

SENTENCING**Is *Harris* a Mandatory Minimums Ruling Whose Time Has Run Out?**

BY DAVID DEBOLD AND MATTHEW BENJAMIN

On Jan. 14, the U.S. Supreme Court will hear argument in *Alleyne v. United States*,¹ the latest case to explore the contours of the Sixth Amendment's jury-trial guarantee at the sentencing phase. Since 2000, when the Supreme Court issued its landmark opinion in *Apprendi v. New Jersey*, the rule has been that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the pre-

scribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."²

On numerous occasions over the past dozen years, the court has applied this rule to invalidate sentencing schemes that allowed judges to find facts that would expose a defendant to a more severe sentencing outcome. Just last term, in *Southern Union Co. v. United States*,³ the court held for the first time that *Apprendi* applies to the imposition of criminal fines. See David Debold and Matthew Benjamin, "A Demise Greatly Exaggerated," 91 CrL 797 (2012).

Alleyne raises a variation on the *Apprendi* theme. Unlike cases such as *Southern Union*, where the court applied the Sixth Amendment to the finding of facts capable of raising the sentencing ceiling, *Alleyne* will address whether a jury must find facts that raise the floor—otherwise known as mandatory minimums.

This is familiar territory for the Supreme Court. Just a couple of years after *Apprendi*, the court held in *Harris v. United States*⁴ that the Sixth Amendment does not require that a jury determine the facts that raise the bottom of a statutory sentencing range. Thus, under *Harris*, a judge may constitutionally find facts that trigger a mandatory minimum sentence within the existing statutory range, and the judge may find such facts by a preponderance of the evidence, with no need for the government to allege them in an indictment.

The vitality of the holding in *Harris* has always been tenuous, at best. The crucial fifth vote came from Justice Stephen G. Breyer, who candidly admitted in his concurrence that he could not "easily distinguish *Apprendi v. New Jersey* from this case in terms of logic." Instead, he voted with the plurality only because he could "not yet accept [*Apprendi*'s] rule."⁵ Many petitioners—recognizing that no more than four justices could agree on a principled basis for the *Harris* holding—have hoped to learn how Breyer would rule if ever forced to admit that *Apprendi* is here to stay. But repeated requests for the court to revisit *Harris* have

¹ No. 11-9335.

David Debold is a partner in the Washington, D.C., office of Gibson, Dunn & Crutcher LLP. Debold practices in the Litigation Department and is a member of the firm's Appellate and Constitutional Law, Securities Litigation, and White Collar Defense and Investigations Practice Groups. He also chairs the U.S. Sentencing Commission's Practitioners Advisory Group. Matthew Benjamin is an associate in Gibson Dunn's New York office and practices in the firm's Litigation Department and White Collar Defense and Investigations Practice Group. He is a member of the U.S. Sentencing Commission's Practitioners Advisory Group. Contact: ddebold@gibsondunn.com or mbenjamin@gibsondunn.com.

² 530 U.S. 466, 476, 67 CrL 459 (2000).

³ 91 CrL 415 (U.S. 2012).

⁴ 536 U.S. 545, 71 CrL 375 (2002)

⁵ Id. at 569-70.

consistently failed—until the recent grant of certiorari in *Alleyne*.⁶ *Alleyne* thus presents the court with a long-anticipated opportunity to overrule *Harris*.

Brandishing *Harris*

Alleyne—like *Harris*—was a prosecution under 18 U.S.C. § 924(c)(1)(A), which makes it a crime to use or carry a firearm during and in relation to either a crime of violence or a drug trafficking crime. That basic offense is punishable by a term of imprisonment “of not less than 5 years.”⁷ But if the firearm was “brandished,” for example, the mandatory minimum sentence increases to seven years. The statute does not expressly state a maximum punishment. But because the words “not less than 5 years” suggest that something more could be imposed, several justices and a number of lower court judges have concluded that there is an implied statutory maximum of life imprisonment.⁸ Four justices in *Harris* concluded that a finding of “brandishing” simply increases a defendant’s mandatory minimum sentence within the implied statutory range of five years to life imprisonment and, joined in that result by Breyer, therefore held that the minimum may be found by a judge using a preponderance-of-the-evidence standard.

That rule has been applied ever since, including in the case of Allen Ryan Alleyne, who was convicted by a jury in the U.S. District Court for the Eastern District of Virginia of committing robbery affecting interstate commerce and of using or carrying a firearm during the robbery. Although *Harris* made the fact of “brandishing” a question for the judge at sentencing, the jury instructions and verdict form nevertheless specifically directed the jury to determine whether Alleyne was responsible for the firearm being “used or carried,” “possessed,” “brandished,” or any combination of the three. On its verdict form, the jury selected only “used or carried”; it did not find “brandishing” beyond a reasonable doubt.

At sentencing, the judge revisited the “brandishing” issue applying the preponderance-of-the-evidence standard. He found that Alleyne was able to reasonably foresee that his accomplice would brandish a firearm during the robbery. Thus, despite the fact that the judge

said he did not “like the role of being the reverser of juries,” he sentenced Alleyne to a 46-month term of imprisonment on the robbery count and a consecutive seven-year term of imprisonment on the firearm count.⁹ The U.S. Court of Appeals for the Fourth Circuit rejected Alleyne’s constitutional challenge, finding it foreclosed by *Harris*. On Oct. 5, at least four justices decided that the time had arrived for reconsidering *Harris*; Alleyne’s petition for a writ of certiorari was granted.

Reconsidering *Harris*

In opposing Alleyne’s certiorari petition, the government argued that principles of stare decisis strongly counsel against revisiting *Harris*. Even though that argument failed, the government invokes the same principles as reason not to overrule *Harris*.¹⁰ The government also argues, among other things, that the *Apprendi* line of cases, and the corresponding Sixth Amendment jury-trial right, is limited to factfinding that would increase the prescribed statutory maximum, i.e., the “ceiling” or longest possible term of imprisonment.¹¹ On this view, if a determination of fact raises only the floor of the statutory sentence range but does not affect the ceiling, a defendant’s constitutional jury-trial guarantee is not implicated; rather, that determination simply has the effect of “channel[ing]” the judge’s discretion at sentencing.¹² Without a judicial finding of “brandishing,” for example, the court could have sentenced Alleyne to anywhere between five years and life imprisonment. Having made such a finding, the court’s discretion was a bit narrower but only at the lower end: The court needed to impose a sentence between seven years and life imprisonment, still within the range authorized by the jury’s conviction.

As the *Harris* court held: “If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed.”¹³

There are several objections to this view. To begin with, although *Apprendi* concerned a fact that increased the penalty for a crime beyond the statutory maximum, it addressed more broadly “facts that increase the prescribed range of penalties to which a

⁶ See, e.g., *Crayton v. United States*, 132 S. Ct. 2379 (2012) (No. 11-8749); *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. 332 (2010) (No. 09-8674).

⁷ 18 U.S.C. § 924(c)(1)(A)(i).

⁸ See, e.g., *United States v. O’Brien*, 130 S. Ct. 2169, 2182, 87 CrL 267 (2010) (Stevens, J., concurring) (describing “implied statutory maximum of life”); *Harris*, 536 U.S. at 575-577 (2002) (Thomas, J., concurring) (describing “the penalty range for a conviction under § 924(c)(1)(A)(i)” as “five years to life in prison”); *United States v. Lucas*, 670 F.3d 784, 795-796 (7th Cir. 2012) (collecting cases from seven other circuits).

⁹ By law, a term of imprisonment imposed under Section 924(c)(1) must run consecutively with the sentence imposed for any other offense, including the underlying crime of violence or drug trafficking crime. See Section 924(c)(1)(D)(ii).

¹⁰ Br. for the United States at 51-55.

¹¹ Id. at 31-34.

¹² Br. for the United States at 10, 13; *Harris*, 536 U.S. at 567.

¹³ *Harris*, 536 U.S. at 566.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

criminal defendant is exposed.”¹⁴ By focusing only on the statutory “ceiling,” *Harris* effectively ignored *Apprendi*’s recognition of a jury-trial guarantee with respect to the entire range, which, “by definition, must include increases or alterations to either the minimum or maximum penalties,” i.e., “both the top and the bottom.”¹⁵ As one federal judge has noted, “Increasing a minimum sentence certainly would seem to increase the range of penalties to which a defendant is exposed.”¹⁶

Next, as Justice Clarence Thomas explained in his *Harris* dissent, “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.”¹⁷ That is because a mandatory minimum sentence is *meaningful* in precisely those instances where the defendant would have otherwise received, at the court’s discretion, a lower sentence. For example, if the court had determined that a sentence for Alleyne of five years on the firearm court was sufficient but not greater than necessary to achieve the purposes of sentencing, its finding of “brandishing” required the court to impose a greater punishment (seven years) than otherwise would have been the case. If, on the other hand, the court had already determined that Alleyne needed a sentence of 20 years on the firearm court regardless of additional factfinding, its finding of “brandishing” would not have exposed him to greater punishment. Thus, in those instances where it is meaningful, a mandatory minimum sentence always effectively increases the sentence to which a defendant is exposed.¹⁸

Furthermore, “as a matter of common sense” and fairness, the jury-trial right ought to apply at least as forcefully to factfinding that *compels* more severe punishment, by raising the floor, as it does to factfinding that merely *permits* it, by raising the ceiling.¹⁹ Indeed, as a practical matter, a legislated mandatory minimum “is far more important to an actual defendant” than the prescribed statutory maximum—not only in terms of shaping his or her decision to plead guilty but also in affecting the ability to make a meaningful offer of all mitigating evidence at sentencing.²⁰ And, as Justice John Paul Stevens observed, “Mandatory minimums may have a particularly acute practical effect in th[e] type of statutory scheme which contains an *implied* statutory maximum of life,” because the maximum often remains hypothetical, while the *actual* sentences tend to cluster around the mandatory minimum. Sentences imposed for violations of Section 924(c)(1)(A), for example, overwhelmingly cluster at the five-, seven-, and 10-year mandatory minimum terms of imprisonment mandated under the statutory subsections for

“carrying,” “brandishing,” and “discharging,” respectively.²¹

Stevens’s observation leads to the second argument that Alleyne makes for reversal—an argument grounded in the statute itself. Recall that several justices and lower court judges have assumed that Section 924(c)(1)(A) has an *implied* statutory maximum of life imprisonment. But as Justices Antonin Scalia, Ruth Bader Ginsburg, and Sonia Sotomayor pointed out during oral argument in *United States v. O’Brien*, “the statute mentions nothing about life.”²² Amici curiae National Association of Criminal Defense Lawyers and National Association of Federal Defenders argue that “it would be passing strange for Congress to authorize a sentence of life imprisonment, the second most severe penalty permitted by law, without including the word ‘life’ in the statute or referencing it anywhere in the legislative history.”²³ Alleyne himself submits that Section 924(c)(1)(A) actually establishes three separate *fixed-term* offenses: a five-year sentence for the basic offense, a seven-year sentence if the firearm is brandished, and a 10-year sentence if the firearm is discharged. In response, the government notes that Alleyne did not raise this argument in the proceedings below and that it is undermined by the statute’s legislative history.²⁴ If Alleyne’s position on this issue carries the day, however, the court could reverse without overruling *Harris*. That is because the sentencing court’s finding of “brandishing” would have exposed Alleyne to a higher *maximum* sentence (a fixed-term of seven years rather than five years) and thus violated *Apprendi*.

The Better Fate: *Harris* Overruled

Harris represented a narrowing of *Apprendi*’s promise of a jury-trial guarantee that applies to punishment. According to the *Harris* plurality, “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.”²⁵ Consequently, *Harris* ruled that the judicial determination of facts that increase a defendant’s mandatory minimum sentence within the prescribed statutory range do not threaten infringement of the jury-trial guarantee. As one commentator noted, this “narrow, formalistic reading of the Sixth Amendment . . . preserves the jury’s function as the adjudicator of the worst possible fate the defendant faces”—the

¹⁴ *Apprendi*, 530 U.S. at 489 (quoting *Jones v. United States*, 526 U.S. 227, 252-253, 65 CrL 347 (1999)).

¹⁵ *Apprendi*, 530 U.S. at 533 (O’Connor, J., dissenting); 530 U.S. at 522 (Thomas, J., concurring).

¹⁶ *United States v. Krieger*, 628 F.3d 857, 864, 88 CrL 311 (7th Cir. 2010).

¹⁷ *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

¹⁸ Tr. of Oral Arg. 22-23, *United States v. O’Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569) (questioning by Justice Sonia Sotomayor).

¹⁹ *Harris*, 536 U.S. at 577-578 (Thomas, J., dissenting).

²⁰ *Apprendi*, 530 U.S. at 563-64 (Breyer, J., dissenting).

²¹ *Harris*, 536 U.S. at 578 (Thomas, J., dissenting); Br. for National Association of Criminal Defense Lawyers and National Association of Federal Defenders as Amici Curiae In Support of Petitioner at 24-25.

²² Tr. of Oral Arg. 13, *O’Brien* (questioning by Scalia); see also *id.* at 14-15 (questioning by Ginsburg and Sotomayor). In contrast, many criminal statutes in the U.S. Code explicitly set maximum terms of life imprisonment. See Br. for National Association of Criminal Defense Lawyers and National Association of Federal Defenders as Amici Curiae In Support of Petitioner at 6 and n.4.

²³ *Id.* at 13 (internal citation and quotation marks omitted).

²⁴ Br. for the United States at 20-24.

²⁵ *Harris*, 536 U.S. at 566 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

statutory maximum—and *only* that fate.²⁶ But under the more robust view that animates the *Apprendi* line of cases, the jury must find, beyond a reasonable doubt, any fact that alters the effective range of penalties to which a defendant is exposed—even when those penalties are short of the statutory outer limits.

Breyer understood that the distinctions and assumptions on which the *Harris* plurality opinion rests are logically untenable. Given that, in practice, statutory minimums are usually the most that a judge is willing to impose, those minimums end up controlling actual sentencing practice. Put another way, the minimum is a *de facto* maximum. Requiring prosecutors to charge in an indictment the facts needed to apply those enhancements, and then prove them to the jury, would be a modest change; as in *Alleyne*'s case, prosecutors in many districts go through these steps already. The only difference is that *Harris* allows—in fact, obligates—judges to ignore the jury when the government proves the necessary fact by a mere preponderance even

²⁶ Benjamin J. Priester, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 *IND. L.J.* 863, 876 (2004).

though that evidence fails to persuade a jury under the burden of proof required by the Fifth Amendment.

Alleyne and other Section 924(c) defendants may benefit from the availability of the two different routes to reversal: the constitutional argument that the Sixth Amendment applies to the determination of facts triggering mandatory minimums and the statutory argument that Congress did not create life-imprisonment maximums through implication alone. Indeed, it would not be surprising if *Alleyne* prevails without either of the two grounds for reversal commanding support of more than four justices.²⁷ Although it would be unfortunate if *Alleyne* fails to produce a definitive ruling on *Harris*'s fate, a new decision extending the jury-trial guarantee to findings that increase the punishment in Section 924(c) prosecutions would still be a vast improvement.

²⁷ For example, Scalia—the only justice who joined the opinion of the court in both *Apprendi* and *Harris*—has focused on Section 924(c)(1)(A)'s silence regarding the maximum term of imprisonment and has characterized the statute as arguably fixed-term “add-ons to the sentence provided by the substantive crime to which (c)(1)(A) refers,” not “mandatory minimums.” See Tr. of Oral Arg. 13, *O'Brien* (questioning by Scalia).