No. 11-9335

IN THE

Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 240 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution and by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. 338 (2007), were cited by the Court or concurring justices. NYCDL also submitted briefs in *Claiborne v. United States*, 551 U.S. 87 (2007) and *Gall v. United States*, 552 U.S. 38 (2007), and has an interest in ensuring

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[1] This brief is filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

that every criminal defendant in the United States receives the protections guaranteed to him or her by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution. In particular, NYCDL has an interest in ensuring a uniform sentencing approach that allows all factors that relate to the offense at issue and that may increase a defendant's sentence—whether a minimum or a maximum—to be found by a jury beyond a reasonable doubt. At the same time, NYCDL has an interest in sentencing efficiency and in preserving the traditional discretion that judges retain with respect to assessing characteristics particular to an individual defendant.

To assist this Court, this *amicus* brief in support of the Petitioner provides two concrete examples demonstrating that any practical concerns about answering the question presented in the affirmative will not produce the kinds of adverse practical effects that have troubled certain Justices. Rather, these examples show that when state and federal courts have extended this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to mandatory minimum sentences, the criminal justice system continues to function smoothly. NYCDL also presents this brief to explain that any remaining concerns about the effects of *Apprendi* on the criminal justice system can be further ameliorated by distinguishing between two types of facts: facts specific to the *offense* and facts specific to the *offender*. As explained below, while the former must be alleged in an indictment and found by a jury beyond a reasonable doubt, the latter can continue to be found by a sentencing judge by a preponderance of the evidence.

SUMMARY OF ARGUMENT

Harris v. United States, 536 U.S. 545 (2002), along with its predecessor *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), should be overruled. Neither *Harris* nor *McMillan* can be reconciled with this Court's modern Fifth and Sixth Amendment jurisprudence. *Harris* allows a sentencing judge to find, by a preponderance of the evidence, facts that increase the range of penalties that a criminal defendant will face. That holding stands in sharp contrast with this Court's reasoning in *Apprendi*, which prevents states from "defining away" facts that expose a defendant to harsher punishment and greater societal stigma. In practice, whether the enhanced punishment results from a raised "floor" or a higher "ceiling" makes no difference to the defendant whose liberty is further curtailed. And because *stare decisis* concerns are at their nadir when dealing with questions of Constitutional law, this Court should not hesitate to fully apply *Apprendi*'s logic to mandatory minimums such as the one faced by Petitioner, and thereby overturn *Harris* and *McMillan*.

As this Court has applied *Apprendi*'s holding over the last decade, several Justices have expressed concerns about the rule's potential impact on trials and sentencing. As NYCDL's experience in New York federal and state courts shows, any such effects will be minimal. New York's federal courts, for example, have operated for seven years under a paradigm for drug offenses that substantially parallels the structure all courts would face should this Court overturn *Harris*. Practitioners there have been able to apply *Apprendi*'s rule to drug offenses with relative ease: from the indictment to the jury instructions or to the plea allocution, New York prosecutors and defense

lawyers are able to address any facts that expose defendants not just to increased maximums, but also to increased minimums. Similarly, criminal defense attorneys in New York state courts regularly confront situations where a jury is required to find facts that trigger a mandatory minimum sentence, without apparent difficulty or inefficiency. These experiences buttress Petitioner's argument that "there are no practical impediments to overruling *Harris*." Pet. Br. 42.

Moreover, any of the enduring practical concerns identified by certain Justices can be addressed by adopting an approach to overruling *Harris* that distinguishes between facts that are specific to the *offense* and facts that are specific to the *offender*. The Constitution's text requires that all facts relating to the alleged "crimes" at issue must be stated in the indictment and presented to the jury, which the Due Process clause requires to be proven beyond a reasonable doubt. To avoid a requirement that aggravating facts concerning an offender's past be presented to the jury if such offender-specific characteristics implicate a mandatory minimum, the Court should draw a line for Constitutional purposes that allows judicial determinations of offender-specific facts that are relevant to sentencing, so long as such facts do not alter the range of applicable sentences. Such a rule comports with the particular competencies of the jury and judge: The jury's traditional role is to answer questions about the criminal conduct alleged in an indictment, while the judge has historically been expected to assess broader offender-based considerations such as an offender's criminal history, amenability to rehabilitation, and correctional treatment. Where, as here, a sentencing judge acts as "the reverser of juries" in finding

offense-related facts only by a preponderance of the evidence, the sentence is unconstitutional. The decision below should be reversed.

ARGUMENT

I. NYCDL'S EXPERIENCES IN NEW YORK'S FEDERAL AND STATE COURTS DEMONSTRATE THAT THERE ARE NO GENUINE PRACTICAL IMPEDIMENTS TO OVERRULING *HARRIS*

Harris should be overruled. *Apprendi* requires that a fact (other than the fact of a prior conviction) that increases the range of punishment must be charged in an indictment and found by a jury beyond a reasonable doubt. Pet. Br. 11 (citing *Apprendi*, 530 U.S. at 490). As Petitioner explains (Pet. Br. 20-21), while a plurality of the Court in *Harris* concluded that *McMillan* could be reconciled with *Apprendi*, five justices disagreed. Justice Thomas, writing for four justices, recognized that the logic of *Apprendi* applied "[w]hether one raises the floor or raises the ceiling" of sentencing ranges, because "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). Justice Breyer, though concurring in the judgment, also observed that he could not "distinguish [*Apprendi*] from [*Harris*] in terms of logic." *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment). The simple fact that five Justices disagreed with *Harris*'s (and, by extension, *McMillan*'s) core logic weighs strongly in favor of *Harris*'s reversal.

Harris's continued vitality rests not on logical grounds, but on practical ones. While observing that "[m]andatory minimum statutes are fundamentally

inconsistent with Congress's simultaneous effort to create a fair, honest, and rational sentencing system," Justice Breyer raised concerns about the "adverse" practical consequences of extending *Apprendi* to apply to such minimums. *Id.* at 569-70. These concerns have been echoed by several other Justices since *Apprendi* was first decided. *E.g.*, *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting); *Apprendi*, 530 U.S. at 550-51 (O'Connor, J., dissenting); *id.* at 555 (Breyer, J., dissenting). It is this ostensible "collateral, widespread harm to the criminal justice system and the corrections process," *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting), that provides the primary obstacle to extending *Apprendi* to mandatory minimum sentencing provisions.

NYCDL's experience in defending criminal cases in both New York federal and state courts, however, demonstrates that full enforcement of *Apprendi* would not create the potential "adverse" consequences that some Justices have raised. As explained below, the relevant players in the criminal justice system—judges, juries, prosecutors, and defense lawyers—have operated under a system effectively applying *Apprendi* to mandatory minimums for years with respect to drug offenses in New York federal courts and to numerous crimes—including arson or murder—in New York state courts. And while Justice Breyer raised questions about whether such a rule would give too much power to prosecutors, *Harris*, 536 U.S. at 571 (Breyer, J., concurring in the judgment), that result has not come to pass. If anything the requirement that the prosecution prove facts that trigger a mandatory minimum beyond a reasonable doubt has had system-wide benefits.

A. New York's Federal Courts Routinely Apply *Apprendi* To Drug-Related Mandatory Minimums

NYCDL members routinely defend against drug-related offenses, where the Second Circuit has applied *Apprendi* to federal mandatory minimums since 2005. NYCDL's experience demonstrates that the practical concerns raised by certain Justices are easily resolved by the participants in the judicial system.

After this Court decided *Apprendi*, the Second Circuit, sitting en banc, addressed how that case applied to 21 U.S.C. § 841, which proscribes the possession of certain narcotics. *See United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc). That statute contains an indeterminate sentencing range of zero to twenty years when there is no quantity of drugs charged, 21 U.S.C. § 841(b)(1)(C), and then imposes increasingly harsh sentences should larger quantities be at issue, including several mandatory minimums, *see id.* § 841(b)(1)(A)-(B). *See generally DePierre v. United States*, 131 S. Ct. 2225, 2231 & n.7 (2011) (describing mandatory minimums for possession of cocaine depending on quantity). Because § 841 involves harsher sentences depending on, *inter alia*, quantity, the Second Circuit held that under *Apprendi*, "quantity is an element of the offense charged under 21 U.S.C. § 841," and that the government must therefore "charg[e] those facts in the indictment and prov[e] them to a jury beyond a reasonable doubt" whenever the it seeks a sentence in excess of the indeterminate penalty in § 841(b)(1)(C). *Thomas*, 274 F.3d at 663.

Four years later, a unanimous panel of the Second Circuit, including then-Judge Sotomayor, extended

Thomas's holding "generally to aggravated drug offenses, not simply those resulting in sentences raising *Apprendi* concerns." *United States v. Gonzalez*, 420 F.3d 111, 125 (2d Cir. 2005). The *Gonzalez* court noted that "[t]he logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped," but held that *Harris* did not apply because "when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum," thus requiring *Apprendi*'s application. *Id.* at 126-27. Thus for the last seven years the federal courts within the Second Circuit have applied *Apprendi*'s strictures to both sentencing minimums and maximums when addressing crimes under 21 U.S.C. § 841.

In response to *Gonzalez*, the federal district courts in New York have routinely been able to try defendants while requiring that drug quantity be charged in the indictment, included in the jury instructions, or allocuted by a pleading defendant. *See, e.g.*, *United States v. Dozier*, No. 11-2808-cr, 2012 WL 3603438, at *1 (2d Cir. Aug. 23, 2012) (denying sufficiency of evidence challenge to jury conviction of conspiracy to distribute more than 50 grams of crack cocaine); *United States v. Morillo-Vidal*, No. 10 Cr. 222-01, 2012 WL 4328295, at *1 (S.D.N.Y. Sept. 21, 2012) (jury finding of possession and conspiracy to possess more than five kilograms of cocaine);[2] *Howard v. United States*, No. 11-CV-5208, 2012 WL 3544763, at

[2] Under 21 U.S.C. § 846, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense."

*3 (E.D.N.Y. Aug. 16, 2012) (denying habeas challenge because, inter alia, "the court expressly asked the jury to identify whether Howard distributed or possessed particular quantities of narcotics on any single occasion"); *United States v. Barret*, No. 10-cr-809, 2012 WL 3229291, at *18 (E.D.N.Y. Aug. 6, 2012) (denying motion for acquittal where jury found defendant guilty of conspiring to possess with intent to distribute 1,000 kilograms or more of marijuana); *Valencia-Lopez v. United States*, No. 10-CV-02893, 2012 WL 2160967, at *7 (E.D.N.Y. June 13, 2012) (rejecting ineffective assistance of counsel habeas claim because defendant "admitted at his plea hearing to the fact—alleged in his Indictment—that his crime involved at least one kilogram of heroin"). This practice is already so commonplace that the leading authority on Second Circuit jury instructions has developed a pattern instruction specifically to guide the jury in determining drug quantities. 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 56-29 (2011). These numerous examples confirm NYCDL's experience that applying *Apprendi* to mandatory minimums will not have a deleterious effect on the criminal justice system.

Nor, for that matter, has the Second Circuit's decision to apply *Apprendi* to mandatory minimums resulted in the practical consequences Justice Breyer raised in his *Harris* concurrence. There, Justice Breyer predicted that applying *Apprendi* to mandatory minimums as to drug quantities would create "seriously adverse" consequences by forcing a defendant to choose between attacking the quantity of the drug and other defenses, such as mistaken identity. *Harris*, 536 U.S. at 571 (Breyer, J., concurring in the judgment). But this dilemma is no different from

many other decisions a defense lawyer makes when crafting arguments—and even choosing to forego potential arguments for strategic reasons—based on the facts of an individual case. Concerns about a single factual tension should not deprive defendants and their lawyers of their choice as to how to argue their cases.

Moreover, if this possible tension actually posed a problem that outweighed the benefits to defendants, one would expect the question to have arisen in cases after *Thomas* and *Gonzalez*. Yet the issue does not appear to have arisen in any federal court decision following *Harris*. Rather, as the Second Circuit observed in *Gonzalez*, requiring the quantity of narcotics to be proven at trial produces benefits for all parties:

> Prosecutors, who must draft indictments and develop evidence to meet their burden of proof; defendants and their counsel, who must decide whether to challenge the sufficiency of the government's case or pursue plea negotiations; and trial judges, who must rule on the relevancy and sufficiency of evidence, prepare jury instructions, and ensure the factual bases for guilty pleas, all need to know long before sentencing which facts must be proved to a jury and which ones can be reserved for resolution by the sentencing judge.

Gonzalez, 420 F.3d at 131. The consequences of applying *Apprendi* to mandatory minimums in federal courts, far from being "adverse," have in fact been salutary.

B. New York's State Courts Effectively Apply *Apprendi* To Mandatory Minimum Sentences For Numerous Crimes

NYCDL's experience in defending the accused in New York's state courts also demonstrates that applying *Apprendi* to mandatory minimums will not be, as the government claimed in its brief opposing certiorari, "disruptive." Brief for the United States in Opposition to Certiorari at 12-13, *Alleyne v. United States*, No. 11-9335. As in New York's federal courts, juries in New York's state courts are already being asked to find offense facts that can trigger mandatory minimum sentences, but this reality has not made the administration of criminal justice more complicated. Specifically, there are numerous cases where juries are presented with the option of convicting a defendant of one offense carrying a particular mandatory minimum as compared to a lesser-included offense lacking a mandatory minimum sentence (or having a lower mandatory minimum). In these cases, the determination of whether the higher mandatory minimum applies turns on whether the jury finds a particular offense fact beyond a reasonable doubt.

Consider, for example, a defendant charged in New York state court with arson. Arson in the first degree is a Class A-I felony, N.Y. Penal Law § 150.20, and therefore carries a mandatory minimum of fifteen years' incarceration, *id.* § 70.00(3)(a)(i). Arson in the second degree, by contrast, is a Class B felony, *id.* § 150.15, and therefore does not carry the fifteen-year mandatory minimum sentence, *see id.* § 70.02. Both crimes require the jury to find (1) that the defendant "intentionally damage[d] a building or motor vehicle by starting a fire"; (2) that "another person who [wa]s not a participant in the crime [wa]s present in such

building or motor vehicle at the time"; and (3) that "the defendant kn[ew] that fact or the circumstances [we]re such as to render the presence of such a person therein a reasonable possibility." *Id.* § 150.15; *see id.* § 150.20. Yet a conviction for arson in the first degree—which triggers the mandatory minimum sentence—requires the jury to find the additional element that the fire "cause[d] serious physical injury to another person." *Id.* § 150.20.[3] Thus, in New York state arson cases the jury decides whether a defendant must serve a mandatory minimum sentence based on its determination of whether the government was able to prove beyond a reasonable doubt the offense-specific element of serious physical injury to another person.

Nor is arson an isolated situation in New York. The distinction between the Class A-I felony of murder in the second degree and the Class B felony of manslaughter in the first degree, for example, similarly turns on the determination of a specific offense fact—whether the defendant acted with the intent to cause death, rather than serious physical injury. *Compare* N.Y Penal Law § 125.25 *with id.* § 125.20. Thus, the jury's factual finding on this one offense element determines whether or not the defendant is subject to a mandatory minimum sentence of life without parole. *See id.* § 70.00(3)(a)(i)(B). No New

[3] Arson in the first degree may also be proven upon the showing of additional elements such as the use of an incendiary device or when "the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor." N.Y. Penal Law § 150.20.

York practitioner disputes the jury's competence to assess this critical factual question.[4]

As these examples illustrate, overturning *Harris* will have little, if any, "disruptive" or "adverse" effect, because New York state practitioners and courts (like their federal counterparts) are well versed in requiring juries to find facts that trigger mandatory minimums under *Apprendi*'s requirements. Rather, a decision holding that the government must prove to a jury beyond a reasonable doubt any offense-related facts that trigger a mandatory minimum sentence would have no more adverse practical consequences than a decision by a legislature to create separate offenses with differing elements. These are familiar requirements to both the prosecution and the defense. In sum, NYCDL's experiences show that there is little reason to think that overturning *Harris* will result in harmful collateral consequences on jury trials and sentencing.

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[4] Nor could New York evade the Fifth, Sixth, and Fourteenth Amendments through artful drafting. The New York arson statute could have been structured in the same way *Harris* read 18 U.S.C. § 924(c)—*i.e.*, with only one arson offense, which did not automatically trigger a mandatory minimum. But *Apprendi*'s constitutional requirements should not turn on the statutory structure or on the label of a particular fact as an "element" or a "sentencing factor," but rather whether the fact at issue changes the range of penalties to which a criminal defendant is exposed. *See United States v. O'Brien*, 130 S. Ct. 2169, 2181 (2010) (Stevens, J., concurring) ("When used as an element of a mandatory sentencing scheme, a sentencing factor is the functional equivalent of an element of the criminal offense itself.").

II. ANY PRACTICAL CONCERNS CAN BE RESOLVED BY DISTINGUISHING BETWEEN OFFENSE- AND OFFENDER-SPECIFIC FACTS

While applying *Apprendi* to mandatory minimums does not raise the concerns Justice Breyer identified in his *Harris* concurrence, NYCDL nonetheless recognizes that legislatures will sometimes seek to base mandatory minimums on certain offender facts that historically have not been, and often should not be, presented to a jury. Such facts, however, should still be considered by the criminal justice system. For example, the Federal Rules of Evidence properly exclude evidence of a defendant's past crimes to suggest a propensity to commit the alleged crime at issue. Fed. R. Evid. 404(b)(1). But such prior crimes are relevant to a judge's sentencing determination and are often explicitly considered by mandatory sentencing enhancements. *See, e.g.*, 18 U.S.C. § 924(c)(1)(C). NYCDL likewise recognizes that the criminal justice system involves more than just juries and crimes: there are rehabilitative concerns as well as long-term commitments to correctional systems that judges, not juries, should consider in fixing a sentence. *See Williams v. New York*, 337 U.S. 241, 248-50 & n.14 (1949) (recognizing the benefits of giving sentencing judges information "to guide them in the intelligent imposition of sentences"). As Justice Kennedy recognized in his *Cunningham* dissent, these policy considerations can be taken into account while simultaneously remaining faithful to *Apprendi*'s principles by distinguishing between facts specific to the *offense* and facts specific to the *offender*. *Cunningham*, 549 U.S. at 296-97 (Kennedy, J., dissenting). Such a line makes sense both as a

matter of Constitutional text and in consideration of institutional capacities.

A. Constitutional Text And Centuries Of Legal Tradition Mandate That Jurors Find All Offense-Specific Facts

As this Court recognized in *Apprendi*, the Constitution's "procedural safeguards designed to protect [a defendant] from unwarranted pains should apply equally to [all] acts that" a state has criminalized. 530 U.S. at 476. The Court explained that the procedural rights set out in the Fifth and Sixth Amendments are "constitutional protections of surpassing importance," *id.*, because requiring the government to prove its criminal accusations to an impartial jury beyond a reasonable doubt serves to "guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of our civil and political liberties," *id.* at 477 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)). As further explained in *Blakely v. Washington*, 542 U.S. 296 (2004), these procedural rights not only "function as circuitbreaker in the State's machinery of justice," but also serve as a "fundamental reservation of power in our constitutional structure" committed to democratic self-governance. *Id.* at 306. Consequently, under the Constitution "the judge's authority to sentence derives wholly from the jury's verdict." *Id.*

These fundamental principles should be interpreted and applied in light of the precise Constitutional texts concerning jury trial rights and related criminal procedures. The jury trial right appears twice in the U.S. Constitution. Section 2 of Article III provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth

Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Similarly, the Fifth Amendment, in addition to its broad due process command, sets out the grand jury requirement that must be met before persons can be "held to answer for a capital, or otherwise infamous crime" and precludes persons from being twice put in jeopardy for "the same offense." In addition to highlighting the favored status of the jury rights and bedrock procedural limits on state police power, the language of these provisions should be read together to help chart the proper boundariess of the procedural rights at issue in this case.

By framing the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused," and by using the terms "crime" and "offense" in Article III and the Fifth Amendment, the constitutional text connotes that the criminal procedure rights in the Fifth and Sixth Amendments attach to any and all offense conduct for which the state seeks to impose a specific form of criminal punishment. *See United States v. White*, 551 F.3d 381, 390 (6th Cir. 2008) (Merritt, J., dissenting) ("By attaching the jury-trial right to *crimes*, rather than to any and all decisions related to the *accused*, the constitutional text suggests a basis for the distinction between offense conduct and offender characteristics."); *cf. Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) (because "[a]ll of these constitutional protections determining which facts constitute the 'crime,'" "in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and … proved beyond a reasonable doubt)"). All specific and defined facts relating to offense conduct which the law makes the basis for depriving a

person of any "life, liberty, or property" are subject to the jury trial right and related constitutional protections.

The jury trial right therefore can and should be understood to concern any and all offense conduct set forth in criminal statutes because the state, through its legislative and executive branches, defines "crimes" and accuses and prosecutes crimes based on what persons do (and not based on who they are). When the law ties mandatory consequences to any specific "offense" conduct—such as the amount of money or drugs involved in an offense, or whether and how the defendant used a weapon, or whether the offense caused bodily harm to a victim—the state has legally defined the specific conduct it believes merits criminal sanction. The jury trial right, in turn, guarantees that a defendant can demand that the state prove to a jury that the defendant did in fact commit the specific offense conduct the state seeks to punish.

B. The Differing Institutional Capacities Of Juries And Judges Allow A Judge To Find Offender-Specific Facts That Do Not Alter Sentencing Ranges

Notwithstanding the importance of the jury, the modern criminal justice system still requires the efforts of sentencing judges to both appropriately tailor individual sentences and to maintain their "broad view and long-term commitment to correctional systems." *Cunningham*, 549 U.S. at 296 (Kennedy, J., dissenting). As the Court recently highlighted in *Oregon v. Ice*, a sentencing judge's fact-finding actions are constitutionally permissible so long as "[t]here is no encroachment … by the judge upon facts historically found by the jury, nor any

threat to the jury's domain as a bulwark at trial between the State and the accused." 555 U.S. 160, 169 (2009). Therefore, so long as a judge does not find offense-specific facts or facts that would otherwise alter the range of sentences to which a defendant would otherwise be exposed, judicial factfinding of offender-specific facts brings distinct benefits into the modern criminal justice system.

Jury trials and sentencing serve distinctly different functions. As the Court has long understood, trials are backward-looking adjudications properly focused on requiring the government to establish all of the facts on which the state bases its demand for criminal punishment. *See Williams*, 337 U.S. at 246-47. Unlike sentencing factors, which "traditionally involve characteristics of the offender … [c]haracteristics of the offense itself are traditionally treated as elements," which "lie[] 'closest to the heart of the crime at issue.'" *United States v. O'Brien*, 130 S. Ct. 2169, 2176 (2010) (quoting *Castillo v. United States*, 530 U.S. 120, 126 (2000)).

Juries are also better suited to find offense-related facts because they benefit from the limitations on admissible evidence, which ensure that adverse offender-related facts do not influence their factual determinations. Of course, offender-related facts are critical for a judge to set a fair sentence, but they are legally irrelevant to determining the facts of an offense and can sometimes prove to be unduly prejudicial in that context. *Cf. Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) ("For the determination of sentences, justice generally requires consideration *of more than the particular acts by which the crime was committed* and that there be taken into account the circumstances of the offense together with the

character and propensities of the offender." (emphasis added) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

By contrast, sentencing is "not confined to the narrow issue of guilt" but rather concerns "the type and extent of punishment after the issue of guilt has been determined," *Williams*, 337 U.S. at 247, and thus justifies allowing a sentencing decision-maker to possess "the fullest information possible concerning the defendant's life and characteristics," *Pepper*, 131 S. Ct. at 1240; *see also United States v. Grayson*, 438 U.S. 41, 53 (1978) (stressing that "the evolutionary history of sentencing ... demonstrates that it is proper—indeed, even necessary for the rational exercise of [sentencing] discretion—to consider the defendant's whole person and personality."). Moreover, offender-specific facts raise considerations that are of critical importance to both a defendant and the criminal justice system writ large, but would be problematic to present to a jury. *See Cunningham*, 549 U.S. at 297 (Kennedy, J., dissenting) (identifying "prior convictions; cooperation or noncooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community" as relevant offender-specific facts); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (allowing sentencing judge to find facts relating to defendant's criminal history even if fact of prior conviction increases maximum sentence). These elements play a vital role in allowing judges to tailor appropriate sentences for individual defendants while maintaining the rough uniformity established by sentencing ranges. As long as offender-specific facts are not an element of the crime charged, there is no Constitu-

tional prohibition against allowing a sentencing judge to find them.[5]

C. *Harris* Improperly Allows Sentencing Judges To Retain Offense-Specific Fact-Finding Power

Under this sensible construction of both the Constitution's text and this Court's prior precedents, there is even more reason for the Court to overrule *Harris* for breaching the line between offense- and offender-specific facts. Whenever a judge engages in fact-finding because operative law ties mandatory punishment to any specific "offense" conduct—such as the amount of money or drugs involved in an offense, or whether and how the defendant used a weapon, or whether the offense caused bodily harm to a victim—the judge invades the jury's traditional province as trier of fact concerning a "crime."

Attempting to harmonize the Court's sentencing and Sixth Amendment jurisprudence just after *Apprendi*, the plurality opinion in *Harris* provided this account of applicable constitutional principles:

> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the

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[5] There may be a handful of statutes where an offender-specific characteristic is an element of the crime and therefore should be treated as such for Sixth Amendment purposes. *See, e.g.*, 18 U.S.C. § 2241(c) (defendant's age in relation to victim is an element of the offense of statutory rape); *id.* § 922(g) (defendant's prior felony conviction is an element of "felon in possession" offense).

> political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.

536 U.S. at 567 (plurality opinion). This effort to conceptually distinguish between facts raising maximum and minimum terms sows confusion and uncertainty—especially in light of the rulings and reasoning in *Apprendi*, *Blakely*, and their progeny. *Harris*'s reference to "judicial expertise" makes little sense if and when a judge is by statute required to engage in backward-looking fact-finding concerning offense circumstances. As former U.S. District Judge Nancy Gertner astutely noted in a commentary on *Harris*, when a judge is required to find offense facts for applying mandatory minimum sentencing terms, often "the judge is 'just' another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences." Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT'G REP. 83, 84 (2002). To speak in this setting of reliance on "judicial expertise" for making factual findings is nonsensical unless and until this fact-finding is confined and limited only to finding those facts concerning offender-related characteristics that have historically been seen as a component of sentencing decision-making.

Harris's approach—permitting judicial fact-finding about the kinds of offense facts traditionally presented to juries—raises the very specter of usurpation of the jury function that this Court has identified in numerous cases. Because *Harris* allows a judge to find facts relating to an offense, for example, "a judge's later, sentencing-related decision that the defendant used [a] machinegun, rather than, say, [a]

pistol, *might conflict with the jury's belief* that he actively used [a] pistol." *O'Brien*, 130 S. Ct. at 2177 (emphasis added) (quoting *Castillo*, 530 U.S. at 128). Such contradictory decisions can undermine the public's perception of the fairness of the criminal justice system. Requiring juries to be the exclusive arbiters of offense-related facts protects public confidence in criminal judgments and the sentences which follow. *See Blakely*, 542 U.S. at 306 (the "jury trial is meant to ensure [the people's] control in the judiciary"). When a sentence is mandatorily enhanced on the basis of the judge's own factual findings concerning offense conduct, facts that the Constitution places in the exclusive province in the jury and that the jury is particularly well-suited to find, such a sentence process should be and is unconstitutional.

As this case makes clear, this error is more than merely hypothetical. Though the jury concluded that Petitioner did not brandish a weapon during the commission of the crime, J.A. 40, the sentencing judge found by a preponderance of the evidence that Petitioner reasonably foresaw that his alleged accomplice would brandish a firearm during the crime at issue, J.A. 61-62. Expressly recognizing that the mandatory minimum at issue allowed the judge to "be[] the reverser of juries," J.A. 48, the district court imposed a sentence based on an offense-related fact not found by the jury. Because the sentencing court relied on a quintessentially offense-specific fact in altering the sentencing range to which Petitioner was exposed, the judgment below must be reversed and *Harris* overruled.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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