NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS DOTSON
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO
PROCEED *IN FORMA PAUPERIS*

Petitioner, Carlos Dotson, pursuant to Rule 39.1, Rules of the Supreme Court, and 18 U.S.C. § 3006 A(d)(7), asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis. The Federal Public Defender was appointed to represent the petitioner in the District Court.

Dated this 13th day of April, 2012.

Respectfully submitted,

STEPHEN B. SHANKMAN
FEDERAL DEFENDER

Needum L. Germany
Assistant Federal Defender
Attorney for Petitioner
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CAROS DOTSON

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the constitutional protections of indictment, jury trial, and proof beyond a reasonable doubt apply to the brandishing enhancement contained in 18 U.S.C. 924(c)(1)(A)(ii)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Carlos Dotson, Petitioner

United States of America, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this Petition and can be found at *United States v. Dotson*, No. 10-6250, slip op. (6th Cir. Jan. 19, 2012) (unpublished).

JURISDICTION

On January 19, 2012, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. *United States v. Dotson*, No. 10-6250, slip op. (6th Cir. Jan. 19, 2012) (unpublished). No Petition for Rehearing En Banc was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition concerns the Fifth Amendment to the United States Constitution, which 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, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

This Petition concerns the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

This Petition also concerns 18 U.S.C. § 924(c)(1), which provides:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any 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.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 924(c).

STATEMENT OF THE CASE

I. Jurisdiction

The district court had jurisdiction in this case because Petitioner was indicted by a federal grand jury on January 29, 2009, for robbery in violation of 18 U.S.C. § 1951, and carrying a firearm during a robbery in violation of 18 U.S.C. § 924(c). The Sixth Circuit Court of Appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

II. Proceedings Below

Mr. Dotson was indicted for robbery and carrying a firearm during a robbery. The indictment did not allege that Mr. Dotson brandished the firearm. Mr. Dotson pled guilty on September 18, 2009. During the change of plea hearing, the defendant did not admit to brandishing a firearm.

At the district court, Mr. Dotson objected to the application of the brandishing enhancement contained in 18 U.S.C. § 924(c)(1)(A)(ii). Defense counsel admitted the brandishing enhancement is proper under *Harris v. United States*, 536 U.S. 545 (2002), but argued that the Supreme Court opinion in *United States v. O'Brien*, 130 S. Ct. 2169 (2010), called into doubt the ruling in *Harris*. Defense counsel argued that if *Harris* is overruled, the brandishing enhancement must be indicted and proven to a jury beyond a reasonable doubt, which was not done in Mr. Dotson's case. The district court applied the brandishing enhancement.

Before the Sixth Circuit, Mr. Dotson argued that *Harris* was inconsistent and wrongly decided. *Harris* is also unrealistic as demonstrated by the guidelines. Mr. Dotson then explained that *Harris* is in tension with *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. O'Brien*, 130 S. Ct. 2169 (2010). Finally, Mr. Dotson argued that *Harris* raises serious separation of powers concerns.

A three judge panel of the Sixth Circuit affirmed the district court's application of the brandishing enhancement. *United States v. Dotson*, No. 10-6250, slip op. (6th Cir. Jan. 19, 2012) (unpublished). The Sixth Circuit held that *Harris* remained good law after *O'Brien* and therefore it was bound to uphold the enhancement. *Id.* at *2-3

Mr. Dotson then filed the instant petition for certiorari.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE THE SIXTH CIRCUIT HAS DECIDED AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

> The unanimity of our decision today does not imply that *McMillan* is safe from a direct challenge to its foundation.

United States v. O'Brien, 130 S. Ct. 2169, 2183 (2010) (Stevens, J., concurring).

Mr. Dotson comes before this Court to make that direct challenge to the foundation of *McMillan* and *Harris*. *O'Brien*, 130 S. Ct. at 2183 (Stevens, J., concurring) ("*McMillan* and *Harris* should be overruled"). This Petition addresses the issue of whether the brandishing enhancement contained in 18 U.S.C. 924(c)(a)(A)(ii) may be applied without the constitutional protections of indictment, trial by jury, and proof beyond a reasonable doubt. This Court has held that

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance . . . Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Mullaney v. Wilbur, 421 U.S. 684, 699-700 (1975) (quoting *In re Winship*, 397 U.S. 358, 363-364 (1970)).

In *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), the Supreme Court approved a statute which imposed a mandatory minimum penalty for a crime based upon facts which were not indicted or proven to a jury beyond a reasonable doubt. The Court held that this is permissible as long as the statute defines the fact requiring a mandatory minimum as a sentencing factor and not an element. *Id.* at 90. In *Harris v. United States*, 536 U.S. 545, 550 (2002), the Supreme Court applied *McMillan* to the 7 year consecutive mandatory minimum of 18 U.S.C. § 924(c)(1)(A)(ii). The Court held that

McMillan was still good law after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that the brandishing enhancement in 18 U.S.C. § 924(c)(1)(A)(ii) is a sentencing factor and not an element.

Finally, the Court dealt with the 30 year consecutive mandatory minimum machine gun enhancement of 18 U.S.C. § 924(c)(1)(B)(ii) in *United States v. O'Brien*, 130 S. Ct. 2169, 2172 (2010). In *O'Brien*, all 9 Justices agreed that the machine gun enhancement must be indicted and proven beyond a reasonable doubt. The majority opinion reached this conclusion on the narrowest grounds available in that case, that the machine gun enhancement is an element and not a sentencing factor as a matter of statutory interpretation. *Id.* at 2180. The two concurring opinions went farther however, and argued that, as a constitutional matter, any fact which increases the mandatory minimum must be indicted and proven to a jury. *Id.* at 2183-84. Justice Stevens was explicit in his desire to overrule *McMillan* and *Harris*, and he pointed out that Justice Breyer (who provided the tie-breaking vote in *Harris*) appeared to have changed sides, "[i]t appears, however, that the reluctant *Apprendi* dissenter may no longer be reluctant." *Id.* at 2183 (Stevens, J., concurring). Specifically, Justice Stevens was relying upon a question Justice Breyer asked at oral argument in *O'Brien* which seemed to indicate that Justice Breyer had changed his mind and was ready to overrule *Harris*,

> But in *Harris*, I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time. So if . . . if that should become an issue about whether mandatory minimums are treated like the maximums for *Apprendi* purposes, should we reset the case for argument? Tr. of Oral Arg. 20 (question by Breyer, J.).

Id. at 2183 n.6 (Stevens, J., concurring).

Mr. Dotson is challenging the application of the brandishing enhancement of 18 U.S.C. §924(c)(1)(A)(ii) which was neither indicted nor proven to a jury beyond a reasonable doubt in this

case. Mr. Dotson acknowledges that *O'Brien* did not explicitly overrule *Harris* and *McMillan*. However, Mr. Dotson submits that *Harris* and *McMillan* were wrongly decided; they conflict with this Court's decisions in *O'Brien*, *Wilbur*, and *Apprendi*; and the time has come for them to be overruled. Accordingly, the Sixth Circuit's decision to follow *Harris* in the instant case thus also conflicts with *O'Brien*.

I. *HARRIS* IS LOGICALLY INCONSISTENT

As a matter of due process and fundamental fairness, any fact which imposes a mandatory increase in the sentencing range must be charged in an indictment and proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476; *see also Harris*, 536 U.S. at 569 (Breyer, J., concurring) ("I cannot easily distinguish [*Apprendi*], from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction."). *Harris* limited this constitutional protection to facts which increase the statutory maximum sentence. 536 U.S. at 560. However, as Justice Breyer recognized in his concurrence when he provided the tie-breaking vote, *Harris* has, at best, a shaky foundation in logic. *Harris*, 536 U.S. at 569 (Breyer, J., concurring).

The Court in *Harris* was correct that "Judicial factfinding in the course of selecting a sentence *within the authorized range* does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.* at 558 (emphasis added). But the imposition of a mandatory minimum changes "the authorized range." For instance, in this case, the authorized range was 5 years to life, and the court could have imposed any sentence within that range without the indictment, jury, and reasonable doubt constitutional protections. 18 U.S.C. § 924(c)(1)(A)(i). The range with the mandatory minimum in this case is 7 years to life. 18 U.S.C. § 924(c)(1)(A)(ii). In other words, the court is no longer allowed to impose a sentence within the

range authorized by the jury and must instead impose a sentence within the new, higher statutory range.

The majority in *Harris* attempts to sidestep this logical inconsistency by pointing to the fact that the brandishing enhancement merely "require[s] the judge to impose a minimum sentence when those facts are found -- a sentence the judge could have imposed absent the finding." 536 U.S. at 560. However, this ruling is counter to the holding in *Apprendi*, where the Court rejected the argument that a constitutional violation is harmless when the district court could have reached the same result without the enhancement. 530 U.S. at 474. In that case,

> Apprendi pleaded guilty to two counts (3 and 18) of second-degree possession of a firearm for an unlawful purpose, N. J. Stat. Ann. § 2C:39-4a (West 1995), and one count (22) of the third-degree offense of unlawful possession of an antipersonnel bomb, § 2C:39-3a; the prosecutor dismissed the other 20 counts. Under state law, a second-degree offense carries a penalty range of 5 to 10 years, § 2C:43-6(a)(2); a third-degree offense carries a penalty range of between 3 and 5 years, § 2C:43-6(a)(3).

Id. at 469-470. The plea agreement provided that Count 22 would run concurrently to Counts 3 and 18, but the prosecutor would be free to seek a hate crime enhancement on Count 18, which would change the penalty for the count from 5-10 years to 10-20 years. *Id.* That meant that the maximum consecutive sentences the trial judge could impose would be 20 years without the hate crime enhancement, and 30 years with the hate crime enhancement. *Id.* at 470. The judge found that the hate crime enhancement did apply, and sentenced Apprendi to 12 years on Count 18, with shorter concurrent sentences on the other counts. The government in *Apprendi* "argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received; Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to

which he pleaded guilty." 530 U.S. at 474. The Supreme Court found the possibility of consecutive sentences which would have achieved the same result to be completely irrelevant, "The constitutional question . . . is whether the 12-year sentence imposed on count 18 was permissible." *Id.*

Aside from having been rejected in *Apprendi*, the argument that the court could have imposed the same sentence without the brandishing enhancement is unrealistic. As the four dissenting Justices in *Harris* pointed out,

> The suggestion that a 7-year sentence could be imposed even without a finding that a defendant brandished a firearm ignores the fact that the sentence imposed when a defendant is found only to have "carried" a firearm "in relation to" a drug trafficking offense appears to be, almost uniformly, if not invariably, five years. Similarly, those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years.

536 U.S. at 578 (Thomas, J., dissenting) (citing United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1 (illustrating that almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment)). The United States Sentencing Guidelines also agree that a defendant should not receive a sentence above the statutory minimum for an 18 U.S.C. § 924(c) conviction. "[I]f the defendant . . . was convicted of violating section 924(c) . . . the guideline sentence is the minimum term of imprisonment required by statute." U.S.S.G. § 2K2.4(b). And indeed, that is what happened to both the defendant in *Harris* and the defendant in this case: they received exactly the mandatory minimum sentence.

II. INDICTMENT, JURY, AND REASONABLE DOUBT CONSTITUTIONAL PROTECTIONS SHOULD NOT BE LIMITED TO FACTS WHICH INCREASE THE STATUTORY MAXIMUM

Indictment, jury, and reasonable doubt constitutional protections, should extend to facts

which increase mandatory minimums. If anything, the justification for these protections is stronger in the mandatory minimum context. As discussed above and in the *Harris* dissent, an increase in the mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A)(ii) is virtually certain to increase a defendant's sentence by 2 years. *Harris*, 536 U.S. at 578 (Thomas, J., dissenting). An increase in the defendant's statutory maximum, on the other hand, may or may not have any effect on a defendant's sentence. Surely the constitutional protections against statutes that force a Judge to be less lenient should be at least as strong as the protections against statutes that allow a Judge to be less lenient.

Separation of powers concerns counsel strongly against unbridled legislative power in this context. *See Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citing The Federalist No. 47, p. 324 (J. Cooke ed. 1961)) ("the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"). By labeling brandishing as a sentencing factor as opposed to an element, the legislature usurped both the judicial power to determine sentences and the power of the citizenry to determine guilt. The legislature is literally acting as the Judge and jury (though not the executioner). The checks and balances upon which this nation was founded require strong constitutional protections against this type of legislative power grabbing. The legislature simply cannot be allowed to bypass the grand jury, the petit jury, the judge, and the reasonable doubt standard by mere artful drafting.

Furthermore, as the Supreme Court recognized in *Wilbur*,

> if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

421 U.S. at 698. Indeed, that is precisely what has happened here, Congress has taken several distinct crimes and defined them as one crime (18 U.S.C. § 924(c)) with several sentencing factors. This constitutional evisceration is especially effective because the statutory maximum for 18 U.S.C. § 924(c) is life, so it is impossible to exceed the statutory maximum. In other words, Congress can increase a defendant's sentence as much as it wants without any constitutional protections or concern for the mitigating circumstances of the individual.

Mandatory minimum sentences are a 20th century phenomenon, so historical practice is not helpful in determining how to deal with them. *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). However, the Defendant submits that the founders of our nation did not intend for the important constitutional protections of the Fifth and Sixth Amendments to be rendered impotent whenever a legislature moves a key part of a statute to a subclause. Accordingly, the district court erred in applying the brandishing enhancement to Mr. Dotson. When the Sixth Circuit upheld the district court it decided an exceptionally important question of federal law in a way that conflicts with relevant decisions of this Court, including *O'Brien*, *Wilbur*, and *Apprendi*.

CONCLUSION

For the foregoing reasons, Petitioner Carlos Dotson respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 13th day of April, 2012.

Respectfully Submitted,

STEPHEN B. SHANKMAN
FEDERAL DEFENDER

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

CAROS DOTSON
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I, Needum L. Germany, do swear or declare that on this date, April 13th, 2012, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Kevin G. Ritz
Assistant United States Attorney
8th Floor, Federal Building
167 North Main Street
Memphis, Tennessee, 38103

Donald B. Verrilli, Jr.
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, D. C. 20530-0001

With a courtesy copy also e-mailed this same date to the Solicitor General, at: SUPREMECTBRIEFS@USDOJ.GOV.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of April, 2012.

_____
Needum L. Germany
Attorney for Petitioner

APPENDIX

1. Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Dotson*, No. 10-6250, slip op. (6th Cir. Jan. 19, 2012) (unpublished).