

The Burger Court Opinion Writing Database

McMillan v. Pennsylvania

477 U.S. 79 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 27, 1986

85-215 - Dynel McMillan, Lorna Peterson, James
Dennison and Harold L. Smalis v. Pennsylvania

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 11, 1986

No. 85-215

McMillan v. Pennsylvania

Dear Thurgood, Harry and John,

We four are in dissent in the
above. Would you, John, be willing to
try it?

Sincerely,



Justice Marshall

Justice Blackmun

Justice Stevens

82 11 11

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1986

No. 85-215

McMillan v. Pennsylvania

Dear Thurgood,

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to be the name "Bill".

Justice Marshall

Copies to the Conference

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2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 31, 1986

85-215 - McMillan v. Pennsylvania

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 27, 1986

Re: No. 85-215 - McMillan v. Pennsylvania

Dear Bill:

I await the dissent.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1986

Re: No. 85-215-McMillan v. Pennsylvania

Dear John:

I do not think that extended discussion of Patterson v. New York is necessary in this case, and cannot join your opinion. I will write a brief dissent.

Sincerely,

T.M.
T.M.

Justice Stevens

cc: Justice Brennan

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[June —, 1986]

JUSTICE MARSHALL, dissenting.

I agree with much in JUSTICE STEVENS' dissent, *post*, at —. Whether a particular fact is an element of a criminal offense that, under *In re Winship*, 397 U. S. 358 (1970), must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States. “[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law.” *Mullaney v. Wilbur*, 421 U. S. 684, 698 (1975). The deference that the majority gives to the Pennsylvania legislature's statement that the visible possession of a firearm should not be considered an element of the crime defined by 42 Pa. Cons. Stat. § 9712 (1982) is thus wholly inappropriate.

I would not, however, rely on the formalistic distinction between aggravating and mitigating facts. The “continued functioning of the democratic process,” *post*, at — (JUSTICE STEVENS, dissenting), might provide us with some assurance that States will not circumvent the guarantee of *Winship* by criminalizing seemingly innocuous conduct and then placing the burden on the defendant to establish an affirmative defense, *id.*, at —. But this Court nonetheless must remain ready to enforce that guarantee should the

STYLISTIC CHANGES THROUGHOUT *A*

P. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[June —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,
dissenting. *)*

I agree with much in JUSTICE STEVENS' dissent, *post*, at —. Whether a particular fact is an element of a criminal offense that, under *In re Winship*, 397 U. S. 358 (1970), must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States. “[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law.” *Mullaney v. Wilbur*, 421 U. S. 684, 698 (1975). The deference that the majority gives to the Pennsylvania legislature's statement that the visible possession of a firearm should not be considered an element of the crime defined by 42 Pa. Cons. Stat. §9712 (1982) is thus wholly inappropriate.

I would not, however, rely on the formalistic distinction between aggravating and mitigating facts. The “continued functioning of the democratic process,” *post*, at — (JUSTICE STEVENS, dissenting), might provide us with some assurance that States will not circumvent the guarantee of *Winship* by criminalizing seemingly innocuous conduct and then placing the burden on the defendant to establish an affirmative defense, *post*, at —. But this Court nonetheless

f. i

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[June —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and
JUSTICE BLACKMUN join, dissenting.

I agree with much in JUSTICE STEVENS' dissent, *post*, at
—. Whether a particular fact is an element of a criminal
offense that, under *In re Winship*, 397 U. S. 358 (1970), must
be proved by the prosecution beyond a reasonable doubt is a
question that must be decided by this Court and cannot be
abdicated to the States. "[I]f *Winship* were limited to those
facts that constitute a crime as defined by state law, a State
could undermine many of the interests that decision sought to
protect without effecting any substantive change in its law."
Mullaney v. Wilbur, 421 U. S. 684, 698 (1975). The defer-
ence that the majority gives to the Pennsylvania legislature's
statement that the visible possession of a firearm should not
be considered an element of the crime defined by 42 Pa.
Cons. Stat. § 9712 (1982) is thus wholly inappropriate.

I would not, however, rely in this case on the formalistic
distinction between aggravating and mitigating facts. The
"continued functioning of the democratic process," *post*, at
— (JUSTICE STEVENS, dissenting), might provide us with
some assurance that States will not circumvent the guarantee
of *Winship* by criminalizing seemingly innocuous conduct and
then placing the burden on the defendant to establish an af-
firmative defense, *post*, at —. But this Court nonetheless

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

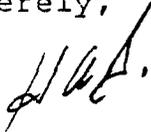
June 16, 1986

Re: No. 85-²¹⁵~~125~~, McMillan v. Pennsylvania

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

P.S. (for Justice Marshall only): It is my understanding that you will be willing to add the three words "in this case" after the word "rely" in the first line of the second paragraph on page 1. This enables me to keep my options open when Martin v. Ohio is before us next Term.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 27, 1986

85-215 McMillan v. Pennsylvania

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS, PETI-
TIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[March —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the constitutionality, under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (the Act).

I

The Act was adopted in 1982. It provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. At the sentencing hearing, the judge is directed to consider the evidence introduced at trial and any additional evidence offered by either the defendant or the Commonwealth. § 9712(b).¹ The Act operates to divest

¹ Section 9712 provides in full:

"(a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C. S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C. S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: Justice Rehnquist

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[April —, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the constitutionality, under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (the Act).

I

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¹ Section 9712 provides in full:

"(a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C. S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C. S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

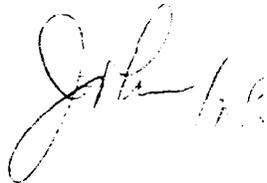
March 11, 1986

Re: 85-215 - McMillan v. Pennsylvania

Dear Bill:

I will be happy to try my hand at the dissent in
this case.

Respectfully,



Justice Brennan

cc: Justice Marshall
Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 27, 1986

Re: 85-215 - McMillan v. Pennsylvania

Dear Bill:

As soon as I can get to it, I will be writing in dissent in this case.

Respectfully,



Justice Rehnquist

Copies to the Conference

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[May —, 1986]

JUSTICE STEVENS, dissenting.

Petitioner Dennison, a 73 year old man, committed an aggravated assault upon a neighborhood youth whom he suspected of stealing money from his house. After a trial at which the Commonwealth proved the elements of the offense of aggravated assault beyond a reasonable doubt, the trial judge imposed a sentence of imprisonment of 11 1/2 to 23 months. Because he had concluded that Pennsylvania's recently enacted Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), was unconstitutional, the trial judge refused to impose the five year minimum sentence mandated by that Act whenever the Commonwealth proves—by a preponderance of the evidence—that the defendant “visibly possessed a firearm during the commission of the offense,” *id.*, § 9712(b).

The judge presiding over Dennison's trial, as well as the judges in the other three petitioners' trials and the superior court judges hearing the appeals, all concluded that visible possession of a firearm was an element of the offense. “‘Visibly possessed a firearm’ is inarguably language which refers to behavior which the legislature intended to prohibit.” App. to Pet. for Cert. A35. As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt. The Pennsylvania Supreme Court agreed that

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-215

DYNEL McMILLAN, LORNA PETERSON, JAMES J.
DENNISON AND HAROLD L. SMALLS,
PETITIONERS *v.* PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[June —, 1986]

JUSTICE STEVENS, dissenting.

Petitioner Dennison, a 73 year old man, committed an aggravated assault upon a neighborhood youth whom he suspected of stealing money from his house. After a trial at which the Commonwealth proved the elements of the offense of aggravated assault beyond a reasonable doubt, the trial judge imposed a sentence of imprisonment of 11½ to 23 months. Because he had concluded that Pennsylvania's recently enacted Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), was unconstitutional, the trial judge refused to impose the 5-year minimum sentence mandated by that Act whenever the Commonwealth proves—by a preponderance of the evidence—that the defendant “visibly possessed a firearm during the commission of the offense,” § 9712(b).

The judge presiding over Dennison's trial, as well as the judges in the other three petitioners' trials and the superior court judges hearing the appeals, all concluded that visible possession of a firearm was an element of the offense. “Visibly possessed a firearm” is inarguably language which refers to behavior which the legislature intended to prohibit.” App. to Pet. for Cert. A35. As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt. The Pennsylvania Supreme Court agreed that

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

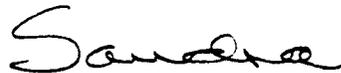
March 7, 1986

No. 85-215 McMillan v. Pennsylvania

Dear Chief,

My vote in this case is to affirm, but on very narrow grounds. Our precedents are far from clear and there is a potential for great mischief here if too much latitude is given.

Sincerely,



The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 27, 1986

No. 85-215 McMillan v. Pennsylvania

Dear Bill,

Please join me.

Sincerely,

Justice Rehnquist

Copies to the Conference

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