No. 08-1569

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN and ARTHUR BURGESS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. RASHKIND
FRANCES H. PRATT
BRETT G. SWEITZER, Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut St., Ste. 540W
Philadelphia, PA 19106
(215) 928-1100

MARK OSLER
Counsel of Record
BAYLOR LAW SCHOOL
1114 S. University Park Dr.
Waco, TX 76798
(254) 710-4917

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many defendants who are subject to mandatory-minimum sentences such as those imposed in this case, and who will be directly affected by the Court's decision in this case.

SUMMARY OF ARGUMENT

Much of the briefing in this case addresses, quite appropriately, the question of whether 18 U.S.C. § 924(c)(1)(B)(ii) describes an "element of the offense" or a "sentencing factor." *Amicus* agrees with Respondents that this provision is an element of the offense, and that the case may be decided on that basis.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

However, even if § 924(c)(1)(B)(ii) is viewed as fitting the historical definition of a "sentencing factor" rather than an element of the offense, the operation of that enhancement in this case still violates the Sixth Amendment.

The first step toward this conclusion is recognizing that traditional sentencing factors based on judge-found facts *can be* in violation of the Sixth Amendment, despite the rule articulated in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which seems to effectively bar the application of the Sixth Amendment to the determination of sentencing factors. That rule, quite simply, cannot survive the decisions of this Court in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), both of which applied the Sixth Amendment to sentencing guideline systems that consisted entirely of what a *McMillan*-style analysis would view as sentencing factors. After *Blakely* and *Booker*, there can be no doubt that what *McMillan* viewed as sentencing factors can be found unconstitutional in the absence of jury rights.

Subsequent to *McMillan*, in *Harris v. United States*, 536 U.S. 545 (2002), a plurality of this Court effectively redefined "elements of the offense" to include those facts that set "the outer limits of a sentence," and would limit the operation of the Sixth Amendment to such "elements." 536 U.S. at 567. This redefinition did not garner a majority of the Court, however, and at any rate the rule that results from this redefinition is still punctured by *Blakely* and

Booker, both of which involved sentencing enhancements that did not fit even the expanded definition of "element" provided by the *Harris* plurality.

Once it is recognized that the Sixth Amendment may be implicated in the process of applying what *McMillan* views as sentencing factors, the question remains as to whether imposing the mandatory-minimum sentence applied in this case violates that Amendment. That question has already been answered once by the Court, though not in a unified manner. In *Harris*, five Justices (the four dissenting Justices, and Justice Breyer in his concurrence) set out their view that the mandatory-minimum provision at issue in that case cannot logically be distinguished from the statute at issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in terms of the operation of the Sixth Amendment. As Justice Thomas described in the *Harris* dissent, the harm to a defendant is the same whether an enhancement raises a maximum sentence or establishes a mandatory minimum, and that potential harm is one that should be accompanied by the protections of the Sixth Amendment. 536 U.S. at 580.

Finally, the granting of jury rights to those facing mandatory-minimum sentences would not be unduly burdensome to the administration of criminal justice. Unlike sentencing guidelines, which involve enhancements based on a multitude of factors, mandatory minimums (including the one at issue here) usually rest on the establishment of a single fact, which can easily be included in the indictment and either tried

to a verdict beyond a reasonable doubt or admitted by the defendant in the course of pleading guilty.

ARGUMENT

I. The assertion that sentencing factors cannot be subject to Sixth Amendment jury rights, a central proposition of *McMillan*, does not survive *Blakely* and *Booker*, and thus the Sixth Amendment can be applied to what *McMillan* described as sentencing factors.

The government contends that two decisions of this Court establish that statutory mandatory-minimum sentences do not violate the Sixth Amendment. Those cases, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (majority opinion) and *Harris v. United States*, 536 U.S. 545 (2002) (plurality opinion), seemingly set out a simple logic: mandatory-minimum provisions such as the one at issue here are sentencing factors (not elements), and because the Sixth Amendment does not require juries at sentencing, there can be no violation of the Sixth Amendment if these sentencing factors are determined by a judge rather than a jury.

Thus, *McMillan* (and the *Harris* plurality) turned on a relatively bright-line rule – elements of the offense are subject to the Sixth Amendment, while sentencing factors are not – leaving as the crucial question whether or not a particular factual

determination involved an element or a sentencing factor. Subsequent cases, however, have obliterated that line by applying the Sixth Amendment to what would be considered sentencing factors under *McMillan* (and the *Harris* plurality). In *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), the Court struck down two sentencing guideline systems. Because these guideline systems consisted entirely of what would have been considered sentencing factors under either *McMillan* or the *Harris* plurality, the Court has already made it very clear that the Sixth Amendment can be applied to sentencing factors.

A. *McMillan*'s dichotomy between elements and sentencing factors cannot be reconciled with the application of the Sixth Amendment to a sentencing guideline system in *Blakely*.

1. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)

McMillan involved a Sixth Amendment challenge to Pennsylvania's Mandatory Minimum Sentencing Act, which mandated five-year sentences where a defendant "visibly possessed a firearm" in the course of certain felonies. 477 U.S. at 81. The Court upheld Pennsylvania's sentencing scheme, finding that the enhancements provided therein were "sentencing factors" rather than "elements" of the offense, and thus did not have to be proven beyond a reasonable

doubt to the jury, as there is no right to a jury at sentencing. 477 U.S. at 93.

On the way to that outcome, the *McMillan* Court defined "elements" as those specific factors that are "included in the definition of the offense." 477 U.S. at 85. In turn, sentencing factors were everything else – that is, factual issues that are not necessary to conviction, but determine the severity of punishment. *Id.* at 86. Traditionally, elements were described in the penal code, while sentencing factors were not; rather, sentencing factors were the facts a judge might choose to focus on in choosing a sentence somewhere within the range of sentences available for the offense. If a jury convicted a defendant of robbery, for example, that meant that a jury had found each element of the offense. Subsequently, a judge could consider additional facts in order to pick a sentence that was allowed by statute – for example, she could give the statutory maximum because the defendant had nearly killed the victim.

The timing of *McMillan* is significant, because it makes this simple distinction between elements and sentencing factors more understandable, and yet less relevant to the present time. 1986 was the year before the federal sentencing guidelines came into effect, and the same year that Len Bias died at the University of Maryland and (in part as a result of Bias' death) the most onerous of the mandatory-minimum

provisions of 21 U.S.C. § 841(a) came into effect.[2] The development of the sentencing guidelines and the imposition of new mandatory-minimum sentences in narcotics cases played major roles in ushering federal sentencing into a new and more complex era, and one in which the dichotomy between elements and sentencing factors makes far less sense. In that simpler era, when juries convicted and judges then sentenced with broad discretion,[3] it is understandable how the *McMillan* Court could dispatch these issues in a few sentences.[4] The logic was swift and clean: "Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury

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[2] Len Bias was the University of Maryland basketball player whose death helped create political support for the harsh, mandatory crack cocaine sentences contained in the revised 21 U.S.C. § 841(a). Subsequently, crack cocaine cases under these provisions and the corresponding sentencing guidelines frequently were the vehicles by which this Court examined difficult sentencing issues. *See United States v. Booker*, 543 U.S. 220 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009).

[3] This evolution was well described in the plurality opinion in *Harris v. United States*, 536 U.S. 545, 558-59 (2002).

[4] The relevant discussion in *McMillan* is contained in a single paragraph, which begins by stating that the proffered conflict between mandatory sentencing and the Sixth Amendment merits "little discussion," which in itself distinguishes the legal landscape of 1986 from the post-*Blakely* world. 477 U.S. at 93.

sentencing, even where the sentence turns on specific findings of fact." 477 U.S. at 93.

2. *Apprendi v. New Jersey,* 530 U.S. 466 (2000)

Apprendi, in turn, considered a New Jersey statute that allowed for a sentence of between five and ten years for possession of a gun for an unlawful purpose. A second statute increased the statutory sentencing range to ten to twenty years if a judge found at sentencing that that purpose was to intimidate a member of a protected group. 530 U.S. at 468-69.

In defending its hate-crime statute, New Jersey in part pointed to *McMillan* and asserted that the aggravating factor (racial animus) was in fact nothing more than one way to phrase the traditional sentencing factor of motive, and that *McMillan* approved the finding of such sentencing factors by a judge rather than a jury. 530 U.S. at 492. The Court rejected this logic primarily on the first point, not the second. Specifically, the majority opinion clarified that what matters is not the technical distinction between an element and a sentencing factor ("labels do not afford an acceptable answer"), but the effect of the finding. 530 U.S. at 494. It would seem, then, that *Apprendi* represents a step away from the dichotomy between elements and sentencing factors that had been so clearly articulated in *McMillan* fourteen years earlier. Those fourteen years, not coincidentally, represented the period in which sentencing guidelines systems

came into effect at the federal level and in many states, and in which mandatory minimums became a more significant part of federal sentencing.

3. *Harris v. United States*, 536 U.S. 545 (2002)

Harris followed *Apprendi* by two years. The petitioner in *Harris* challenged the "brandishing" provision of 18 U.S.C. § 924(c), which increased the mandatory minimum to seven years (from five) if a judge found at sentencing that the defendant brandished a gun as opposed to simply having carried it.

A plurality of the Court upheld the statute. The split vote, however, resulted in a very limited holding. Five Members of the Court (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Breyer) voted to uphold the statute, but only four concluded that *Apprendi* applies only to factual determinations that set statutory maximums and not to those that establish mandatory minimums. Justice Breyer concurred in the judgment, but wrote separately to state that he could not easily distinguish *Apprendi* "from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion so far as it finds such a distinction." 536 U.S. at 569. Justice Breyer's concurrence was based, instead, on his conviction that *Apprendi* was wrongly decided and that *both* statutory maximums and mandatory minimums are properly set by judge-found sentencing factors. *Id*.

Justice Kennedy's plurality opinion accepted the *McMillan* dichotomy between elements and sentencing factors, even as it redefined "elements of an offense" beyond simply what a jury must find in order to convict. That redefinition is odd, strained, and seems to be far from the traditional understanding of "elements" that *McMillan* described: "Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." 536 U.S. at 567. Importantly, though, this redefinition is in Part III of Justice Kennedy's opinion, which did not gain Justice Breyer's support, and thus did not constitute a majority position. 536 U.S. at 572 (Breyer, J., concurring).

Because *McMillan*'s bright-line rule (based on what a statute directs a jury to find) constituted a majority position while *Harris*'s redefinition (expanded to include facts that set the outer limit of a sentence) did not, it is only the *McMillan* rule that has the force of precedent.

4. *Blakely v. Washington*, 542 U.S. 296 (2004)

Blakely addressed a challenge to the Washington Sentencing Reform Act, which established mandatory sentencing guidelines directing sentences beneath statutory maximums but within ranges that could be determined by judge-found facts. Ralph Blakely, for

example, pleaded guilty to a kidnapping charge with a statutory-maximum penalty of ten years. 542 U.S. at 299. Under Washington's sentencing guidelines, though, he faced a sentence (without enhancements) of forty-nine to fifty-three months. *Id.* However, Blakely could face a sentence above that range (but still below the statutory maximum) if the judge found a fact that justified such a departure. *Id.* The judge did find such a fact (that Blakely acted with deliberate cruelty), and sentenced him to ninety months, which was more than the presumptive guideline range but less than the statutory maximum. *Id.*

It was this sentencing scheme that the Court struck down in *Blakely*. In so doing, the Court rejected both the bright-line rule of *McMillan and* the view of the four-Justice *Harris* plurality that *Apprendi* applies only to enhancements (redefined there as "elements of the offense") that exceed otherwise-applicable statutory maximums. Blakely's enhancement, after all, was not an element of the offense of conviction and did not push his sentence above the statutory maximum.

What is most significant about *Blakely*, and the reason that the *McMillan* dichotomy between elements and sentencing factors falls in its wake, is that *Blakely* plainly ruled contrary to the central proposition of *McMillan* – that anything beyond an element of the offense is not subject to the Sixth Amendment. *Blakely* struck down a statute for its failure to require jury findings for what indisputably are sentencing factors under *McMillan*.

Though (as described above) the *Harris* redefinition of "elements" lacks the precedential force of *McMillan*, it, too, falls under the bare essence of what *Blakely* did. The *Harris* plurality would have the definition of "elements" include those facts that allow an otherwise-applicable statutory maximum to be exceeded, but *Blakely* stood firmly for the proposition that the Sixth Amendment is implicated even when statutory maximums are not affected.

After *Blakely*, it is clear that the Sixth Amendment can and will be applied to fact determinations that would have been categorized as "sentencing factors" under the *McMillan* bright-line definition, or even under the modified definition provided by the *Harris* plurality.

B. The merits opinion in *Booker*, on its face, shows that Sixth Amendment standards may be applied to what *McMillan* and the *Harris* plurality called sentencing factors.

Booker, of course, extended the rule of *Blakely* to the federal sentencing guidelines. It did so through two majority opinions: a merits opinion, holding that the then-current mandatory guidelines are unconstitutional in that they denied defendants their right to jury determinations of enhancement factors, and a remedial opinion, which effectively cured the problem by making the federal guidelines advisory rather than mandatory. At a basic level, *Booker* reiterated

the holding of *Blakely*, which had made it clear that the Sixth Amendment could apply to what would be "sentencing factors" under the definitions provided in both *McMillan* and the *Harris* plurality. Quite simply, *Booker* again struck down, under the Sixth Amendment, an entire system resting on factual determinations that would be categorized as "sentencing factors" under either *McMillan* or the *Harris* plurality, as these factors neither were part of the penal code definition of a crime, nor did they allow for statutory maximums to be exceeded.

Booker, though, constituted a more specific rejection of *McMillan* and the *Harris* plurality in the context of this case, because the guidelines rejected included the same factual determinations as at issue in *Harris*. *Harris* involved the enhancement under 18 U.S.C. § 924(c) for "brandishing" a weapon, and the guidelines found defective under *Booker* contain an enhancement for the same factor, under U.S.S.G. § 2B3.1(b)(2)(C) (providing increase of five offense levels if a firearm is "brandished" during a robbery). This factor, under the guidelines, affected the sentence but did not budge the statutory maximum, and thus did not meet the definition of "element" under the standard articulated by the *Harris* plurality. Quite directly, then, after *Booker*, it is clear that what were considered sentencing factors even under the expanded definition provided in the *Harris* plurality are now subject to Sixth Amendment analysis.

The bar to considering the Sixth Amendment implications of determinations that had been defined as sentencing factors is now gone. The only issue is whether or not the determination of fact at issue in this case does, in fact, violate the Sixth Amendment.

II. 18 U.S.C. § 924(c)(1)(B)(ii)'s requirement of a mandatory-minimum sentence based on judge-found facts violates the Sixth Amendment.

The question remains, then, whether the mandatory-minimum provision at issue in this case violates the Sixth Amendment. A majority of the Court has already opined (in *Harris*) that the Sixth Amendment's application to the statute in *Harris* (and in the similar mandatory-minimum provision at issue here) is indistinguishable from its operation in *Apprendi*. By that sound logic, the rule in *Apprendi* should be applied to the mandatory-minimum sentencing provision here, and jury rights required if that provision is to be constitutionally employed.

A. A majority of the Court has already concluded that the Sixth Amendment's application to the determination of facts establishing statutory maximums and mandatory minimums is indistinguishable.

Although five Members of the Court voted to uphold the statute at issue in *Harris*, only four (Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia) did so by distinguishing *Apprendi*. Justice Breyer, while concurring in the judgment, made it clear that he did so because he still rejected the *Apprendi* decision, and thought that judge-found facts should be permitted to both establish mandatory-minimum sentences and be used to exceed otherwise-applicable statutory maximum sentences. 536 U.S. at 569 (Breyer, J., concurring).

In so doing, Justice Breyer joined with the dissenters (Justices Thomas, Ginsburg, Stevens, and Souter) in concluding that *Apprendi* and *Harris* cannot be logically distinguished – in fact, Justice Breyer was quite clear in this, stating that he could not "agree with the plurality's opinion insofar as it finds such a distinction," *id.*, and declining to join the plurality in Part III of Justice Kennedy's opinion, which attempted to distinguish *Apprendi* from *Harris*. 536 U.S. at 572. Thus the dissenting view – that if *Apprendi* is good law, then the Sixth Amendment would bar mandatory minimums established by judge-found facts – had the support of five Justices.

In that dissenting opinion, Justice Thomas explained why the *Apprendi* logic also applies to mandatory minimums. Constitutional rights protect individuals, and the effect on an individual defendant is the same regardless of whether he is subject to a judge-found mandatory minimum or a sentence that may exceed an otherwise-applicable maximum sentence:

> Looking at the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum. In either case the defendant cannot predict the judgment from the face of the felony, see 530 U.S. at 478-479, and the absolute statutory limits of his punishment change, constituting an increased penalty. In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty.

536 U.S. at 579-80.

The intervening years have not weakened this logic. In *Booker*, this rationale for upholding and extending the jury right was reaffirmed, albeit without reference to mandatory minimums. Specifically, and importantly, the *Booker* merits opinion recognizes

that the jury right was demanded by the Framers of the Constitution at least in part out of a fear of "'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." 543 U.S. at 238-39 (*quoting* The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton)). The specter of judicial despotism is raised again when a judge, as here, can increase a sentence from five to 30 years by determining a fact, on her own, by a preponderance of the evidence. As five Members of the Court concluded in *Harris*, if *Apprendi* is taken as good law (as it has been in several cases since 2000), it must apply to mandatory minimums as well.

B. Requiring jury findings to determine facts establishing mandatory minimums would not unduly burden the administration of criminal law.

Unlike the Court's remedial choice in *Booker*, it is not possible to simply make mandatory minimums advisory, as their mandatory nature is their very essence. Thus, the probable remedy would be to require jury findings of any facts necessary to establish a mandatory minimum.

In *Booker*, the remedial opinion expressed great concern about the burdens that jury rights attached to guideline enhancements might impose on the

federal system of criminal justice.[5] 543 U.S. at 252-57. Those concerns are lessened when mandatory minimums are at issue, because there will usually be only a single fact to be considered, rather than the multitude of enhancement facts that are presented in almost any guidelines case. For example, in this case it would have been fairly simple for the government to have charged the circumstances that led to the enhancement applied against Respondents, and for the jury to have made findings on the matter.

Many States already provide an example of how an efficient system can accommodate jury findings for enhancements. Texas, for example, is hardly considered a defendant's paradise. However, Texas not only provides for a right to jury sentencing in all felony cases,[6] but directs that aggravating factors must be proven beyond a reasonable doubt. Apparently, it is possible to run a highly efficient criminal adjudication system while incorporating substantial jury rights relating to traditional sentencing factors. The comparatively small cost of providing such rights in the limited arena of mandatory minimums is far outweighed by the value to defendants and justice of

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[5] The merits opinion, in contrast, emphasized that " . . . the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly." 543 U.S. at 244.

[6] Tex. Code Crim. Pro. § 37.07; *Postell v. State*, 693 S.W.2d 462 (Tex. Ct. Crim. App. 1985) (*en banc*).

the long-overdue application of *Apprendi* to fact-based mandatory-minimum sentence determinations.

CONCLUSION

For the foregoing reasons, and for those set forth in the Respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL M. RASHKIND
FRANCES H. PRATT
BRETT G. SWEITZER, Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut St., Ste. 540W
Philadelphia, PA 19106
(215) 928-1100

MARK OSLER
Counsel of Record
BAYLOR LAW SCHOOL
1114 S. University Park Dr.
Waco, TX 76798
(254) 710-4917

Counsel for Amicus Curiae
National Association of Federal Defenders

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