

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-215

TITLE DYNEE McMILLAN, LORNA PETERSON, JAMES J. DENNISON AND  
HAROLD L. SMALLS, Petitioners V. PENNSYLVANIA

PLACE Washington, D. C.

DATE March 4, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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DYNEL McMILLAN, LORNA PETERSON, :  
JAMES J. DENNISON AND HAROLD :  
L. SMALLS, :

Petitioners, :

V. : No. 85-215

PENNSYLVANIA :

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Washington, D.C.

Tuesday, March 4, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:48 o'clock p.m.

APPEARANCES:

LEONARD N. SOSNOV, ESQ., Philadelphia, Pennsylvania; on  
behalf of Petitioners.

STEVEN J. COOPERSTEIN, ESQ., Assistant District Attorney  
of Philadelphia County, Philadelphia, Pennsylvania,  
on behalf of Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Sosnov, you may  
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF LEONARD N. SOSNOV, ESQ.,  
5 ON BEHALF OF THE PETITIONERS

6 MR. SOSNOV: Mr. Chief Justice, and may it  
7 please the Court:

8 The principal issue before this Court is  
9 whether Pennsylvania's Mandatory Sentencing Act violates  
10 due process of law because it provides for proof by only  
11 a preponderance of the evidence of the legislatively  
12 specified defense-related facts which require the  
13 imposition of a mandatory sentence of imprisonment.

14 The Mandatory Act provides that if a defendant  
15 is convicted of one of the numerated list of felonies,  
16 the Commonwealth may give notice of its intention to  
17 proceed under that act rather than Pennsylvania's  
18 discretionary sentencing scheme.

19 QUESTION: Do you suggest that that particular  
20 provision goes to anything other than the sentence, the  
21 penalty?

22 MR. SOSNOV: Yes. This type of sentencing  
23 scheme is totally different from any other type of  
24 nonmandatory sentencing scheme. In fact, the proceeding  
25 under the Pennsylvania Mandatory Sentencing Act is



1 essentially a trial. There is only one issue at that  
2 proceeding. The Commonwealth gives notice of its  
3 intention to proceed under the Act. A hearing is  
4 required by the Act. At that hearing there is but one  
5 issue, the same issue that is normally at a criminal  
6 trial, and the issue is did the defendant commit the  
7 prohibited conduct which the state wishes to punish? In  
8 this case, the question is did defendant visibly possess  
9 a firearm during the commission of criminal activity.

10 At that hearing, the Commonwealth has the  
11 burden of proof by only a preponderance of the  
12 evidence. If the Commonwealth establishes the facts by  
13 a preponderance of the evidence, a sentence of  
14 imprisonment of five to ten years must follow.

15 QUESTION: I think what the Chief Judge is  
16 driving at, if the arm, the pistol was in evidence at  
17 the trial itself and was Exhibit A, what more do you  
18 need?

19 MR. SOSNOV: As a matter of state law --

20 QUESTION: Yes.

21 MR. SOSNOV: If at the trial the pistol was  
22 exhibited in evidence, and even if defendant was  
23 convicted of an offense such as possession of an  
24 instrument of a crime, it is irrelevant under this  
25 statutory scheme. This statutory scheme is set up so

1 that the hearing is held separately, and that if a  
2 defendant --

3 QUESTION: Well what hearing do you need more  
4 than to look at the pistol?

5 MR. SOSNOV: Justice Marshall, we would not be  
6 here, we would have no complaint if in fact the factual  
7 determinations, visible possession of a firearm during  
8 the commission of an offense, had to be proven beyond a  
9 reasonable doubt at trial and that defendant had a right  
10 to a jury trial. The deficiency with this statute is  
11 that those factual determinations do not have to be made  
12 at trial, and that defendant --

13 QUESTION: Well, suppose the jury in a special  
14 verdict said he did shoot the man, he did rob the man  
15 with a pistol?

16 MR. SOSNOV: If the jury was given, under  
17 Pennsylvania procedure --

18 QUESTION: Yes.

19 MR. SOSNOV: -- special interrogatories that  
20 provided the question: did the defendant visibly  
21 possess a firearm during the commission of the offense,  
22 and the jury was instructed you must find that beyond a  
23 reasonable doubt, defendant had a right to a jury  
24 determination of that under Pennsylvania law, there  
25 would be no constitutional claim.

1 QUESTION: Did you ask for that instruction?

2 MR. SOSNOV: We could not ask for that  
3 instruction. The Act is clear.

4 QUESTION: You could not?

5 MR. SOSNOV: We could not because the Act is  
6 clear. As a matter of state law --

7 QUESTION: Well, wait a minute, wait a minute  
8 now. The First Amendment, if nothing else, would  
9 guarantee you the right to make any objection you wanted  
10 to. The statute has nothing to do with that. The  
11 statute might control how the judge would rule, but it  
12 would have nothing to rule with what kind of an  
13 objection you could make to raise it. And for all you  
14 know, the judge might have said that he was going to  
15 read the statute that way.

16 MR. SOSNOV: If the judge did that, he would  
17 be violating state law. In other words, the judge would  
18 be making rulings that were directly contrary to what is  
19 required by this statute. This statute is very  
20 specific. It states the applicability of this section  
21 is to be determined at sentencing, so that if the judge  
22 decided on his own I want to have this determination  
23 made at trial, I want all four of the factual issues  
24 determined at trial: did the defendant possess a  
25 firearm visibly during the commission of an offense, if

1 I wanted to do that at trial, a judge would be violating  
2 state law.

3 The reason we are here is because this --

4 QUESTION: You would still, you would still  
5 have to make the determination at sentencing, I take it,  
6 under state law, even if the judge went ahead and  
7 wrongly decided he would also find it at the trial.

8 MR. SOSNOV: Not only that, the finding at  
9 trial would be irrelevant and nonbinding because the Act  
10 is clear that the procedure is one to take place at  
11 sentencing, and that the burden of proof is by only a  
12 preponderance of the evidence. That's why the verdicts  
13 are irrelevant at trial.

14 In fact, there was a recent case -- it is not  
15 in my brief. It was just reported last week,  
16 Commonwealth v. Storn, at 502 Atlantic 2d, 215, a  
17 Superior Court case where defendant pled guilty to  
18 robbing a bank at gunpoint and the judge proceeded to  
19 impose the mandatory sentence of five to ten years. The  
20 Superior Court reversed because the Superior Court held  
21 that under this statutory scheme, the defendant was  
22 denied the hearing at sentencing where either side could  
23 present evidence, and the determination as to be made  
24 whether there was proof by a preponderance of the  
25 evidence.



1           We would have no complaint if this statute,  
2 like all the other statutes across this country, I have  
3 attached as appendixes to my brief, the way this is  
4 normally done in every state in this country, the way it  
5 has always been done, when this factual determination  
6 determines a more severe punishment, proof beyond a  
7 reasonable doubt is required, and it doesn't matter what  
8 form such a statute takes, whether it is explicitly an  
9 element of the offense, such as an armed robbery  
10 statute, or whether it's a separate offense, such as a  
11 prohibition against committing a felony with a firearm,  
12 or whether it's part of a penalty provision, for  
13 example, Section 924 of Title 18 of the U.S. Code that's  
14 entitled "Penalties," and it provides for increased  
15 punishment if a defendant committed an offense with a  
16 firearm. Under all these kinds of statutes,  
17 historically and consistently it's been recognized proof  
18 beyond a reasonable doubt is required, and that's  
19 because this is an essential, critical fact in the  
20 manner in which the crime was committed which in the  
21 eyes of the legislature, the legislature has determined  
22 makes the offense more serious and which makes the  
23 penalty for the offense more serious.

24           Pennsylvania and New Jersey, which has passed  
25 a similar act, stand alone. These are the only two

1 states in this country that have ever had this  
2 legislatively specified factual determination and not  
3 required proof beyond a reasonable doubt. They require  
4 proof by only a preponderance of the evidence.

5 As I said, they stand alone.

6 In each of the cases before this court, there  
7 was no hearing held pursuant to the Mandatory Sentencing  
8 Act because after the Commonwealth gave notice of its  
9 intention to proceed under the act, the lower court  
10 judges held the act unconstitutional.

11 QUESTION: May I ask this question?

12 Do you agree that each of your petitioners was  
13 lawfully convicted of the offenses for which they were  
14 charged?

15 MR. SOSNOV: Yes, they were lawfully convicted  
16 for the offenses which they were charged with.

17 QUESTION: So you are only debating the  
18 enhancement of the sentence?

19 MR. SOSNOV: I am only debating the  
20 application of the Mandatory Sentencing Act, that that  
21 act is unconstitutional.

22 QUESTION: And is it not a fact that each of  
23 the petitioners could have been sentenced to more than  
24 the mandatory add-on sentence if the Court had so  
25 decided?

1 MR. SOSNOV: No. As a matter of fact, as to  
2 three of the four defendants, under the discretionary  
3 sentencing scheme, the sentence of five to ten years in  
4 prison mandated by this act is the maximum for that  
5 offense, and for one of the defendants, the maximum  
6 penalty was greater than five to ten years.

7 What they have lost, of course, under a scheme  
8 like this is they have lost the opportunity for a much  
9 lesser sentence, and there's nothing wrong with a state  
10 having a mandatory sentencing act.

11 QUESTION: How would they -- how would they  
12 get that, by proving that there was no firearm  
13 involved?

14 MR. SOSNOV: To get a lesser sentence? The  
15 defendant would not have that burden. Normally --

16 QUESTION: No, since the state was claiming  
17 it, would -- if I win a defense, he would be free, or  
18 they, any one of them would be free to show that there  
19 was no firearm involved.

20 MR. SOSNOV: Any defendant would be free in  
21 any criminal prosecution to cite, to prove anything, but  
22 the question here I believe is what burden of proof the  
23 state has to meet to provide for a more severe  
24 punishment.

25 In effect here, what Pennsylvania has done is

1 create two classes of felonies. Right now, aggravated  
2 assault, for example, carries one punishment while  
3 aggravated assault with a firearm carries a more severe  
4 punishment. That is exactly what has been done here.

5 I have set it forth in a table in my reply  
6 brief. The penalties are vastly different now for  
7 whether you commit an offense with a firearm or without  
8 a firearm.

9 QUESTION: Well, Mr. Sosnov, you take the  
10 position that the due process clause requires the  
11 invalidation of this scheme, right?

12 MR. SOSNOV: That is correct.

13 QUESTION: What is the defendant were to be  
14 sentenced by a judge who simply takes the position that  
15 if somebody commits an assault with a firearm, by gum,  
16 I'm going to give him five years? Is that a violation  
17 of due process because the judge determines that for  
18 himself and imposes the sentence?

19 MR. SOSNOV: Do you mean under a discretionary  
20 scheme, Justice O'Connor?

21 QUESTION: Sure.

22 MR. SOSNOV: It would depend on how that  
23 arose. If a judge took it on his own under a  
24 discretionary scheme to in every case, ignoring all the  
25 individual circumstances of the case, the background and



1 character of the defendant, the other factors concerning  
2 the crime, and the judge said in every case that comes  
3 before me where defendant possesses a gun, I'm going to  
4 impose five to ten years imprisonment, that would be an  
5 abuse of discretion. That's been held by -- it will be  
6 reversible on --

7 QUESTION: If he says at least five years.

8 MR. SOSNOV: If he says, if he isolated the  
9 one factor and ignored his duty to consider all the  
10 discretionary factors, he would be committing an abuse  
11 of discretion. It would be reversible on that ground,  
12 and additionally, it may be a violation of due process  
13 of law because, in effect, he'd be ignoring the state's  
14 discretionary sentencing scheme.

15 The difference, I think the key difference  
16 between a scheme like this --

17 QUESTION: Mr. Sosnov, in these cases do we  
18 know what sentences would have been imposed apart from  
19 the mandatory statute?

20 MR. SOSNOV: Yes, we do, because each of the  
21 defendants in this case, because the lower court judge  
22 concluded that the Mandatory Act was unconstitutional,  
23 in each of these cases the judge imposed a sentence  
24 based on the discretionary scheme. We have sentences  
25 here ranging from 11 1/2 to 23 months imprisonment on

1 the low end, to four to eight years. Each of the four  
2 defendants has received a sentence below that mandated  
3 by the Mandatory Sentencing Act.

4           The essential difference between a  
5 discretionary sentencing scheme where a judge considers  
6 a whole host of factors, indeed, must in deciding on a  
7 proper sentence to impose, and this sentencing scheme,  
8 is it is nothing like these other sentencing schemes.  
9 It is simply like a trial. There is only one issue.  
10 The issue is did the defendant commit the prohibited  
11 conduct? In essence, what Pennsylvania has done here is  
12 they have set up a bifurcated trial proceeding. You  
13 first determine at trial, for purpose of this act,  
14 beyond a reasonable doubt did the defendant commit a  
15 robbery, and then you take the tradition element of the  
16 offense, was he armed, and you determine that after  
17 trial by a preponderance of the evidence.

18           That is all that has happened here. Once we  
19 get beyond the label of sentencing, it's a lot like the  
20 Winship case. In Winship there was a claim it's a  
21 juvenile adjudication. It's only civil. Therefore  
22 there's no need for the reasonable doubt standard, and  
23 what this Court did is it examined the operation of the  
24 statute, and the operation of the adjudicatory scheme  
25 for juveniles was that a juvenile was accused of

1 committing conduct which the state wished to punish,  
2 essentially a criminal act. And if those facts were  
3 found, if those facts were established, then confinement  
4 could result as a proof of those facts.

5 That is exactly what we have here. We have  
6 only one issue at this hearing, the issue, did he do  
7 it? Did he commit the conduct the state wishes to  
8 punish? And if in fact those facts were established,  
9 the Judge has no choice, the inevitable consequences  
10 follow just like at a trial, five to ten years  
11 imprisonment.

12 If in fact in a situation like this the  
13 constitutional line is not drawn here and Pennsylvania  
14 is permitted to do this, Pennsylvania and New Jersey,  
15 aside from the whole trend of our jurisprudence, there  
16 is really no place to draw the constitutional line  
17 because in essence, and in Mullaney v. Wilbur, this  
18 Court emphasized this, this Court emphasized the problem  
19 that a state might take the traditional element of the  
20 offense, the state might transpose that traditional  
21 element of the offense into a sentencing statute where  
22 it had the exact same effect on the defendant.

23 QUESTION: Well, counsel, what if in this case  
24 the elements of the crime had not included committing it  
25 with a gun and at the sentencing stage the judge says,

1 well, I notice in the probation report here that you had  
2 a gun when you committed this assault, and I always take  
3 that into consideration in sentencing someone, so I am  
4 giving you three years instead of six months, would that  
5 be a violation of anything in the federal Constitution?

6 MR. SOSNOV: The judge, as long as the judge  
7 did his duty, as I responded before to Justice  
8 O'Connor's question, as long as the judge did his duty,  
9 considering all the factors, he certainly could consider  
10 this factor, and the difference between a proceeding  
11 like that and this proceeding is there are no  
12 legislatively specified facts which have to be  
13 determined by the judge and which have inevitable  
14 consequences which follow.

15 As this Court said in *Bullington v. Missouri*,  
16 in both the majority opinion and the dissenting opinion,  
17 the normal sentencing proceeding is not a search for  
18 facts. It is a question of looking at the character of  
19 the defendant, his conduct, his past background, and  
20 meting out just desserts, considering a whole host of  
21 factors.

22 QUESTION: Well, aren't those facts? Aren't  
23 all those factors facts?

24 MR. SOSNOV: That's right, but the process is  
25 completely different because the process, unlike a



1 trial, the process is not a search for legislatively  
2 defined issues, and they don't have inevitable  
3 consequences which follow just like at a trial. In  
4 other words, to impose -- if this Court, for example,  
5 said there must be proof beyond a reasonable doubt for  
6 every fact at a sentencing proceeding, that wouldn't  
7 make much sense for a lot of reasons. One reason is it  
8 would be impractical. In other words, in every  
9 sentencing proceeding, the factors that a judge  
10 considers in the characterization of the defendant will  
11 vary. There will be a whole host of different factors  
12 in every sentencing proceeding. It would be impractical  
13 to have a minitrial on each fact, each incidental fact  
14 which went into a judge's consideration of sentencing.

15 Again, it would be impractical to have a  
16 shifting burden of proof to examine every sentencing  
17 hearing, look at that sentencing hearing and decide,  
18 well, on this sentencing hearing I've got --

19 QUESTION: I know you answered it a little  
20 while back, but just once again, this trial, a gun is in  
21 evidence, is Exhibit A, there are 87 witnesses that  
22 testify that he held up the person with the gun, and the  
23 jury finds that he held up the person with the gun, my  
24 only question now is what evidence could he give to save  
25 himself?

1 MR. SOSNOV: In some cases, obviously unless  
2 we had this hearing where a preponderance of the  
3 evidence was the standard, the separate hearing, in some  
4 cases defendant is going to lose. In other words --

5 QUESTION: Well, I mean -- just give me the  
6 evidence that any person you can imagine would give.

7 MR. SOSNOV: In that particular situation?

8 QUESTION: Yes.

9 MR. SOSNOV: I would think if he wanted to he  
10 might come up with some countervailing evidence, but he  
11 would probably lose, but that's true with any burden of  
12 proof.

13 QUESTION: But you agree, you agree there was  
14 no way he could escape being said to have had the gun.

15 MR. SOSNOV: There would be --

16 QUESTION: Is there any way?

17 MR. SOSNOV: In that hypothetical, in that  
18 hypothetical, it would be very difficult, even if the  
19 proof burden was beyond a reasonable doubt, for that  
20 defendant to have a chance of prevailing and winning at  
21 it.

22 QUESTION: Well, what good would the hearing  
23 do?

24 MR. SOSNOV: The same, Justice Marshall --

25 QUESTION: I mean, I've given you whatever

1 hypothetical you could imagine.

2 MR. SOSNOV: Justice Marshall, but the same --  
3 I think the problem with that hypothetical is the same  
4 hypothetical could be given for trial. In other words,  
5 a man approaches trial and there are 87 witnesses who  
6 say they saw him commit a robbery, that he visibly  
7 possessed a firearm and he committed a robbery, 87  
8 witnesses, the defense has no witnesses to offer, would  
9 this Court, if the jury was charged or state law  
10 provided that a conviction could be by preponderance of  
11 the evidence, this Court would not tolerate that.

12 It's not a question of retrospectively looking  
13 back at the facts in a particular case and saying in  
14 that particular case what would have been that  
15 defendant's chances of winning at a higher standard of  
16 proof. The burden of proof regulates --

17 QUESTION: I understood, I understood Justice  
18 Marshall's question to be directed at in the second  
19 hearing, what would you provide to offset the evidence  
20 in the case in chief?

21 MR. SOSNOV: That will vary from case to  
22 case.

23 QUESTION: Well, take this case, then.

24 MR. SOSNOV: I will take, for example, in Mr.  
25 McMillan's case, given this statutory framework, in Mr.

1 McMillan's case, Mr. McMillan was convicted at trial of  
2 aggravated assault, of shooting another individual. He  
3 was tried by a jury. There was one witness against Mr.  
4 McMillan at trial, and that witness had a criminal  
5 record, and that witness first told the police, I don't  
6 know who shot me. He was the sole witness against Mr.  
7 McMillan, the jury was out quite a long time. Mr.  
8 McMillan wanted to testify at trial that he didn't do  
9 it, but because he, too, had a criminal record and the  
10 judge ruled that the criminal record would be admissible  
11 at the trial, Mr. McMillan decided not to testify at  
12 trial.

13 Mr. McMillan at sentencing again said he  
14 didn't do it. Mr. McMillan had had a separate hearing,  
15 a hearing with a burden of proof by more than  
16 preponderance of the evidence, a burden of proof beyond  
17 a reasonable doubt, Mr. McMillan may indeed prevail  
18 before the judge at that hearing. In other words, the  
19 judge could be faced with conflicting versions of the  
20 same event by two different people.

21 QUESTION: Well, in order to do that, would  
22 the judge have to say I was wrong in convicting you?

23 MR. SOSNOV: No.

24 QUESTION: Well, how could he?

25 MR. SOSNOV: First of all --



1 QUESTION: He's going to say one, he had a  
2 gun, another time he didn't have one?

3 MR. SOSNOV: In this, in this, Mr. McMillan's  
4 case, the jury was the factfinder, so the judge did not  
5 find the facts. And Pennsylvania law has provided that  
6 indeed that's the procedure. The procedure is that at  
7 the hearing there is a separate determination, and at  
8 that separate determination, either side shall present  
9 whatever evidence they wish to offer.

10 QUESTION: If we rule with you, what outcome  
11 will you and your clients get other than a hearing?

12 MR. SOSNOV: If you rule our way, our clients  
13 will be sentenced as they are pursuant to a valid,  
14 discretionary sentencing scheme.

15 QUESTION: They would still go to jail.

16 MR. SOSNOV: They've all gone to jail.

17 QUESTION: Yes.

18 MR. SOSNOV: They've all gone to jail. We  
19 have no complaint about them going to jail.

20 QUESTION: Well, would you give them --

21 MR. SOSNOV: We are asking that they be  
22 sentenced pursuant to a valid discretionary scheme  
23 rather than a constitutionally invalid scheme, and in  
24 this Court in Hicks v. Oklahoma said that defendant  
25 certainly has a due process liberty interest in being

1 sentenced pursuant to a valid discretionary scheme.

2 QUESTION: Well, isn't what you want a -- you  
3 want this second hearing all over with a different  
4 burden of proof?

5 MR. SOSNOV: It does not have to be a second  
6 hearing. Every state in this country -- we are not  
7 asking for two trials with a jury.

8 QUESTION: You don't want a hearing with the  
9 burden of proof beyond a reasonable doubt?

10 MR. SOSNOV: We are saying that Pennsylvania  
11 does not have to do it as a second hearing with proof  
12 beyond a reasonable doubt and a jury trial; Pennsylvania  
13 can provide that all this be done at trial. In other  
14 words, if Pennsylvania provides that proof beyond a  
15 reasonable doubt of visible possession of a firearm  
16 during the commission of the offense is to be determined  
17 by the jury trial, like --

18 QUESTION: But that isn't what Pennsylvania  
19 did. So what Pennsylvania wants done is to have it done  
20 at the sentencing hearing.

21 MR. SOSNOV: But a lower burden of proof and  
22 without a jury trial, and that's why it is violating the  
23 Constitution.

24 QUESTION: You started your argument, Mr.  
25 Sosnov, with the assertion that, well, this only

1 involves Pennsylvania and New Jersey, but what about the  
2 states that require by legislative action that  
3 restitution be ordered to victims of crimes where  
4 there's been a pecuniary loss, and that the sentencing  
5 judge determine by a preponderance of the evidence how  
6 much is to be repaid by the defendant in restitution,  
7 would your argument reach those cases as well? Would  
8 that be invalid?

9 MR. SOSNOV: I don't believe -- I don't  
10 believe it would be governed because --

11 QUESTION: Why? It's a legislatively mandated  
12 fact that has severe consequences for the defendant.

13 MR. SOSNOV: For one, it does not have the  
14 legislatively mandated deprivation of liberty that is  
15 involved in this case.

16 QUESTION: Well, what about --

17 QUESTION: It might have if he doesn't pay  
18 what's ordered, off he goes to jail.

19 QUESTION: What about, and what about the  
20 enhancements for repeaters?

21 MR. SOSNOV: That I think presents separate  
22 issues because it is not offense related.

23 QUESTION: Well, at sentencing some states  
24 impose the enhanced -- determine whether he's a repeater  
25 at the sentencing, a separate hearing by a judge.

1 MR. SOSNOV: I think there are key differences  
2 there, and that is that this Court has always held, in  
3 Winship, in Millaney, that proof beyond a reasonable  
4 doubt is required for offense related facts, the  
5 question what did he do, what offense did he commit.  
6 Historical facts such as his background, his prior  
7 record, have always been recognized as sentencing  
8 determinations.

9 We have no risk in that situation of the state  
10 taking elements of the offense and putting them in a  
11 statute at a lesser burden of proof. There's an  
12 entirely different set of circumstances because, as this  
13 Court recognized in Oyler v. Boles, whether somebody is  
14 a recidivist is essentially independent of the crime  
15 which the defendant is accused of committing which the  
16 state is trying to punish.

17 With the Court's permission, I would like to  
18 reserve my remaining time for rebuttal.

19 Thank you.

20 CHIEF JUSTICE BURGER: Mr. Cooperstein?

21 ORAL ARGUMENT OF STEVEN J. COOPERSTEIN, ESQ.

22 ON BEHALF OF RESPONDENT

23 MR. COOPERSTEIN: Mr. Chief Justice, and may  
24 it please the Court:

25 First, to clarify one fact about this statute



1 at issue, it is not an enhancement statute at all. The  
2 statute sets forth a mandatory minimum sentence for  
3 certain violent felonies that is at all times within the  
4 pre-existing legislative range of authorized sentences,  
5 so this is not an add-on; this is merely -- all this  
6 statute does is remove discretion from the sentencing  
7 court to sentence at the low end of the already  
8 legislatively determined scale, so that we don't have  
9 the risk that the Pennsylvania legislature has tried to  
10 increase a defendant's penalty by hiding an element of a  
11 crime and labeling it a sentencing factor.

12 QUESTION: Mr. Cooperstein, let me give you a  
13 hypothetical that keeps running through my mind.

14 Supposing you define the crime of homicide as  
15 the killing of another human being, and the sentence for  
16 that shall be anywhere from one year to life at the  
17 discretion of the judge; and in the second paragraph you  
18 said if it is proved at the sentencing hearing by a  
19 preponderance of the evidence that the killing was  
20 willful, there shall be a minimum sentence of 15 years,  
21 and that's it, would that be permissible?

22 MR. COOPERSTEIN: No, I don't believe that  
23 would be permissible. That comes very close to Mullaney  
24 v. Wilbur --

25 QUESTION: Doesn't it also -- isn't that

1 precisely this case?

2 MR. COOPERSTEIN: No, it's not precisely this  
3 case. The reason for that is that the state has not  
4 tried to distinguish between essentially grades of an  
5 offense, let's take robbery. The Pennsylvania  
6 legislature --

7 QUESTION: Well, it's distinguished between  
8 robbery without a gun and robbery with a gun.

9 MR. COOPERSTEIN: But each one -- the key fact  
10 is how the state views the blameworthiness of an  
11 individual crime. The state by setting for robbery, by  
12 setting a 20 year maximum, shows that it considers the  
13 crime of robbery at knife point just as blameworthy as  
14 robbery at gunpoint. It's just that someone who commits  
15 a robber at gunpoint has no entitlement to a lenient  
16 sentence. He may --

17 QUESTION: Why can't a state treat all  
18 homicides as blameworthy, just as it treats all  
19 robberies as blameworthy, justifying a penalty up to  
20 life?

21 MR. COOPERSTEIN: Because in Your Honor's  
22 hypothetical, if the state considers the mental element  
23 to be a distinguishing factor between one sentence and a  
24 greater sentence, the mental element is so basic to all  
25 definitions of crimes that that is beyond the power of

1 the legislature to rearrange. The legislature may not  
2 take something so fundamental to the definition of what  
3 a crime is as intent and rearrange that. That's not  
4 what the Pennsylvania legislature has done here. All  
5 it --

6 QUESTION: Mr. Cooperstein, I doubt that you  
7 know the answer, but why did they just limit it to  
8 firearms and not knives and other deadly weapons?

9 MR. COOPERSTEIN: I don't know the answer to  
10 that.

11 There is a separate guideline scheme in  
12 Pennsylvania where if this mandatory sentencing scheme  
13 is not applicable, the sentencing judge must add 12 to  
14 24 months to the minimum sentence if the defendant used  
15 any weapon.

16 Now, the judge has some discretion to get  
17 around that, but that's any weapon.

18 QUESTION: Any weapon.

19 MR. COOPERSTEIN: Yes.

20 QUESTION: May I ask this question as to how  
21 the statute actually operates?

22 One of the petitioners, I think it was Mr.  
23 Smalls, was sentenced to four to eight years --

24 MR. COOPERSTEIN: Yes.

25 QUESTION: Apply the minimum mandatory

1 sentence to just what the actual sentence was  
2 initially.

3 MR. COOPERSTEIN: That is what the -- the  
4 judge in that case and in all four of these cases  
5 declared the Mandatory Act unconstitutional and  
6 sentenced as if it did not exist.

7 QUESTION: I understand, I understand that,  
8 but on remand, and if we should affirm, if we should  
9 affirm the Supreme Court of Pennsylvania, what would the  
10 sentence for Smalls be?

11 MR. COOPERSTEIN: The sentence would be a  
12 minimum of five to ten years. In Pennsylvania --

13 QUESTION: Minimum would be five to ten?

14 MR. COOPERSTEIN: Yes. In Pennsylvania, each  
15 judge must set a minimum and a maximum. The minimum  
16 sets the parole eligibility date. This statute speaks  
17 only to the minimum sentence, to the parole eligibility  
18 date, and says that it must be at least five years.

19 QUESTION: In other words, he must serve five  
20 years, but he could be required to serve another five?

21 MR. COOPERSTEIN: Yes.

22 QUESTION: Why beyond the eight that he was  
23 initially sentenced to?

24 MR. COOPERSTEIN: Because the -- one missing  
25 fact is that under Pennsylvania law, the minimum



1 sentence must be no greater than one half of the  
2 maximum, so that when it sets a minimum to be a  
3 mandatory five years, it in effect sets the maximum at a  
4 mandatory ten years.

5 QUESTION: Am I right that Peterson was  
6 sentenced from one to six year?

7 MR. COOPERSTEIN: Yes, Peterson.

8 QUESTION: What would his sentence be on  
9 remand?

10 MR. COOPERSTEIN: Her sentence would be five  
11 to ten. Each of these defendants would receive a five  
12 to ten year sentence under, under if they were sentenced  
13 pursuant to this mandatory scheme.

14 QUESTION: So they would have five years they  
15 have to serve but the next five they could be paroled.

16 MR. COOPERSTEIN: Yes, that is correct.

17 Not only has the Pennsylvania legislature not  
18 increased the sentence available to any of these  
19 defendants, it also has not changed the definition of  
20 any crime. It has retained as a separate crime  
21 possessing an instrument of the crime for which a  
22 defendant may be sentenced to five years in addition to  
23 whatever he is sentenced for his basic offense. Of  
24 course, the prosecution maintains the burden of proving  
25 such a crime beyond a reasonable doubt, so that it has

1 not --

2 QUESTION: Mr. Cooperstein, what are the  
3 limits on the state's power to take something that looks  
4 a lot like an element of a crime in most states and  
5 label it a sentencing consideration in your view? What  
6 are the limits in your view?

7 MR. COOPERSTEIN: Well, I think the limits  
8 are, one limit is clearly intent, that the state may not  
9 move around intent and put the burden on the defendant  
10 or give the prosecution a lesser burden.

11 QUESTION: The mens rea element?

12 MR. COOPERSTEIN: Yes, yes. Of course, there  
13 are exceptions for regulatory offenses.

14 QUESTION: May I test that with a question?

15 Supposing the crime of intentional stealing,  
16 call it larceny, whatever it might be, is punishable by  
17 a year to five -- a year to ten years, say, and then  
18 they say, but if the amount stolen is over \$1000, there  
19 shall be a minimum sentence of three years, and that  
20 amount could be proved by just a preponderance of the  
21 evidence, an old fashioned distinction between petty  
22 larceny and grand larceny?

23 MR. COOPERSTEIN: Yes, I believe --

24 QUESTION: The same intent in both cases. I  
25 suppose they could rearrange that under your scheme.

1 MR. COOPERSTEIN: I believe the state would be  
2 free to rearrange that, yes, and if I might continue  
3 answering your question, Justice O'Connor, I believe  
4 that Patterson v. New York makes it clear -- gives some  
5 examples of the type of thing that a legislature may not  
6 do. It may not declare a defendant presumptively  
7 guilty, and I think that goes beyond just a mere  
8 declaration. A court can look at the way in which the  
9 legislature has defined its crimes, any way in which it  
10 has rearranged its crimes and determine what is it  
11 really sentencing the defendant for.

12 Here in this case it's obvious that what the  
13 legislature has done is sentence -- is declare  
14 sentencing practices for robbery, for aggravated  
15 assault, and for the other crimes. It is clear that the  
16 legislature has not tried to impose a sentence for  
17 possession of a weapon and lightened the prosecution's  
18 burden.

19 QUESTION: I hear the words, but I don't have  
20 a clear picture in my mind of what the constitutional  
21 line is in your view --

22 MR. COOPERSTEIN: Well, I think --

23 QUESTION: -- that this Court has drawn.

24 MR. COOPERSTEIN: I think that one has to look  
25 at several different factors. One that I think is

1 primary in this case is that the legislature has not  
2 given the authority to increase any sentence, that as  
3 long as it's within the existing statutory maximum, it  
4 has not tried to lighten the prosecution's burden. I  
5 don't think that there is one fact that it is possible  
6 to point to and say anything over that line is too far  
7 and anything inside that line is fine. I think that all  
8 of the -- the whole statutory scheme has to be looked  
9 at.

10 QUESTION: Well, could this statute have put  
11 the burden on the defendant to prove that he didn't have  
12 visible possession of a firearm?

13 MR. COOPERSTEIN: I believe that that would  
14 have been permissible under the reasoning of Patterson  
15 v. New York, yes.

16 I might also add that when you look -- one of  
17 the things to look at is the purpose behind the  
18 statute. This was passed as an amendment to the  
19 sentencing code. It was passed along with two like  
20 statutes, one of which imposed a mandatory minimum  
21 sentence for crimes committed on public transportation  
22 and the other is a recidivist section for these violent  
23 felonies so that it's -- when you look at what the  
24 Pennsylvania legislature did here, it's quite clear that  
25 it was a bona fide sentencing statute, it was not some



1 attempt to lighten the prosecution's burden because it  
2 had difficulty obtaining convictions.

3 QUESTION: Well, what if -- I take it you  
4 would -- you probably would come out the other way if  
5 the statute had said, had set ten years for ordinary  
6 robbery but if it's done with a gun, the sentence is  
7 twenty years.

8 MR. COOPERSTEIN: I believe that sets a much  
9 more difficult question.

10 QUESTION: Well, and the judge determines  
11 whether the -- just like he would under this case, he  
12 would be permitted to find whether a gun was present by  
13 a preponderance of the evidence.

14 MR. COOPERSTEIN: But in one --

15 QUESTION: What's the real difference between  
16 those two cases?

17 MR. COOPERSTEIN: Well, I think Patterson  
18 makes clear that the way in which a state defines its  
19 crimes is entitled -- is the dividing line, that when  
20 the state seeks to treat one class of robber different  
21 from another, it has taken upon itself a --

22 QUESTION: What if the statute just says, it  
23 says but if the judge determines at the sentencing  
24 hearing that the robbery was done with a gun, he shall  
25 impose twenty years.

1 MR. COOPERSTEIN: However --

2 QUESTION: You think that's just really just  
3 adding an element to the crime?

4 MR. COOPERSTEIN: I'm not saying that that  
5 statute would be unconstitutional. I said that that is  
6 a much more difficult question than this, than the  
7 statute at issue here.

8 I think under Patterson it may be a  
9 constitutional statute, the one that you have posed to  
10 me.

11 I might also add that, as I think was adverted  
12 to in Mr. Sosnov's argument, a holding that this burden  
13 of proof is unconstitutional would have a widespread  
14 effect on sentencing. Every sentencing judge acting  
15 responsibly is going to take into account the nature of  
16 the crime for which the defendant is convicted, and  
17 certainly a primary fact about that is what -- how did  
18 the defendant accomplish its crime. All the crimes in  
19 this Pennsylvania statute involve force or the threat of  
20 force. All that is done here is the legislature has  
21 told each sentencing judge, if that force was  
22 accomplished by means of a firearm, this is how you  
23 shall weight that particular factor, so that this is not  
24 a radically different sentencing scheme; it merely  
25 directs the Court to make one factfinding and limits the

1 judge's discretion accordingly depending on what fact he  
2 finds.

3 Unless there are any other questions, I will  
4 rely on this brief.

5 CHIEF JUSTICE BURGER: Very well.

6 Do you have anything further, Mr. Sosnov?

7 ORAL ARGUMENT OF LEONARD N. SOSNOV, ESQ.

8 ON BEHALF OF PETITIONERS -- Rebuttal

9 MR. SOSNOV: Yes, Your Honor. I would like to  
10 make a few points briefly.

11 First of all, it is not a factor; it is the  
12 factor, and that is why in essence Pennsylvania created  
13 two classes of felonies. There's inevitable  
14 consequences just as at trial when that additional fact  
15 is proven.

16 The line suggested by the Commonwealth of mens  
17 rea being the only element of an offense that cannot be  
18 switched to a sentencing statute, a mandatory sentencing  
19 statute, is ridiculous. It's no line at all. If the  
20 Commonwealth is correct, then our robbery statutes can  
21 be rewritten just like this statute to provide that  
22 beyond a reasonable doubt is required for proof that a  
23 defendant stole something, but the penalty of five to  
24 ten years would be mandated if at sentencing it is shown  
25 that there was force, physical force used in the

1 taking. They could take every traditional statute, take  
2 an aggravated assault statute which provides that the  
3 elements of the offense are that somebody struck  
4 somebody and serious bodily injury occurred. According  
5 to the Commonwealth's theory, since that did not involve  
6 mens rea the seriousness of the jurisdiction, you could  
7 take that fact out and put it in a sentencing statute;  
8 it would have the exact same effect on a defendant but  
9 on a lower burden of proof.

10 I think if we talk about a slippery slope  
11 here, the slippery slope is if this act is upheld  
12 because then basically, constitutionally, anything  
13 goes. It will not affect in any way traditional  
14 discretionary sentencing hearings for this Court to hold  
15 this act unconstitutional. A judge will be free, as he  
16 always has been free, and as the judges in these very  
17 cases did, to consider at sentencing every important  
18 factor, including if defendant had a gun. Each of these  
19 cases the judge considered all of the factors mandated  
20 by a discretionary scheme, and in each case the  
21 defendant received a sentence of imprisonment. However,  
22 what he did not receive is a mandated sentence of  
23 imprisonment based on proof by a preponderance of the  
24 evidence without a jury determination to critical  
25 facts.



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Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:26 o'clock p.m., the case in  
the above-entitled matter was submitted.)

**CERTIFICATION**

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-215 - DYNEL McMILLAN, LORNA PETERSON, JAMES J. DENNISON AND HAROLD

L. SMALLS, Petitioners V. PENNSYLVANIA

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BY Paul A. Richardson

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