No. 11-9335

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN 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

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

MICHAEL S. NACHMANOFF
Federal Public Defender

Mary E. Maguire
Assistant Federal Public Defender
Counsel of Record
Patrick L. Bryant
Appellate Attorney
Office of the Federal Public Defender
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 343-0800
Mary_Maguire@fd.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision and Statute

No. 11-9335

IN THE SUPREME COURT OF THE UNITED STATES

ALAN 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

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

ARGUMENT

In its brief in opposition, the government offers several reasons why the Court should deny certiorari in Allen Alleyne's case. None of the government's reasons are persuasive. This Court should grant the writ of certiorari and use this case as a vehicle to overturn *Harris v. United States*, 536 U.S. 545 (2002).

1. The bulk of the government's brief is a defense of the four-Justice plurality decision in *Harris*. Br. in Opp. 6-11. Of course, five Justices disagreed with that reasoning in *Harris* itself, *see* 536 U.S. at 572-83 (Thomas, J., dissenting); 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment), and the plurality's reasoning has never

been adopted by a majority of the Court. Moreover, numerous lower courts continue to express frustration over the incompatibility of *Harris* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. *See* Pet. 11.

The government cites several of this Court's recent cases for the proposition that they "reinforce" *Harris* and its predecessor, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Br. in Opp. 10. However, language in those opinions is more properly characterized as merely descriptive of the holding in *Harris*; the Court has not yet taken another case raising the precise issue in *Harris* and Petitioner's case. For instance, the government argues that, even after *Apprendi*, there remains a constitutionally-valid distinction between elements of offenses and so-called "sentencing factors." Br. in Opp. 10-11 (citing *Ring v. Arizona*, 536 U.S. 584, 604 n.5 (2002)). But the cited footnote in *Ring* only reports the result in *Harris*, which was decided the same day, and does not adopt the *Harris* plurality's reasoning.

Further, the government's reliance on the difference between elements and sentencing factors begs the question by assuming that brandishing is the latter. Even if these labels continue to have some significance in determining legislative intent, *see United States v. O'Brien*, 130 S. Ct. 2169, 2180 (2010), they are not controlling for purposes of adhering to the constitutional rule that any fact which increases the prescribed range of penalties must be charged in an indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490 (holding that "[i]t 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" and that "[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt") (quotation omitted).

In addition, what *Apprendi* makes plain, and where *Harris* goes astray, is that over-ruling a jury and imposing a punishment greater than that authorized by the jury's verdict is a violation of due process. *See Apprendi*, 530 U.S. at 484-90; *In re Winship*, 397 U.S. 358, 364 (1970). In other words, the mandatory minimums under 18 U.S.C. § 924(c) "increase the prescribed range of penalties" and therefore should be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *O'Brien*, 130 S. Ct. at 2182-2183 (Stevens, J., concurring). An "increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense," and thus, "facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards." *Harris*, 536 U.S. at 578 (Thomas, J, dissenting); *see also O'Brien*, 130 S. Ct. at 2177 (noting potential unfairness in treating machinegun provision as a sentencing factor rather than as an element).

No decision of this Court since *Harris* has done anything to make it compatible with the *Apprendi* rule. Instead, later cases have only reinforced the fact that *Harris* does not align with fundamental notions of due process. The time has come for this Court to reconcile its jurisprudence in the only way possible, by overruling *Harris*.

2. As the government is incapable of harmonizing *Harris* and *Apprendi*, it falls back on the doctrine of *stare decisis* in arguing that certiorari should be denied. Br. in Opp. 12-13. To begin, the government recognizes, as it must, that *stare decisis* carries less force in constitutional cases. Br. in Opp. 12 (citing *Arizona v. Rumsey*, 467 U.S. 203, 212

(1984)). The doctrine should hold even less sway here, where the holding in question is a plurality opinion that is an outlier from a pre-existing body of authority. Moreover, this Court has not shied from the obligation of overruling its prior decisions "where the necessity and propriety of doing so has been established." *Ring*, 536 U.S. at 608 (quotation omitted).

Ring is a perfect example. In order to apply the *Apprendi* rule, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had permitted judges to find aggravating factors necessary for the imposition of the death penalty. *Ring*, 536 U.S. at 609 (noting that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury") (citing *Apprendi*, 530 U.S. at 494 n.19). The government asserts that *Harris* has created settled expectations this Court should not upend. Br. in Opp. 12-13. Yet the government fails to acknowledge that lower courts continue to chafe at the incompatibility of *Harris* and *Apprendi*. *See* Pet. 11. In addition, *Harris* is not even as "settled" as *Walton* was when *Ring* overruled it.

As this Court has stated many times, *stare decisis* is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). In *Payne*, the Court noted that the decisions it was overturning "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions" and that "[t]hey have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts." *Id.* at 828-30. The same is no less true of *Harris*, which did not even

have a majority opinion. Whatever force the doctrine of *stare decisis* has, it is at its weakest here, and should not dissuade the Court from granting the writ and overruling *Harris*.

3. The government suggests obliquely that legislatures have somehow relied on *Harris* in passing new mandatory minimum sentences. Br. in Opp. 13. First, this ignores the fact that most statutes carrying mandatory minimum sentences, including 18 U.S.C. § 924(c), under which both Petitioner and the defendant in *Harris* were convicted, pre-date that decision. Also, it is far from clear that the mandatory minimum sentence provisions in the terrorism and destructive-device statutes the government cites are *Harris*-style sentencing factors, as opposed to *O'Brien*-style elements (even assuming that distinction makes a constitutional difference).

Most importantly, overruling *Harris* would not bar legislatures from creating mandatory minimum sentences. It would simply require that the facts necessary for imposing them be charged in an indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt. The government and the courts already apply this rule with regard to the unadorned five-year mandatory minimum sentence under § 924(c); it would be no great burden to require the same for imposition of the seven- or ten-year mandatory minimums for brandishing or discharging the firearm. The proof of this proposition is that the government attempted to do as much in Mr. Alleyne's case: the brandishing allegation was charged in the indictment, C.A.J.A. 9-10, and included in the verdict form, Pet. App. 28a. The jury failed to find brandishing beyond a reasonable doubt, and courts should not put themselves in the position of second-guessing the jury's verdict. Therefore, under

Apprendi, the district judge should not have been permitted to find, by a mere preponderance, "facts that increase[d] the prescribed range of penalties to which [Petitioner was] exposed." 530 U.S. at 490; *see also O'Brien*, 130 S. Ct. at 2174.

CONCLUSION

The plurality decision in *Harris* is an outlier from the *Apprendi* line of cases. Neither *stare decisis* nor any other doctrine counsel in favor of sustaining it any longer. Mr. Alleyne's case presents an ideal vehicle for reconciling these conflicting precedents by overruling *Harris*. For the reasons given above, as well as those presented in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL S. NACHMANOFF
Federal Public Defender
for the Eastern District of Virginia

Mary E. Maguire /pb
Mary E. Maguire
Assistant Federal Public Defender
Counsel of Record
Patrick L. Bryant
Appellate Attorney
Office of the Federal Public Defender
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 343-0800
Mary_Maguire@fd.org

June 20, 2012