No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), should be overruled.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at pages 1a to 6a of the appendix to the petition and at 2011 WL 6228319 (4th Cir. Dec. 15, 2011).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over

Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on December 15, 2011. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

In relevant part, 18 U.S.C. § 924(c)(1)(A) provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the sentence imposed on Petitioner Allen Ryan Alleyne. Mr. Alleyne was convicted by a jury of one count of robbery affecting interstate commerce, in violation of 18 U.S.C. §§ 1951(a), 2, and one count of using or carrying a firearm during in or in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The government additionally charged Mr. Alleyne with brandishing a firearm during the robbery, and included that charge on the verdict form, but the jury found Mr. Alleyne not guilty of brandishing. *See* Pet. App. 28a.[1]

At sentencing, the district court imposed a 46-month sentence on the robbery charge. Relevant to this petition, the court, over Mr. Alleyne's objection, imposed a consecutive 84-month sentence for the firearm offense after finding by a preponderance of the evidence that Mr. Alleyne reasonably could have foreseen that his accomplice would brandish a gun during the robbery. Pet. App. 27a; C.A.J.A. 1005.

The Events at Issue

The government alleged that Mr. Alleyne and an accomplice engaged in a holdup robbery of the manager of a convenience store as he drove to make a bank deposit. According to the government's evidence, Mr. Alleyne learned of the store's deposit procedure from his girlfriend, Valencia Jones, who worked at the store (and testified at trial).

[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

Ms. Jones stated that Mr. Alleyne and another man staked out the store and its manager to learn his habits and routes to the bank. On October 1, 2009, the two men followed the manager as he left the store, but then pulled ahead of him and went in the direction of the bank. The store manager came upon their stopped vehicle, thinking they had car trouble. The driver motioned the manager to stop, then walked up to his car. When the manager rolled down the window to see what the problem was, the robber thrust a gun at the manager's neck and demanded the store's deposit bag. The manager handed it over, and the gunman went to the passenger side of his car. During the robbery, the passenger had moved to the driver's side, and when the gunman returned, they drove away. The government alleged that Mr. Alleyne was the man who stayed in the car, although the manager could not identify him. The gunman was not identified at trial or charged for his participation. Ms. Jones received a 30-month sentence for her part in hatching the plan and taking a share of the proceeds.

Proceedings in the District Court

As noted, Mr. Alleyne was charged with a Hobbs Act robbery count and one count under 18 U.S.C. § 924(c). Both counts also referenced 18 U.S.C. § 2. C.A.J.A. 9-10. The trial evidence largely consisted of the testimony of Valencia Jones about her role in the robbery scheme and her claims that Mr. Alleyne was involved, as well as cell-phone records suggesting that Mr. Alleyne was in the vicinity at the time certain events in the robbery occurred. In addition, there was evidence that the vehicle used in the robbery was a rental car with stolen license plates. Mr. Alleyne presented evidence undermining Ms. Jones's

credibility and portions of her story. At the conclusion of the trial, the jury found Mr. Alleyne guilty of robbery and of using and carrying a firearm during the crime, but it found that he did not brandish a weapon. Pet. App. 28a.

At sentencing, the government asked the district court to impose an enhanced 84-month mandatory minimum consecutive sentence because the firearm was brandished, notwithstanding the jury's verdict acquitting Mr. Alleyne of that conduct. C.A.J.A. 957-61. Mr. Alleyne objected on two grounds. First, although he acknowledged that this Court's opinion in *Harris v. United States*, 536 U.S. 545, 556 (2002), held that brandishing was a sentencing factor for the judge to find, in order to preserve the issue for further review Mr. Alleyne argued that *Harris* was inconsistent with this Court's line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Second, Mr. Alleyne argued that even under a preponderance of the evidence standard, the government's evidence did not show that Mr. Alleyne reasonably foresaw that a gun would be brandished. Accordingly, Mr. Alleyne contended that the mandatory minimum sentence on the firearm count should be 60 months instead of 84 months. C.A.J.A. 928-31.

During the sentencing hearing, the district court stated, with regard to the jury, that "I think it's fair to say they didn't find brandishing beyond a reasonable doubt because they were told they had to find it beyond a reasonable doubt if they were going to do it." Pet. App. 11a. The court stated, "I don't like the role of being the reverser of juries," but went on to conclude that it was bound by *Harris*. Pet. App. 13a-14a. The court noted that it could, in theory, "avoid the whole problem by finding [the sentencing range to be] five to life and

sentencing him to seven," but expressed that doing so would be "intellectually dishonest." Pet. App. 23a-24a. In line with its role under *Harris*, the court heard argument over whether to apply the enhanced sentence to the facts of this case. Ultimately, the court found, by a preponderance of the evidence, that Mr. Alleyne reasonably foresaw that the gunman would brandish a firearm during the robbery. Pet. App. 27a. As a result, the court imposed an 84-month sentence on the § 924(c) count, consecutive to a 46-month sentence on the robbery count. C.A.J.A. 1005, 1011. Mr. Alleyne filed a timely appeal. C.A.J.A. 1016.

Proceedings in the Court of Appeals

Mr. Alleyne raised three issues on appeal to the United States Court of Appeals for the Fourth Circuit: (1) whether the entirely circumstantial evidence was sufficient to support the jury's verdicts; (2) whether the government or the district court constructively amended or fatally varied from the indictment by charging him as the principal in the robbery but convicting him on an aiding-and-abetting theory; and (3) whether the district court erred, as a constitutional or factual matter, in applying the enhanced sentence for brandishing.[2]

In a brief, unpublished, *per curiam* opinion, issued without oral argument, the court of appeals found that the evidence was sufficient and that neither a constructive amendment nor a fatal variance occurred. Pet. App. 1a-5a; *United States v. Alleyne*, No. 11-4208, 2011 WL 6228319, at *1-*2 (4th Cir. Dec. 15, 2011). With respect to the sentencing issue, the Fourth Circuit first noted that "Supreme Court precedent forecloses any argument that

[2] Although Mr. Alleyne maintains his innocence, the only issue raised in this petition is the sentencing issue.

Alleyne's constitutional rights were violated by the district court's finding that he was accountable for brandishing the firearm despite the jury's finding that he was not guilty of that offense." Pet. App. 6a (citing *Harris*). The court went on to find that the district court's factual findings were not clearly erroneous. *Id.* Accordingly, the Fourth Circuit affirmed Mr. Alleyne's conviction and sentence. *Id.* This timely petition follows.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RECONSIDER ITS DECISION IN *HARRIS V. UNITED STATES*

I. *Harris* Is an Incompatible Outlier From the *Apprendi* Line of Decisions

In the court of appeals, Mr. Alleyne challenged the district court's application of a seven-year mandatory minimum sentence to his conviction under 18 U.S.C. § 924(c). The Fourth Circuit rejected the claim, without discussion, by citing this Court's decision in *Harris*. Pet. App. 6a. Although the lower court lacked the power to overturn that ruling, the time has come for this Court to do so.

In *Harris*, the Court considered whether Sixth Amendment protections applied to a factual finding that increased the defendant's mandatory minimum sentence from five to seven years. 536 U.S. at 550-51. Relying on this Court's earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), a plurality of four Justices reasoned that facts raising the sentencing floor are constitutionally different from facts raising the ceiling, such that only the latter need be treated as elements. *See Harris*, 536 U.S. at 557. Four dissenters

maintained that *Apprendi*'s principles apply with equal force to maximum and minimum sentences alike. *See id.* at 572-83 (Thomas, J., dissenting).

Justice Breyer cast the deciding vote. He agreed with the dissent that no constitutional or even "logic[al]" distinction can be drawn between factual findings that raise sentencing minimums and those that raise sentencing maximums. *Harris*, 536 U.S. at 569. He concurred in the plurality's judgment, however, on the ground that he did not "yet" accept the *Apprendi* rule. *Id.* Eight years later, however, in considering *United States v. O'Brien*, 130 S. Ct. 2169 (2010), Justice Breyer suggested that the time has come to revisit *Harris* and to apply the Sixth Amendment to mandatory minimums, explaining that he continues to believe that "*Apprendi* does apply to mandatory minimums" and *Apprendi* has now been "the law . . . for some time." *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting Justice Breyer's comment at oral argument). This Court did not reach the issue, however, because it ruled as a matter of statutory construction that the provision at issue was an element.[3]

Justice Breyer and the four dissenting Justices in *Harris* were correct in perceiving the logical and practical inconsistency of the plurality's position. A strict distinction between maximum and mandatory minimum sentences cannot be reconciled with the rule of *Apprendi* that the Constitution's indictment, jury, and proof guarantees apply to all "facts that increase

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[3] Justice Thomas would have reached the issue and held, in accordance with his dissent in *Harris*, that "[i]f a sentencing fact either raises the floor or raises the ceiling of a range of punishments to which a defendant is exposed, it is, by definition, [an] elemen[t]." *O'Brien*, 130 S. Ct. at 2184 (Thomas, J., concurring in the judgment) (quotation omitted).

the prescribed range of penalties to which a criminal defendant is exposed." *O'Brien*, 130 S. Ct. at 2174 (quoting *Apprendi*, 530 U.S. at 490) (in turn quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring))) (emphasis added); *id.* at 2182 (Stevens, J., concurring) (same).

Justice Thomas has repeatedly and cogently explained that this constitutional requirement must apply "to sentencing facts that . . . 'alter the defendant's statutorily mandated sentencing range, by increasing the mandatory minimum sentence.'" *Id.* at 2184 (Thomas, J., concurring) (citation omitted). "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). In *O'Brien*, Justice Stevens joined Justice Thomas in expressly calling for *Harris* to be overruled, agreeing that no meaningful distinction can be drawn between facts that increase the bottom of a statutory sentencing range and facts that increase its top. *O'Brien*, 130 S. Ct. at 2183. Justice Kennedy has likewise recognized that "[o]nce the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered." *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting) (rejecting, prior to *Apprendi*, position that such facts are subject to Constitution's indictment, jury and proof requirements).

Facts triggering a mandatory minimum sentence "warrant constitutional safeguards" because as "a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense." *O'Brien*, 130

S. Ct. at 2184 (Thomas, J., concurring) (citation omitted). It is the mandatory minimum that bars the defendant from calling upon the sentencing judge to take full account of mitigating circumstances, a prohibition that should itself be recognized as punishment, at least for *Apprendi* purposes. *See Harris*, 536 U.S. at 569-70 (Breyer, J., concurring) (observing that "statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency"). And in the § 924(c)(1) context, as the Court has recognized, the mandatory sentencing provisions effectively increase the sentence that the defendant would otherwise receive, as judges overwhelmingly impose the mandatory minimum and nothing more. *See O'Brien*, 130 S. Ct. at 2177-78 (considering seven-year minimum for brandishing); *Harris*, 536 U.S. at 578 (Thomas, J., dissenting).

Since it decided *Apprendi*, this Court has taken up numerous cases to address the scope of its constitutional rule.[4] *Harris* is the clear outlier among these decisions. The

[4] *See, e.g.*, *Southern Union Co. v. United States*, No. 11-94, 132 S. Ct. 756 (2011) (granting certiorari to consider whether *Apprendi* applies to imposition of criminal fines); *O'Brien*, 130 S. Ct. at 2178 (avoiding addressing *Apprendi*'s constitutional rule by applying principles of statutory construction to find that whether firearm is a machinegun is element of offense, rather than sentencing factor); *Oregon v. Ice*, 555 U.S. 160, 168-69 (2009) (holding that *Apprendi* does not require facts triggering consecutive sentences to be found by a jury); *Cunningham v. California*, 549 U.S. 270, 274-75 (2007) (reaffirming *Apprendi* as applied to California's determinate sentencing law); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (reaffirming *Apprendi* as applied to federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (clarifying that "statutory maximum" for purposes of *Apprendi* is maximum sentence a judge may impose without additional factual findings); *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (applying *Apprendi* to capital sentencing); *Harris*, 536 U.S. at 568 (holding that *Apprendi* does not apply to facts triggering mandatory minimum sentences); *United State v. Cotton*, 535 U.S. 625, 630-31 (2002) (holding that defective indictment under *Apprendi* does not deprive court of jurisdiction).

incompatibility between *Harris* and the *Apprendi* line of cases has been noted by several lower courts. *See, e.g.*, *United States v. Krieger*, 628 F.3d 857, 867-69 (7th Cir. 2010) (noting that "[t]he thread by which *McMillan* hangs may be precariously thin" and that "it is difficult to reconcile *McMillan* with *Apprendi*"), *cert. denied*, 132 S. Ct. 139 (2011); *United States v. Tidwell*, 521 F.3d 236, 521 & n.11 (3d Cir. 2008) (noting that "distinguishing *Apprendi* from *McMillan* and *Harris*" is a "difficult task"); *United States v. Grier*, 475 F.3d 556, 575 (3d Cir.2007) (Ambro, J., concurring) ("To create a sentencing process that fully carries through on the promise of *Apprendi* and *Blakely*, I believe the Supreme Court would have to overrule at least, *McMillan* and *Harris*.") (citations omitted); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence . . . ."); *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005) ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped."); *see also United States v. Washington*, 462 F.3d 1124, 1140 (9th Cir. 2006); *United States v. Barragan-Sanchez*, 165 F. App'x 758, 760 (11th Cir. 2006); *United States v. Jones*, 418 F.3d 726, 731 (7th Cir. 2005); *United States v. Arias*, 409 F. Supp. 2d 281, 299 n.10 (S.D.N.Y. 2005); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 432 n.15 (S.D.N.Y. 2004).

As the Fourth Circuit acknowledged in Mr. Alleyne's case, the district courts and courts of appeals are bound by *Harris*. Nevertheless, they continue to recognize its fundamental flaws. Only this Court can harmonize this line of authority, and it can only do

so by overruling *Harris*. The tension between *Apprendi* and *Harris* is too pronounced to be tolerated. As Justice Breyer appears to have contemplated at oral argument in *O'Brien*, the plurality decision in *Harris* is ripe to be revisited.

II. This Case Presents an Ideal Vehicle for Overruling *Harris*

Mr. Alleyne's case offers this Court an excellent vehicle to reconsider and overturn *Harris* for three reasons. First, the issue has been preserved and litigated by both parties in the lower courts. The brandishing allegation was charged in the indictment, C.A.J.A. 9-10, argued by the government to the jury, C.A.J.A. 840, included in the district court's instructions to the jury, C.A.J.A. 888, 914-21, listed in a special verdict form, Pet. App. 28a, and addressed at sentencing, Pet. App. 9a-27a. Because the jury acquitted Mr. Alleyne of brandishing, Pet. App. 28a, there can be no contention that the evidence was sufficient to prove it beyond a reasonable doubt. *See* Pet. App. 11a (district court noting that jury did not find brandishing beyond a reasonable doubt); *cf. Cotton*, 535 U.S. at 633 (finding that evidence showing drug quantity was "overwhelming" and "essentially uncontroverted"). Mr. Alleyne preserved the issue in his appeal to the Fourth Circuit, where that court acknowledged that it was governed by *Harris*. Pet. App. 6a. The fact that the jury rejected the government's plea to find Mr. Alleyne guilty of brandishing, only to have the district court apply the increased mandatory minimum sentence anyway, places this case in the perfect posture for this Court to revisit the *Harris* decision.

Second, this case is on all fours with *Harris*, should the Court wish to use a firearm case to overrule its prior decision. As in *Harris*, the sentencing court applied the increased

sentence for brandishing provided in § 924(c)(1)(A)(ii). Under § 924(c), a finding of brandishing or discharging increases the mandatory minimum, but the maximum remains the same as in the unenhanced penalty. Accordingly, because this case only involves the "floor," rather than the "ceiling," it presents the issue in a cleaner fashion than, for example, a drug case where a finding affects both the minimum and maximum sentence. *See, e.g.*, *Krieger*, 628 F.3d at 866-67 (considering whether "death resulting" in drug distribution case is an element or sentencing factor, where a finding that death resulted increased both minimum and maximum sentence).

Third, it is clear from the record that the district court only applied the seven-year mandatory minimum because it found facts by a preponderance standard, as countenanced in *Harris*. The court stated that it did not "like the role of being the reverser of juries." Pet. App. 13a. Thus, the court understood the primacy of the jury's role that is at the heart of *Apprendi* and its progeny. The court only made the necessary factual finding on its own because *Harris* required it. *See* Pet. App. 23a-24a (remarking that it would be "intellectually dishonest" to "avoid the whole problem by finding [the sentencing range to be] five to life and sentencing him to seven"). After the court found that a mandatory minimum sentence of seven years applied, it sentenced Mr. Alleyne to the bare minimum.[5] C.A.J.A. 1005. This is consistent with this Court's acknowledgment that virtually every defendant subject to a mandatory minimum sentence under § 924(c)(1)(A) receives the minimum sentence, despite

[5] In addition, the 46-month sentence the court imposed on the robbery count represented the low end of the applicable guideline range. C.A.J.A. 969, 1005.

a theoretical maximum of life. *See O'Brien*, 130 S. Ct. at 2177-78; *see also Harris*, 536 U.S. at 578 (Thomas, J., dissenting). On this record, there is no reason to believe that the district court would impose an 84-month sentence, let alone any sentence above 60 months, if the brandishing enhancement did not apply. Therefore, the issue is dispositive in this case, and likely to lead to significant relief for Mr. Alleyne if the Court rules in his favor.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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