAEL R. DREEBEN

13 ON BEHALF OF THE RESPONDENT

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

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

19 As a matter of statutory interpretation, the  
20 amended section 924(c) creates one crime with a minimum of  
21 5 years and a maximum of life in prison and then gives the  
22 sentencing court additional guidance as to where the  
23 penalty shall be set within that 5-year-to-life range.  
24 The increase in the mandatory minimums does not run afoul  
25 of the Apprendi rule and is, in fact, specifically

1       endorsed by this Court's decision in McMillan.

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

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

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

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

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

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

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

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

1 of judicial discretion within the otherwise applicable  
2 range.

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

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

20 MR. DREEBEN: It --

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

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

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

5                   MR. DREEBEN: If it's --

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

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

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

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

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

1 That's what the statute means.

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

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

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

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

25 QUESTION: So, Apprendi is just a draftsmanship

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

5 I'm sorry. For -- for this crime you get 1 to  
6 20, but if you brandish, you get -- you get 25.

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

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

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



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

7 By virtue of doing that, Congress envisioned  
8 that there would a spectrum of offenders under section  
9 924(c), some of whom are going to be at the bottom of the  
10 tier and are just the least worst offenders under that  
11 statute. They'll get 5 years. Others are going to be the  
12 worst of the worst. They are going to get a sentence that  
13 will be closer to the top of the statute. Within that  
14 range, Congress gave to the sentencing judge additional  
15 guide points of how to exercise that discretion. For  
16 someone who brandishes, that's a little worse than simply  
17 using; he should get at least 7 years. For someone who  
18 discharges -- that's an increment worse yet -- it's 10  
19 years.

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

1 QUESTION: So, if you tell the --

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

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

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

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

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

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

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

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

24 MR. DREEBEN: That's correct.

25 QUESTION: -- under the guideline.

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

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

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

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

25           That is precisely why we urge the Court to

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

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

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

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

25            The fact that that can happen shows, I think,

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

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

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

6           QUESTION: Is that the implication of Apprendi?

7           MR. DREEBEN: That is the --

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

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

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

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

1 the Court next month in the Cotton case.

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

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

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

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

21 MR. DREEBEN: The defense bar has been --

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

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



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

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

5 QUESTION: To get it expanded.

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

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

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

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

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

19           MR. DREEBEN: The Government could do that.

20           QUESTION: They could do it.

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

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

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

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

22           If there --

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

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

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

5 QUESTION: 3553.

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

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

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

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

1     that the initial look was unreliable.

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

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

22            Here not only do you not have that feature,  
23    because there was no Federal antecedent for section  
24    924(c), but you have the very important consideration that  
25    there's no constitutional doubt that should be applied to

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

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

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

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

24 QUESTION: Right.

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

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

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

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

1 is argue from the background baseline tradition.

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

10 Thank you.

11 QUESTION: Thank you, Mr. Dreeben.

12 Mr. Ingram, you have 3 minutes remaining.

13 REBUTTAL ARGUMENT OF WILLIAM C. INGRAM

14 ON BEHALF OF THE PETITIONER

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

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



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

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

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

1 at the top of a sentencing scheme would be.

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

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ingram.

13 The case is submitted.

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