No. 11-9335

IN THE SUPREME COURT OF THE UNITED STATES

ALLEN RYAN ALLEYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Harris v. United States, 536 U.S. 545 (2002), should be overruled.

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-9335

ALLEN RYAN ALLEYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2011 WL 6228319.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2011. The petition for a writ of certiorari was filed on March 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Eastern District of Virginia, petitioner was convicted of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Judgment 1. He was sentenced to a total of 130 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. In August 2009, petitioner's girlfriend, who worked at a convenience store, suggested a plan to rob the store's manager as he drove the store's daily deposits to a local bank. Gov't C.A. Br. 7. She provided petitioner with extensive information about the store's operations, and petitioner and an accomplice (who was not identified at trial) spent several days surveilling it. Id. at 7-9. Petitioner accompanied his girlfriend to rent a car for use in the robbery. Id. at 9-12.

On October 1, 2009, petitioner and the accomplice waited for the manager to leave the store with the day's deposits, then positioned their rental car on the side of the road ahead of him. Gov't C.A. Br. 13. As the manager's van approached, petitioner's accomplice got out of the rental car and made it appear as though he and petitioner were experiencing car trouble. Id. at 13-14. He then walked towards the manager's van and gestured for the manager to roll down his window. Id. at 14. When he reached the van, petitioner's accomplice pulled out a semi-automatic pistol, pushed

it up against the manager's throat, and demanded the bag containing the bank deposits. Ibid. The manager complied, handing over a total of $13,201. Id. at 13-14. After the robbery, petitioner sped away in the rental car with the accomplice in the passenger seat. Id. at 14.

2. A grand jury in the Eastern District of Virginia indicted petitioner on one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and one count of "us[ing], carry[ing], brandish[ing], and possess[ing]" a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2. Indictment 1-2. The jury, which was instructed that it could find petitioner guilty either as a principal or on an aiding-and-abetting theory, convicted petitioner on both counts. Pet. App. 28a; see 9/3/10 Tr. 840-842; 9/7/10 Tr. 868-871.

The verdict form asked the jury, if it convicted petitioner on the firearm count, to determine whether he "[u]sed or carried a firearm during and in relation to a crime of violence," "[p]ossessed a firearm in furtherance of a crime of violence," or "[b]randished a firearm in connection with the crime of violence." Pet. App. 28a. In response to questions from the jury during deliberations, the court instructed the jury that it had to find "at least one" of the these in order to convict petitioner on the firearm count, but that it could "check yes to all three," so long as the jurors were unanimous about whatever they selected. 9/7/10

Tr. 872-873. The jury selected only "[u]sed or carried a firearm during and in relation to a crime of violence." Pet. App. 28a.*

3. The presentence investigation report (PSR) calculated an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment on the robbery count. PSR ¶ 80. Petitioner's conviction on the firearm count required a mandatory-minimum sentence, consecutive to any sentence on the robbery count. 18 U.S.C. 924(c)(1)(A); see Abbott v. United States, 131 S. Ct. 18, 23 (2010). The default length of that consecutive mandatory-minimum sentence is five years, but increases to seven years if the firearm was brandished. 18 U.S.C. 924(c)(1)(A)(i)-(ii). The PSR stated that petitioner was subject to the seven-year mandatory minimum. PSR Addendum 1.

Petitioner objected to the imposition of a seven-year mandatory minimum, contending that the court lacked constitutional authority to find that he aided and abetted the brandishing of a firearm during the robbery and that, in any event, the evidence did not support a finding that he knew his accomplice would brandish a gun. Dkt. # 72 at 2 n.1; Pet. App. 14a-18a. Petitioner acknowledged, however, that the former argument was foreclosed by Harris v. United States, 536 U.S. 545 (2002), in which this Court

* Petitioner erroneously states (Pet. 5) that the jury "found that [petitioner] did not brandish a weapon." In light of the instructions, the verdict form may simply reflect the jury's failure to reach complete unanimity on the brandishing issue.

held that brandishing of a firearm under Section 924(c)(1)(A)(ii) is a sentencing factor that can constitutionally be found by the sentencing judge. Dkt. # 72 at 2 n.1.

The district court concluded that "the decision in Harris combined with the evidence in this case calls for the overruling of the objection." Pet. App. 26a. It reasoned that "brandishing is a sentencing factor * * * to be determined by a preponderance of the evidence"; that the "preponderance of the evidence here would support a finding that the defendant aided and abetted the brandishing that actually, undeniably, and undisputedly occurred"; and that "[a]lthough the jury did not find beyond a reasonable doubt that the defendant reasonably foresaw his co-conspirator brandishing a firearm for the express purpose of intimidation, the Court is not precluded from finding by the lower preponderance of the evidence that he did." Id. at 26a-27a. The court sentenced petitioner to a 46-month term of imprisonment on the robbery count and a consecutive 84-month (seven-year) term of imprisonment on the firearm count. Id. at 27a; Judgment 2.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-6a. The court held, as petitioner again conceded, that Harris foreclosed a constitutional challenge to the enhanced sentence on the firearm count. Pet. App. 6a; see Pet. C.A. Br. 33.

ARGUMENT

Petitioner contends (Pet. 7-14) that this Court should overrule its holding in Harris v. United States, 536 U.S. 545 (2002), that a sentencing court may constitutionally find facts, by a preponderance of the evidence, that increase a defendant's minimum sentence within an authorized range. The Court has repeatedly and recently denied petitions arguing that Harris should be overruled or asserting that Harris already has been overruled implicitly. See, e.g., Crayton v. United States, No. 11-8749, 2012 WL 443758 (May 14, 2012); Krieger v. United States, 132 S. Ct. 139 (2011) (No. 10-10392); Booker v. United States, 131 S. Ct. 1001 (2011) (No. 10-6999); Berroa v. United States, 131 S. Ct. 637 (2010) (No. 09-11362); Benford v. United States, 130 S. Ct. 3322 (2010) (No. 09-8674). There is no reason for a different result here.

1. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), this Court upheld the constitutionality of a sentencing provision under which a person convicted of a specified felony was subject to a mandatory-minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. Id. at 80-94. The Court held that due process did not require the State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt. Id.

at 84-93. The Court also held that the Sixth Amendment did not require that visible possession be found by the jury at trial. Id. at 93. The Court explained that the provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." Id. at 87-88.

Sixteen years later, in Harris, the Court "[r]eaffirm[ed] McMillan." 536 U.S. at 568. In Harris, as in this case, a district court imposed a mandatory-minimum seven-year term of imprisonment under 18 U.S.C. 924(c)(1)(A)(ii) based on a judicial determination that a firearm had been brandished during the commission of an offense. 536 U.S. at 551. This Court first concluded, as a statutory matter, that Section 924(c)(1)(A) "regards brandishing * * * as [a] sentencing factor[]" and not as an element of a separate, graduated offense. Id. at 556; see also United States v. O'Brien, 130 S. Ct. 2169, 2180 (2010) ("[T]he brandishing and discharge provisions codified in § 924(A)(ii) and (iii) do state sentencing factors."). The Court additionally concluded, as a constitutional matter, that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments." Harris, 536 U.S. at 568. The Court explained

that by increasing the minimum sentence on that basis, "Congress 'simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor.'" Ibid. (quoting McMillan, 477 U.S. at 89-90) (alterations omitted). That sentencing factor, the Court held, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." Ibid.; see id. at 565, 567-568 (plurality opinion); id. at 569-570, 572 (Breyer, J., concurring in part and concurring in the judgment).

The Court in Harris adhered to McMillan notwithstanding the defendant's argument that McMillan had been superseded by Apprendi v. New Jersey, 530 U.S. 466 (2000). See Harris, 536 U.S. at 557 (plurality opinion). In Apprendi, the Court had held that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; see, e.g., Cunningham v. California, 549 U.S. 270, 282 (2007). The plurality in Harris observed that Apprendi had expressly declined to overrule McMillan, in favor of simply "limit[ing] [McMillan's] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict -- a limitation identified in the McMillan opinion itself." Apprendi, 530 U.S. at 487 n.13 (cited at Harris, 536 U.S. at 563 (plurality opinion)).

The plurality in Harris explained in detail the reasons for distinguishing between facts that increase the maximum sentence to which a defendant is exposed and facts that merely bear on the choice of sentences within the range permitted by the jury's verdict. Harris, 536 U.S. at 556-568 (plurality opinion). Whereas Apprendi had held that judicial determination of the former type of facts would contravene the "prevailing historical practice" that formed the backdrop for the Fifth and Sixth Amendments, "[t]here [i]s no comparable historical practice of submitting facts increasing the mandatory minimum to the jury." Id. at 563. To the contrary, "[j]udges * * * have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swelled the penalty above what the law has provided for the acts charged.'" Id. at 562 (plurality opinion) (quoting 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 85, p. 54 (2d ed. 1872)) (brackets omitted). Accordingly, the Fifth and Sixth Amendments "ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." Id. at 566 (plurality opinion) (quoting Apprendi, 530 U.S. at 498 (Scalia, J., concurring)).

2. Petitioner offers no persuasive reason for the Court to again revisit application of the Fifth and Sixth Amendments to judicial factfinding in the context of a statutory mandatory

minimum. Petitioner's core argument -- that a "strict distinction between maximum and mandatory minimum sentences cannot be reconciled with the rule of Apprendi," Pet. 8 -- did not prevail in Harris, and the stare decisis considerations that supported that decision have only gathered force with the passage of time.

As petitioner notes (Pet. 10 & n.4), this Court has "taken up numerous cases" over the past decade "to address the scope of" Apprendi. But those cases reinforce, rather than undermine, Harris and McMillan. Those decisions have consistently distinguished judicial factfinding that raises the minimum term within the existing range from judicial factfinding that increases the maximum sentence to which a defendant is exposed. In Blakely v. Washington, 542 U.S. 296 (2004), for example, this Court extended Apprendi to invalidate a sentencing enhancement, under a state sentencing guidelines scheme, that produced "a sentence greater than what state law authorized on the basis of the verdict alone." Id. at 305. The Court distinguished McMillan on the ground that it "involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact." Id. at 304; see id. at 304-305 (citing Harris). Likewise, in Ring v. Arizona, 536 U.S. 584 (2002), the Court reiterated that Apprendi applies only to "elevation of the maximum punishment," while "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence" under Harris. Id. at

604 & n.5; see also Rita v. United States, 551 U.S. 338, 373 n.2 (2007) (Scalia, J., concurring in part and concurring in the judgment) (recognizing that "eliminating discretion to impose low sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment" and citing Harris).

Petitioner highlights (Pet. 8-9) this Court's statement in United States v. O'Brien that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 130 S. Ct. at 2174 (quoting Apprendi, 530 U.S. at 490) (brackets omitted). But that statement is a verbatim quotation from Apprendi and reflects no post-Apprendi change in the law. O'Brien followed up the statement by explaining that while "judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury," id. at 2175, "sentencing factors may guide or confine a judge's discretion in sentencing an offender 'within the range prescribed by statute,'" id. at 2174-2175 (quoting Apprendi, 530 U.S. at 481). And the holding of O'Brien -- that a weapon's status as a machinegun under 18 U.S.C. 924(c)(1)(B)(ii) is an element of an offense, rather than a sentencing factor, id. at 2180 -- was purely statutory and did not expand upon Apprendi.

3. Principles of stare decisis strongly counsel against revisiting Harris and McMillan . "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). No "special justification" exists here. McMillan and Harris offend no historical practices; they are consistent with the rule of Apprendi; and a rule permitting legislatures to increase minimum sentences within an authorized range based on judge-found facts is clear and workable.

Stare decisis, moreover, "has special force when legislators or citizens have acted in reliance on a previous decision, for in th[at] instance overruling the decision would * * * require an extensive legislative response." Hubbard v. United States, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (internal quotation marks and citation omitted). Even at the time Harris was decided, "[l]egislatures and their constitutents" had already "relied upon McMillan to exercise control over sentencing through dozens of statutes like the one the Court approved in that case." Harris, 536 U.S. at 567-568 (plurality opinion); see id. at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance"); see also Apprendi, 530 U.S. at 487 n.13 (noting the "likelihood

that legislative decisions may have been made in reliance on McMillan"). That reliance has only increased in the decade since Harris. See, e.g., Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, §§ 6903-6906, 118 Stat. 3770-3773 (adding mandatory-minimum sentences). It would be even more disruptive now than it would have been in Harris to "overturn those statutes or cast uncertainty upon the sentences imposed under them." Harris, 536 U.S. at 568 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

NINA GOODMAN
Attorney

JUNE 2012