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IN THE SUPREME COURT OF THE UNITED STATES

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ALLEN RYAN ALLEYNE, :

Petitioner : No. 11-9335

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Monday, January 14, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MARY E. MAGUIRE, ESQ., Assistant Federal Public Defender, Richmond, Virginia; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-9335, Alleyne v. United States.

Ms. Maguire?

ORAL ARGUMENT OF MARY E. MAGUIRE

ON BEHALF OF THE PETITIONER

MS. MAGUIRE: Mr. Chief Justice, and may it please the Court:

This case is about who gets to decide the facts that trigger a mandatory minimum sentence. Any fact that entitles a prosecution by law to a sentence more severe than a judge could otherwise impose must be found by the jury beyond a reasonable doubt.

Under Harris, the government is entitled --

JUSTICE SOTOMAYOR: Counsel, could you address an issue that's very important to me, the one of stare decisis. And so that -- hone in on that.

MS. MAGUIRE: Yes, Justice Sotomayor. I do not believe that stare decisis poses a problem for the Court in this case because Harris was a plurality opinion. And while four of the Justices found that -- I'm sorry, five of the Justices voted to uphold McMillan, only four of the Justices found that McMillan

1 was consistent with Apprendi.

2 And so we have a plurality opinion, and, for  
3 our constitutional position, we do not believe that  
4 Harris --

5 JUSTICE SOTOMAYOR: Well, the problem is,  
6 whether you're right or wrong -- and you're absolutely  
7 right, it was a plurality opinion -- your adversary says  
8 States have passed laws relying on it, the Federal  
9 system is now structured around it, why isn't the damage  
10 as great as they claim -- potential damage, I should  
11 say.

12 MS. MAGUIRE: Well, first of all, I would  
13 just note that, even though McMillan was decided in  
14 1986, there is nothing in the legislative history that  
15 indicates that Congress referred on McMillan when it  
16 passed 924(c).

17 In addition, 924(c) is silent as to who  
18 should be the fact-finder that triggers the mandatory  
19 minimum. And, finally, in the McMillan case, that was  
20 not really a Sixth Amendment case --

21 JUSTICE SOTOMAYOR: Address, please, the  
22 practical consequences.

23 MS. MAGUIRE: Certainly.

24 JUSTICE SOTOMAYOR: How many -- how many  
25 Federal courts are you aware are already charging the

1 924(c) facts to a jury, notwithstanding the -- the fact  
2 that it's not required?

3 MS. MAGUIRE: Yes, I -- I would say that  
4 there is little to no practical effect, if the Court is  
5 to adopt a rule, because the majority of the Federal  
6 courts are already -- and Federal prosecutors are  
7 already -- alleging these facts in the indictment and  
8 proving them to a jury beyond a reasonable doubt. And I  
9 think that this case is the exact example of that.

10 It was alleged in the indictment. It went  
11 to the jury, the jury got a special verdict form, so  
12 there is no difficulty in implementing this rule --

13 JUSTICE ALITO: But isn't your position that  
14 a decision of this Court is not entitled to stare  
15 decisis protection, if there isn't a majority opinion in  
16 that case?

17 MS. MAGUIRE: Yes, Your Honor. I do not  
18 believe that Harris has precedential value because it is  
19 a plurality opinion. In our --

20 JUSTICE ALITO: Well, I can think of some  
21 pretty important decisions of this Court that were not  
22 the result of a majority opinion. Do you want us to  
23 adopt that as a blanket rule?

24 MS. MAGUIRE: No, Your Honor, but I would  
25 note that, in constitutional questions like this one,

1 stare decisis is at its weakness -- weakest. I would  
2 also --

3 JUSTICE ALITO: All right. Constitutional  
4 decisions of this Court not decided with the majority  
5 opinion, no stare decisis effect. That's your argument?

6 MS. MAGUIRE: Well, and also, Your Honor,  
7 what I think is significant in this case, in terms of  
8 the issue of stare decisis, is that McMillan was not a  
9 Sixth Amendment case. McMillan was decided more on due  
10 process grounds. And the only discussion of the Sixth  
11 Amendment in McMillan comes in the last paragraph, when  
12 it talks to the fact that the defendant has no right to  
13 jury sentencing.

14 And so, for those reasons, we do not believe  
15 that stare decisis poses a problem.

16 JUSTICE SCALIA: You haven't distinguished  
17 McMillan. You've distinguished Harris. How do you  
18 distinguish McMillan? Your -- your only grounds for  
19 distinguishing that is it was not a  
20 Sixth Amendment case, even though the opinion refers to  
21 the Sixth Amendment?

22 MS. MAGUIRE: Well, Your Honor, it does, in  
23 fact, refer to the Sixth Amendment in the very last  
24 paragraph. But what McMillan was mostly concerned about  
25 was a due process claim --

1 JUSTICE SCALIA: I don't care about  
2 "mostly." The issue is whether McMillan was a  
3 Sixth Amendment case, in part or in whole. And I don't  
4 know how you can say it wasn't. We -- we don't decide  
5 cases on -- on what a case mostly says. We decide on  
6 what it says.

7 MS. MAGUIRE: That's absolutely --

8 JUSTICE GINSBURG: Ms. Maguire, you don't --  
9 you don't have to take the position that there's no  
10 stare decisis effect. In a unanimous -- a recent  
11 unanimous decision of this Court, obviously, would carry  
12 more weight than one that has a plurality opinion, so  
13 you don't have to say -- it isn't a question of yes or  
14 no, it's a question of the degree of respect that we  
15 would give to our former decision.

16 MS. MAGUIRE: I think that that is exactly  
17 right, Justice Ginsburg. And, in fact, the other  
18 factors that the Court considers when looking at stare  
19 decisis is what were the margins of vote on the previous  
20 cases, and McMillan was decided on a 5-4 decision,  
21 whereas Harris, as we've noted, was a plurality  
22 decision.

23 Both opinions were found over spirited  
24 dissents. They have been criticized by this Court and  
25 the lower courts, and, in all of those instances, we

1 believe that stare decisis is at its weakest --

2 JUSTICE ALITO: Well, I think it's important  
3 for this Court to have a consistent doctrine of stare  
4 decisis. The doctrine can't be, "We will overrule  
5 decisions that we don't like, but we will stick with  
6 decisions that the majority does like." So I'm still  
7 looking for your understanding of what stare decisis  
8 means in constitutional cases.

9 Now, with the suggestion of  
10 Justice Ginsburg, I gather that your position is, if  
11 it's a narrow decision, then it's -- stare decisis has  
12 less weight; is that it? Now, what other factors? So  
13 it has less weight. Why isn't it controlling, though?  
14 Why does it have insufficient weight here?

15 MS. MAGUIRE: Because, Justice Alito,  
16 another thing that you look -- look to, when you are  
17 considering stare decisis, is whether or not the rule is  
18 workable, whether or not the prior decision was badly  
19 reasoned, and those are other factors that the Court can  
20 consider.

21 And, if you look at this Court's Sixth  
22 Amendment jurisprudence, as it has developed since  
23 Apprendi, then in Booker, then in Blakely, then in  
24 Cunningham, what we are asking for today is a logical --

25 JUSTICE KAGAN: But why is this not



1 workable? I mean, you can -- you can argue about  
2 whether it was right or wrong. You can argue about  
3 whether it has created some incongruity in the system.

4 But haven't the last number of years  
5 suggested that it's perfectly workable? Everybody knows  
6 what they are supposed to do; everybody does it. Why --  
7 why is this not workable?

8 MS. MAGUIRE: Well, the Harris rule is not  
9 workable on a practical level because what happens under  
10 the Harris rule is the government is entitled to a fact  
11 that drives a more severe punishment that never goes to  
12 the jury. If -- if -- and what we are asking here is  
13 that the court find that, where there is a fact that  
14 triggers a mandatory minimum, that that fact be found by  
15 the jury.

16 JUSTICE SOTOMAYOR: Now I understand --

17 CHIEF JUSTICE ROBERTS: That sounds like --  
18 that sounds like an argument that it's wrong, and that  
19 is, of course, the first step in -- in the stare decisis  
20 analysis. It doesn't sound, to me, responsive to  
21 Justice Kagan's question is, in what sense is it  
22 unworkable?

23 MS. MAGUIRE: Well, I think it becomes  
24 unworkable in the drug cases, Your Honor, and in the  
25 9841 statute because what you have there is you have, in

1 some circuits, people alleging drug weight, but, in  
2 other circuits, you have they called this mixing and  
3 matching. And, as long as the statutory maximum does  
4 not exceed 20 years, the prosecutors are not alleging  
5 the drug weights in the indictment.

6 And that becomes unworkable and quite  
7 confusing to the courts. And the lower courts have  
8 criticized the Harris rule, primarily in cases like  
9 Krieger and others that we -- are cited in our amicus  
10 brief, that the rule is somewhat unworkable.

11 JUSTICE SCALIA: Why wouldn't that be a  
12 problem if -- if the question had to be decided by the  
13 jury? Why does -- why does requiring it to be decided  
14 by the jury eliminate that -- that problem of the -- of  
15 the mixing or not mixing?

16 MS. MAGUIRE: Well, asking it to be found by  
17 a jury solves the problem because it -- it allows the  
18 fact to go to the jury, the jury finds it. And we have  
19 a long history in this country that jury verdicts drive  
20 punishment. And so the idea is that the punishment that  
21 somebody is open to should be driven by the jury  
22 verdict.

23 JUSTICE GINSBURG: You mentioned drug  
24 weight. Let's -- so you're making -- your argument  
25 would mean that drug weight also has to be found by the

1 jury because that can -- the length of the sentence can  
2 depend on the -- the drug weight.

3 MS. MAGUIRE: If the drug weight is going to  
4 trigger a mandatory minimum, Your Honor, yes, we would  
5 say that, under our rule, that that would have to be  
6 alleged in the indictment and proved to the jury beyond  
7 a reasonable doubt, which, as our amicus briefs point  
8 out, is being done already in the majority of circuits  
9 throughout the country.

10 And so this is not going to put -- put any  
11 additional burden on the prosecutors to be doing this.  
12 And, fundamentally, what it does is that it levels the  
13 playing field because what it does in trial situations  
14 is it allows a defendant to know exactly what it is that  
15 the government is going to prove.

16 The government then has to bring in those  
17 witnesses at the time of trial, so that they can be  
18 cross-examined on this fact that is going to trigger the  
19 mandatory minimum in their case. And so it helps level  
20 the playing field in that regard.

21 JUSTICE ALITO: Now, if you were defending a  
22 case involving drug weight and your client maintained  
23 that he or she had nothing to do with these drugs, how  
24 would you proceed? Your argument would be: They're not  
25 my drugs, but if they were my drugs, they weren't --

1 they didn't weigh more than one kilo.

2 MS. MAGUIRE: Well, Justice Alito, those are  
3 strategical questions that come up in every trial case  
4 that we have. And you have to decide, as a trial  
5 lawyer, what your theory of the defense is going to be.  
6 It's simply going to be, I wasn't there; or you may  
7 decide to challenge the drug weight.

8 But those -- those strategic decisions exist  
9 whether or not the Court adopts this rule or doesn't  
10 adopt the rule --

11 JUSTICE KENNEDY: But the question was  
12 what -- what strategic decision do you think the lawyer  
13 should make?

14 MS. MAGUIRE: Well, any strategic decision a  
15 lawyer makes is going to depend on the individual facts  
16 of the case. For example --

17 JUSTICE KENNEDY: So you -- but -- but  
18 Justice Alito has a real problem. What -- don't you put  
19 the defense in a very difficult position?

20 MS. MAGUIRE: You don't put the defense in a  
21 very difficult position because, in fact, if you adopt  
22 our rule, we believe that you are protecting the  
23 defendant's Sixth Amendment right to a jury because this  
24 is a fact that is going to be triggering a mandatory  
25 minimum.

1           And, if the government has to prove it, they  
2 then have to bring in the witness to the trial, who is  
3 then subject to cross-examination, which is a far  
4 more --

5           JUSTICE KENNEDY: But -- but isn't it  
6 difficult for you to say he had nothing to do with the  
7 drugs, plus the drugs didn't weigh more than a certain  
8 amount?

9           MS. MAGUIRE: I don't believe that that is  
10 difficult, and I believe that those are decisions that  
11 you make in every case. For example, in the case -- in  
12 this case -- in Mr. Alleyne's case, our theory --

13           JUSTICE KENNEDY: I think that I am hearing  
14 that, in every case, you are going to want witnesses --  
15 you are going to insist on a jury determination of the  
16 amount. That's kind of what I'm hearing.

17           MS. MAGUIRE: That is the rule,  
18 Justice Kennedy, that we are asking the Court to adopt,  
19 that if there's a fact --

20           JUSTICE KENNEDY: Justice Alito says why  
21 doesn't that put defense counsel in a very difficult  
22 position?

23           MS. MAGUIRE: Well, it doesn't put defense  
24 counsel in a difficult position at all because those are  
25 the same decisions that you make, whether or not you

1 adopt this rule or you don't adopt this rule.

2 JUSTICE KENNEDY: Well, we're not getting  
3 far with this. But one answer you could say is that, in  
4 order to preserve the constitutional right, you want us  
5 to have a bifurcated trial. I thought you were -- might  
6 say that.

7 MS. MAGUIRE: No, we are not -- we are not  
8 asking for a bifurcated trial. We are just asking that  
9 if there's one --

10 JUSTICE KENNEDY: That's good because that's  
11 an extra problem.

12 (Laughter.)

13 JUSTICE KAGAN: Ms. Maguire, could I take  
14 you to a different kind of question?

15 MS. MAGUIRE: Certainly.

16 JUSTICE KAGAN: Let's assume that there were  
17 a statute, and it said carrying a gun is an offense and  
18 that the range is 5 to 10 years. I realize it goes up  
19 further in the real world, but let's just say 5 to 10  
20 years. And Congress said, in setting the penalty within  
21 that range, the judge shall consider whether the  
22 defendant brandished the gun and whether the defendant  
23 discharged the gun. Now -- and that's all the statute  
24 said.

25 That would be constitutional; is that not

1 right?

2 MS. MAGUIRE: Yes, Justice Kagan, that would  
3 be constitutional because it doesn't have the mandatory  
4 effect.

5 JUSTICE KAGAN: Okay. So it's  
6 constitutional for the judge to say, seven years because  
7 you brandished, nine years because you discharged.

8 So what makes it unconstitutional, what  
9 makes it a violation of the Sixth Amendment, when, now,  
10 Congress just provides something extra in the statute?  
11 It says not just you shall consider brandishing and  
12 discharging, but, if you find brandishing, you get 7; if  
13 you find discharging, you get 9.

14 MS. MAGUIRE: Okay. What makes that  
15 unconstitutional is because you are stripping the judge  
16 of all authority, and, by operation of law, you are  
17 telling that judge that you must impose this sentence.

18 JUSTICE KAGAN: Well, that seems right as a  
19 definitional matter, as a descriptive matter. But I  
20 guess the question I'm having difficulty with is why  
21 does that matter for purposes of the Sixth Amendment?  
22 The jury is doing the exact same thing, which is the  
23 jury isn't doing anything in either of my examples.

24 So the only difference between example  
25 number one, which you said was constitutional, and

1 example number two is that, now, Congress is giving  
2 further instruction to the judge, but nothing more is  
3 being taken away from the jury; is it?

4 MS. MAGUIRE: Well, yes, it is because, in  
5 your second hypothetical, where it is the mandatory  
6 minimum, which is exactly what we have in this case,  
7 this notion that somehow Congress is channelling  
8 discretion is a fiction because what it does is it tells  
9 the judge, you must impose seven years, and you cannot  
10 even consider what is authorized by the jury verdict in  
11 this case.

12 And the jury verdict in this case authorized  
13 a range of five years as the bottom. And so what  
14 happens is, when you have Congress coming in and saying  
15 that, if you find this fact on a mere preponderance  
16 standard, you must impose seven years, then you are  
17 stripping the defendant of the benefit of the full jury  
18 verdict in this case, which authorized a range that had  
19 a lower floor than that called for by the Federal  
20 statute.

21 JUSTICE SCALIA: Ms. Maguire, could -- could  
22 you repeat the first sentence you uttered in this  
23 argument? I -- I hesitated to jump in so early, but  
24 could you repeat it verbatim? Maybe you had committed  
25 it to memory. Good -- good counsel often does that.



1 (Laughter.)

2 MS. MAGUIRE: Thank you, Justice Scalia.

3 It's -- my very first sentence was, "This case is about  
4 who gets to decide the facts that trigger a mandatory  
5 minimum sentence."

6 JUSTICE SCALIA: No, that wasn't it.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: It started,  
9 "Mr. Chief Justice."

10 (Laughter.)

11 JUSTICE SCALIA: I think what you said was  
12 who has to decide a fact which causes a defendant to be  
13 subject to a penalty that he would not otherwise be  
14 subject to? And the fact is that, in the case of a  
15 mandatory minimum, the defendant could have been given  
16 that mandatory minimum. It was up to the judge.

17 So this mandatory minimum does not increase  
18 the penalty to which the defendant is subject. He's  
19 subject, in Justice Kagan's example, to any penalty  
20 between one years -- one year and 10. The judge, even  
21 without the statute that she mentioned, could have given  
22 him seven years because he -- he brandished a gun.  
23 There -- there is really no -- no increase in the  
24 penalty to which he is exposed.

25 And I thought that is what Apprendi

1 addressed, any increase in the penalty to which you are  
2 exposed, so that when you decide, I'm going to rob a  
3 bank -- you know -- you know, when you go in, you are  
4 going to get between one and 10 years, and, with a  
5 mandatory minimum, you get between one and 10 years.

6 So what's the complaint, as far as Apprendi  
7 is concerned?

8 MS. MAGUIRE: The complaint is that -- and  
9 why we believe that the rule we are asking the Court to  
10 adopt, Justice Scalia, is a natural -- it follows the  
11 logic of Apprendi, is because, in both cases, you have  
12 judicial factfinding that's leading to a more harsh  
13 sentence. In your --

14 JUSTICE SCALIA: It isn't leading to a more  
15 harsh -- more harsh sentence. That's the whole point of  
16 Apprendi. Does it lead to a sentence which is greater  
17 than the judge would otherwise be authorized to impose?  
18 And, in the case of a mandatory minimum, it never is.  
19 The judge could impose that, if he was a hanging judge.  
20 You know, you have some hanging judges; you have some  
21 bleeding heart judges.

22 And -- and what a mandatory minimum simply  
23 says is -- you know, we don't care what kind of a judge  
24 you are, at least this much. But it doesn't expose the  
25 defendant to any greater penalty. He's -- he's at risk

1 between one and 10 years.

2 MS. MAGUIRE: Well -- and I think,  
3 Justice Scalia, that's -- that's a false presumption. I  
4 think that's the position of the government, that,  
5 somehow, mandatory minimums channel discretion within a  
6 range. That is a fiction because a judge is being  
7 told, you must impose this, you have no choice, you  
8 cannot go below this. That is the whole nature of a  
9 mandatory minimum. And so this --

10 JUSTICE SOTOMAYOR: Do you have any  
11 statistics, on at least 924(c), of how often the greater  
12 is the sentence than the absolute minimum required by  
13 law?

14 MS. MAGUIRE: Well, Justice Sotomayor, this  
15 Court found in O'Brien -- and I think that it's also  
16 cited in the Lucas briefs and Dorsey briefs that this  
17 Court is holding, that the majority of all defendants  
18 convicted under 924(c) are, in fact, sentenced at the  
19 mandatory minimum.

20 JUSTICE SOTOMAYOR: So, in fact, your  
21 argument is that fixing a sentence is different than  
22 giving a judge discretion because it ignores the fact  
23 that a judge might have given you less?

24 MS. MAGUIRE: That is exactly right.

25 JUSTICE SCALIA: That seems to me --

1 JUSTICE SOTOMAYOR: So it's depriving you of  
2 the constitutional right to have a jury decide what your  
3 sentence could be?

4 MS. MAGUIRE: That is exactly right.

5 JUSTICE SOTOMAYOR: Of having a judge decide  
6 what your sentence could be?

7 MS. MAGUIRE: That is exactly right. And  
8 it's further depriving you -- it is depriving the  
9 defendant of liberty interests. It is imposing a  
10 stigma, and it is entitling the prosecutor to a greater  
11 and more severe punishment.

12 CHIEF JUSTICE ROBERTS: That's -- I'm not  
13 sure that that's -- you've emphasized several times that  
14 it takes away the discretion of the judge. That seems,  
15 to me, to be a matter between Congress and the Judiciary  
16 and not a Sixth Amendment question.

17 MS. MAGUIRE: Well, Mr. Chief Justice,  
18 actually, the language of this Court in Apprendi said  
19 that it is unconstitutional for the legislature to  
20 remove from the jury the assessment of facts that  
21 increase the prescribed range of penalties to which a  
22 criminal defendant is exposed.

23 And that is exactly what's happening in this  
24 context because --

25 JUSTICE KAGAN: Well, Apprendi, thought, did it

1 both ways. I mean, that's the best sentence for you in  
2 Apprendi, but there are other sentences in Apprendi  
3 which more go towards what Justice Scalia suggested,  
4 that the question was increasing it above the maximum  
5 that the jury authorized.

6           So I'm not sure that we can get from the  
7 language of Apprendi -- and I guess the question is, as  
8 a matter of principle, why I -- I completely understand  
9 why a defendant would care about this. The question is  
10 does it -- does it create a Sixth Amendment violation,  
11 which is -- you know, the jury has to do this, when --  
12 when Congress is decreasing the judge's discretion, but  
13 it's -- either way, the jury isn't deciding this.

14           MS. MAGUIRE: Well, Justice Kagan, we do  
15 believe the Sixth Amendment is implicated because we  
16 think the history of the Sixth Amendment in this country  
17 shows that the role of the jury is the buffer between  
18 the citizen meant to protect and the government.

19           And mandatory minimums give the prosecution  
20 far much power. And, in fact, if you do not adopt our  
21 rule and -- and make the government have to prove it  
22 beyond a reasonable doubt, what happens is then the  
23 average citizen does not get the benefit of a jury  
24 verdict, and his sentence is not driven wholly by the  
25 jury verdict because, in this case, we had a jury

1 verdict, the government alleged the fact, we had a  
2 special verdict form, the jury failed to find that fact.

3           As a result of that, then, the range to --  
4 that Mr. Alleyne should have been exposed was a  
5 five-year mandatory minimum and for the constitutional  
6 argument assuming a maximum of life. Here, what  
7 happened and at the sentencing hearing was on a mere  
8 preponderance, the judge had to impose seven. And so we  
9 believe that is where you have the Sixth Amendment  
10 problem because the defendant --

11           JUSTICE SCALIA: But you -- you quoted  
12 Apprendi correctly as saying that the jury has to decide  
13 any fact which increases the sentence to which the  
14 defendant is exposed. That's the language you quoted,  
15 and it's accurate.

16           Why does a mandatory minimum increase the  
17 sentence to which the defendant is exposed? He could  
18 get the mandatory minimum sentence, even if there were  
19 no mandatory minimum prescribed. He is exposed to a  
20 sentence of one to 10 years. A mandatory minimum says,  
21 you must impose seven years if he brandishes.

22           But the sentence to which he is exposed is  
23 one to 10 years. And the mandatory minimum does not  
24 change that at all. He is at risk for one to 10 years.

25           MS. MAGUIRE: Well, I understand that that

1 may not change the exposure. What it does, on a  
2 practical level, is it prevents the judge from even  
3 considering anything less than the seven years.

4 JUSTICE SCALIA: That's true.

5 MS. MAGUIRE: And that becomes the problem.

6 JUSTICE SCALIA: That's true. But you must  
7 acknowledge that that's not the theory of Apprendi.

8 MS. MAGUIRE: Well, I think the theory of  
9 Apprendi if you -- if you take it out to its logical  
10 step, is that, if you have judicial factfinding that is  
11 resulting in a more harsh sentence being imposed, then,  
12 in fact, you have a Sixth Amendment problem.

13 And so what happens on the mandatory  
14 minimums is that, if a judge finds the mandatory  
15 minimum, a more harsh sentence is being imposed because,  
16 as an example, in this case, the judge could not even  
17 consider giving the five-year year floor as a mandatory  
18 minimum, which we've already noted is, in fact, how most  
19 criminal defendants are sentenced under the 924(c)  
20 statute at the mandatory minimum level.

21 JUSTICE SCALIA: I think the logic of  
22 Apprendi is that the jury has to decide it if it  
23 increases the sentence to which the defendant is  
24 exposed, not if it eliminates some discretion of the --  
25 of the Court. He's exposed.

1 JUSTICE SOTOMAYOR: How about Booker? What  
2 did Booker do --

3 MS. MAGUIRE: Well, I think --

4 JUSTICE SOTOMAYOR: -- to the logic of  
5 Apprendi?

6 MS. MAGUIRE: Justice Sotomayor, what I  
7 believe that Booker did is that Booker indicated that  
8 when you have a fact that drives -- a finding of fact  
9 that drives a mandatory sentence to be imposed, that,  
10 obviously, that was the Sixth Amendment problem.

11 Now, I understand and appreciate --

12 JUSTICE SOTOMAYOR: Even when the statutes  
13 had a higher maximum?

14 MS. MAGUIRE: That is correct, Your Honor.

15 JUSTICE SOTOMAYOR: Because the jury was --  
16 because the judge was constrained within a different  
17 maximum?

18 MS. MAGUIRE: That is correct, Your Honor.

19 JUSTICE SOTOMAYOR: Is that your argument  
20 here?

21 MS. MAGUIRE: Yes. And so what I believe is  
22 that what Booker indicates is that it is this mandatory  
23 effect which may -- and that is why this Court found --  
24 extending Apprendi in the Booker case, that, in fact,  
25 the guidelines then had to become advisory. It is the



1 mandatory effect of the factfinding that is essential in  
2 these cases.

3 JUSTICE SCALIA: It wasn't a mandatory  
4 minimum case. Booker was a case in which the maximum  
5 was increased on the basis of judge finding of fact.  
6 The maximum was increased. So, under the situation in  
7 Booker, the -- the exposure of the defendant was,  
8 indeed, increased on the basis of judge factfinding.  
9 Instead of one to 10, the statute in -- in Booker said,  
10 if you brandish a gun, you can get 15.

11 That's a -- that's a quite different  
12 situation from saying, yes, you are still on the hook  
13 for one to 10, but, if you brandish, you got to get 7.

14 MS. MAGUIRE: Well, Justice Scalia, I think  
15 the concern in Booker was the mandatory nature of the  
16 guidelines. And while I would agree with you, that this  
17 Court, in its constitutional part of the Booker  
18 decision, did, in fact, look to the increase in the  
19 maximums, it is the same problem. You have judge --  
20 judicial factfinding that is mandating a particular  
21 sentence.

22 And that is where you have the Sixth--

23 JUSTICE ALITO: Why is Booker -- why is  
24 Booker entitled to greater stare decisis weight than  
25 Harris and McMillan?

1 MS. MAGUIRE: Well, I believe that Booker  
2 is -- is entitled to greater weight because it was more  
3 recently decided by this Court, and I also believe that  
4 it is a more recent interpretation of this Court of the  
5 principles held in Apprendi.

6 I would like to reserve the remainder of my  
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Dreeben?

10 ORAL ARGUMENT OF MICHAEL R. DREEBEN

11 ON BEHALF OF THE RESPONDENT

12 MR. DREEBEN: Mr. Chief Justice, and may it  
13 please the Court:

14 This Court should adhere to its decision in  
15 Harris v. United States, which reaffirmed  
16 McMillan v. Pennsylvania because those decisions  
17 properly respected the fact that a mandatory minimum  
18 divests the defendant of the right to judicial leniency.

19 JUSTICE SOTOMAYOR: Could I go back to a  
20 simple question on the stare decisis, the practicality  
21 question?

22 What is so impractical about letting a jury  
23 decide an issue that sets a mandatory sentence of any  
24 kind? Why -- why are juries incapable of figuring out  
25 whether a gun was carried or brandished? Why are they

1 incapable of figuring out how many -- how much drugs  
2 were sold or whether someone was driven by any of the  
3 factors that States want to commit to judges, but the  
4 Sixth Amendment might require them to submit to juries?

5 MR. DREEBEN: Justice Sotomayor, the  
6 government's argument here is not that juries are  
7 incapable of finding facts under the Federal statutes  
8 that involve mandatory minimums. It's that Congress has  
9 sound reasons for wishing to allocate that factfinding  
10 to the sentencing process and that it is not  
11 unconstitutional for Congress to do so.

12 JUSTICE SOTOMAYOR: But what does that have  
13 to do with the needs -- the constitutional need to make  
14 sure that juries are driving a fixed sentence of any  
15 kind?

16 MR. DREEBEN: The -- the constitutional  
17 question, in my view, Justice Sotomayor, turns on  
18 whether there is a right to the mercy of a tenderhearted  
19 judge. That is what a defendant loses when a judge  
20 finds a mandatory minimum fact.

21 JUSTICE BREYER: No, no, it isn't quite. I  
22 mean, the -- the linguistic difference -- I agree with  
23 Justice Scalia, and I agree with you. It turns on the  
24 word "exposed." I mean, if you state Apprendi's holding  
25 as it was just stated, this is a different case because

1 you could, in fact, if you were the defendant, have been  
2 sentenced to that anyway. That's your argument.

3 MR. DREEBEN: Correct.

4 JUSTICE BREYER: Now, let's put it  
5 differently. There is a fact in the world. There's a  
6 gun, or there wasn't a gun. In the Apprendi case, if  
7 the fact turns out to be gun, you could get two more  
8 years. All right? We have to go to the jury. Now,  
9 here there's a fact in the world, gun or not gun.

10 If it turns out not gun, you get a lower  
11 sentence, you could. And, if it turns out to be the  
12 fact, gun, you can't -- the judge cannot put you in that  
13 box. He has to put you in a worse box. He has to put  
14 you in a worse box. He has to give you more than --  
15 more than the three years, two years, or one year. He  
16 has to. Okay?

17 Now, from the point of view of the  
18 defendant, worse or not -- at least as bad. From the  
19 point of view of Congress, same. They drew some lines,  
20 want a judge to administer them, and they turn on facts.  
21 And the sentence very often will turn on those facts.

22 From the point of view of the judge, same.  
23 It's the jury decides or he decides. In the one case,  
24 his discretion is cut off to give a lower sentence. In  
25 the other case, his discretion is granted to give a

1 higher sentence.

2 Now, I see tremendous similarities, though I  
3 grant you the words are different, but can you -- can  
4 you just explain --

5 MR. DREEBEN: Justice Breyer, yes.

6 JUSTICE BREYER: -- why the difference in  
7 the words should overcome the fact that I can't think of  
8 a -- of a difference, other than those words that  
9 happened to be used in Apprendi?

10 MR. DREEBEN: Well, Justice Breyer, we have  
11 a chart in our brief that I think is addressed  
12 explicitly to the question that you are asking, and it's  
13 on page 36 of our brief. And it illustrates the  
14 difference between an Apprendi situation and a  
15 Harris-McMillan situation. So the government's gray  
16 brief.

17 And the point of the chart is this --

18 JUSTICE SCALIA: What page? What page?

19 MR. DREEBEN: This is page 36 of the  
20 government's brief.

21 JUSTICE BREYER: I'm afraid the other side  
22 was upside down, and I saw what you meant.

23 MR. DREEBEN: Okay. The point of Apprendi  
24 is a jury cannot be reduced to low-level gatekeeping.  
25 Congress cannot pass a statute that says it is a crime

1 to assault someone, and that's punishable by one year in  
2 prison. But if the crime involves rape, then it's  
3 punishable by 10 years in prison. Or if the crime  
4 involves attempted murder, then it's punishable by up to  
5 life.

6 Congress can't do that because it would  
7 diminish the role of the jury in finding the critical  
8 facts that constitute the crime that sets the  
9 defendant's maximum exposure. Apprendi protects against  
10 that.

11 In a Harris situation, the defendant is  
12 already exposed to the maximum penalty that the  
13 defendant incurs under the statute, and that's what the  
14 second column illustrates. The defendant who commits a  
15 Section 924(c) crime knows that the defendant faces up  
16 to life in prison.

17 When the mandatory minimum comes along, it  
18 doesn't increase the defendant's exposure to the most  
19 severe punishment he can get. It divests the defendant  
20 of a degree of judicial discretion. But the Sixth  
21 Amendment does not protect a right to judicial  
22 discretion.

23 JUSTICE SOTOMAYOR: You know, but that --

24 JUSTICE BREYER: But --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 JUSTICE BREYER: That's the -- that's the --  
2 you've used all the words, which do make the difference,  
3 in your mind. But my question --

4 MR. DREEBEN: It's not just in my mind,  
5 Justice --

6 JUSTICE BREYER: -- is why should those  
7 words make a difference?

8 Look, in the one case -- I'll be repeating  
9 myself, but I want you to see it. In the one case,  
10 presence of a fact or not means the defendant goes into  
11 a higher sentencing box. In the other case, presence of  
12 a fact or not means that he cannot go into the low  
13 sentencing box.

14 MR. DREEBEN: And when he cannot --

15 JUSTICE BREYER: In the one case, he cannot  
16 go into the low sentencing box; in the other case, he  
17 can't go into the high sentencing box. I got that  
18 difference.

19 My only problem is why does it make a  
20 difference.

21 MR. DREEBEN: It matters because the Sixth  
22 Amendment protects a right to a jury trial; it does not  
23 protect a right to judicial leniency.

24 JUSTICE BREYER: No, it's not -- well, you  
25 can call it judicial leniency, but you could call the

1 other judicial harshness. I mean, what is, in fact,  
2 turning out --

3 MR. DREEBEN: No, because, in -- in the  
4 other situation, it protects the right of the jury to  
5 determine the ingredients of the crime that Congress has  
6 determined exposed the defendant --

7 JUSTICE BREYER: And, here, we have the  
8 ingredients of a crime that Congress has determined that  
9 you have to get the five years.

10 MR. DREEBEN: Well, we know --

11 JUSTICE BREYER: I mean, in the one case,  
12 you can say all that Apprendi did. It never should have  
13 been decided -- I mean, some of us thought that --  
14 because, in fact --

15 JUSTICE SCALIA: I wonder who -- I wonder  
16 who that could have been.

17 (Laughter.)

18 JUSTICE BREYER: All you're talking about  
19 there is that you are stopping the judge from exhibiting  
20 his otherwise discretion towards harshness, and that's a  
21 matter for judges. I've heard all these arguments  
22 before, you see.

23 MR. DREEBEN: Well --

24 JUSTICE BREYER: And I've just heard them in  
25 the context of harshness, and, now, I don't know why



1 changing it to leniency makes them somehow more  
2 relevant. They weren't apparently relevant in the first  
3 situation; so why are they relevant in this one?

4 MR. DREEBEN: They weren't relevant  
5 in the first situation because, if there is no cap from  
6 the maximum that a judge could impose based on judicial  
7 factfinding, the role of a jury can be shrunk to what  
8 the Court has called low-level gatekeeping. That can  
9 never happen under a statute that increases only the  
10 mandatory minimum.

11 JUSTICE KAGAN: Well, is that --  
12 Mr. Dreeben, and -- and I think it's -- it's a great  
13 question. Is the jury functioning as a low-level  
14 gatekeeper under the Harris rule? Because I could make  
15 the argument that, in fact, it is -- you know, you take  
16 a statute, and it says, five and up for carrying, and  
17 seven and up for brandishing, right? And this isn't  
18 even a hypothetical. This is pretty close to this case.

19 It goes to the jury. The jury says, we  
20 think he was carrying, we do not think that he was  
21 brandishing, all right? And then it goes to the judge.  
22 And, now, the judge says, you know what, if I had my  
23 druthers, I would only give five years. If I had my  
24 druthers, I absolutely would defer to the jury verdict,  
25 but I can't defer to the jury verdict because Congress

1 has said I have to make this special factfinding, and  
2 the truth of the matter is I think he did brandish, and  
3 so I have to give seven years.

4 So the judge is not deferring to the jury,  
5 and he's not deferring to the jury when he would prefer  
6 to do so. I guess the question is isn't that, in every  
7 practical sense -- doesn't the mandatory minimum  
8 effectively increase the maximum punishment that the --  
9 that the defendant otherwise would get?

10 MR. DREEBEN: Well, it certainly doesn't  
11 increase the maximum punishment that's authorized under  
12 the statute. And it doesn't prevent the judge from  
13 making the exact same finding by a preponderance of the  
14 evidence that the jury did not make beyond a reasonable  
15 doubt and giving seven years, even if there were no  
16 mandatory minimums.

17 JUSTICE KAGAN: Yes. But what I'm  
18 suggesting is that in the world of judges -- you know,  
19 this -- the graph you wrote has this very little  
20 difference in the Harris situation between five and  
21 seven. But, in fact, most judges want to give five. I  
22 mean, that's the truth of the matter, that -- you know,  
23 nobody's giving a 97-year sentence.

24 So -- so the action in the criminal justice  
25 system is at this lower range. And, at this lower

1 range, what the mandatory minimums do is effectively  
2 tell a judge that they cannot defer to a jury verdict.

3 MR. DREEBEN: Well, it's, first of all, not  
4 entirely accurate that judges do not give higher  
5 sentences than the minimum. There are plenty of cases  
6 in which they do so. If the 920 --

7 JUSTICE GINSBURG: But let's say --

8 JUSTICE KAGAN: I know there are plenty of  
9 cases. All I'm saying is it's not the unusual case to  
10 find ourselves in exactly this position, where the judge  
11 wants to give five, the jury wants to give five, the  
12 judge can't defer to the jury's verdict that it should  
13 be five.

14 MR. DREEBEN: But taking away judicial  
15 discretion to treat a fact within the range differently  
16 than what Congress wants doesn't infringe the jury trial  
17 right.

18 The jury can find facts by a -- beyond a  
19 reasonable doubt, but, when the judge is at sentencing,  
20 he is not operating under that burden, so the  
21 factfinding role of the jury --

22 JUSTICE KENNEDY: But you could say that  
23 with reference to the -- to the maximum. Everything you  
24 said could be applied to the maximum, and Apprendi says  
25 you can't say that.

1           MR. DREEBEN: I don't think that it's quite  
2 true that everything that I said applies to the maximum,  
3 Justice Kennedy, because, as the plurality opinion in  
4 Harris explained, once the court has been confronted  
5 with a defendant who's convicted, the judge's discretion  
6 extends up to the statutory maximum. He can't use his  
7 factfinding ability to increase the defendant's exposure  
8 to criminal punishment. Mandatory minimums can never do  
9 that.

10           The defendant is already exposed to the  
11 sentence that the judge could give. And I grant you,  
12 Justice Kagan, that some judges might choose to give a  
13 lower sentence. But the fact that they might choose to  
14 reflects judicial leniency, tenderheartedness, something  
15 that the Sixth Amendment does not speak to.

16           JUSTICE GINSBURG: How about in deference to  
17 the jury's finding? I mean, in this -- this -- this  
18 very case, wasn't it so that the judge said, I could  
19 just say seven years because it's within the range, but  
20 it would be dishonest of me to do that, wouldn't it? I  
21 have to say seven because it's the mandatory minimum.

22           I think this is a case where the effect  
23 is -- is shown graphically, that the judge says, I'm  
24 stuck with the seven; I would prefer five. That's what  
25 the jury would lead me to do, but I'm -- my hands are

1 tied, I cannot respect the jury's finding.

2 MR. DREEBEN: I think, Justice Ginsburg,  
3 that the judge said he would be intellectually honest  
4 and not ignore the fact that the -- the finding of  
5 brandishing did trigger the mandatory minimum. He did  
6 not say, I otherwise would have given five. And I think  
7 that this case --

8 JUSTICE SCALIA: But is it the usual case  
9 that a judge, when faced with this decision, has before  
10 him a jury finding? I -- that --

11 MR. DREEBEN: It's not the usual case,  
12 Justice Scalia.

13 JUSTICE SCALIA: The Petitioner is asking  
14 these cases to be thrown out, even if there has been no  
15 jury finding.

16 MR. DREEBEN: Correct.

17 JUSTICE SCALIA: And the judge says -- you  
18 know, I have to decide whether he brandished or not; I  
19 think he brandished. But I -- you know, the Petitioner  
20 here wants to say, the judge cannot consider himself  
21 bound by a mandatory minimum. It seems to me the  
22 unusual case in which you have a jury finding, that the  
23 judge must ignore in -- in -- he actually doesn't ignore  
24 it, he goes along with it.

25 The jury may well be right, that it's

1 impossible to prove beyond a reasonable doubt that --  
2 that the felon brandished a gun, but it's -- it -- it's  
3 quite easy to say that it's very likely he brandished a  
4 gun -- brandished a gun, which is what the judge has to  
5 find. So he -- he's not even ignoring the jury finding.

6 MR. DREEBEN: No, there is no inconsistency  
7 between -- and I think, if you look at the way this case  
8 evolves, it's not even clear that the jury rejected  
9 brandishing. What's very interesting about this case is  
10 it's possibly the best illustration of the unfairness  
11 problem that Justice Alito alluded to and that  
12 Justice Breyer has written about in his opinions. The  
13 issue at trial in this case was identity.

14 Was the defendant actually the person  
15 sitting in the car, while his accomplice walked up to  
16 the victim and -- and put a revolver into his neck and  
17 asked for money? That was the issue at trial. There  
18 was no discussion of brandishing whatsoever.

19 Nobody focused on it, and it allowed the  
20 defendant, after the jury rejected his identity  
21 argument, to go to the judge and say, even though the  
22 jury has now found that my guy did it, he could not have  
23 foreseen that a gun would have been used.

24 JUSTICE SOTOMAYOR: Mr. Dreeben, can I go  
25 back to a point you made earlier? You talked about a

1 legislature not attempting to supplant the jury's role  
2 on the maximum. You don't see the same danger -- we  
3 started out in a country where almost all sentencing was  
4 in the discretion of the judge; whatever crime you  
5 committed, the judge could decide where to sentence you.

6 As Apprendi and its subsequent progeny laid  
7 out, these sentencing changes that have come into  
8 existence have really come into existence the latter  
9 half of the last century.

10 What -- don't you fear that, at some point,  
11 the legislature will go back to the old system of  
12 supplanting the jury by just saying what it said in  
13 924(c)? Every single crime has a maximum of life.

14 And all the -- and every single fact that's  
15 going to set a real sentence for the defendant, a  
16 minimum, we're going to let the judge decide by a  
17 preponderance of the evidence.

18 The bottom line of my question is, when  
19 Apprendi was decided, what should be the driving force  
20 of protecting the jury system? The deprivation of  
21 discretion, whether that's permissible or not, or  
22 whether a sentence is fixed in a range, whatever it  
23 might be, by a jury?

24 MR. DREEBEN: Justice --

25 JUSTICE SOTOMAYOR: What's the better rule

1 to keep both extremes from happening?

2 MR. DREEBEN: I think, Justice Sotomayor,  
3 that the Court recognized, in Apprendi, that its rule  
4 was limited and to certain extent could be evaded by  
5 legislatures, if they were inclined to do so.

6 JUSTICE SCALIA: Mr. Dreeben, I think that  
7 history is wrong. In fact, the way the country started,  
8 there was no judicial discretion. There were simply  
9 fixed penalties for crimes. If you stole a horse, you  
10 were guilty of a felony, and you would be hanged.  
11 That's where we started.

12 MR. DREEBEN: Well --

13 JUSTICE SCALIA: And I would think that the  
14 risk involved is whether, if we come out the way that  
15 the Petitioner here urges us to do, legislatures will  
16 consider going back to -- to where we started from and  
17 simply saying, if you brandish, you get seven years,  
18 period, with no discretion in the judge.

19 That, it seems to me, is the greater risk.

20 MR. DREEBEN: Well, Justice Scalia, I agree  
21 in part with both you and Justice Sotomayor on history.  
22 In fact, if you look at the 1790 Crimes Act that the  
23 First Congress passed, many of the set sentences are  
24 determinant sentences.

25 Others of the sentences were -- were



1 prescribed up to a certain amount of years. And, within  
2 that, it was well understood that judges would find  
3 facts to graduate the penalties according to the gravity  
4 of the crime.

5           And what the legislatures have done in the  
6 20th Century innovation of mandatory minimums within an  
7 otherwise authorized range, as you have with 924(c), is  
8 say, we would prefer that judges take into account  
9 brandishing and discharging, as under Justice Kagan's  
10 hypothetical statute, but we would like to -- to do that  
11 in a uniform manner.

12           We know that they can find, by a  
13 preponderance of the evidence, that brandishing exists.  
14 We know that many, if not most, judges would consider  
15 that worse than simple possession of a firearm in a  
16 crime of violence, and we want judges to behave  
17 consistently.

18           By proscribing consistency, they are acting  
19 in accord with the historical tradition of having  
20 determinate sentences, a tradition that this Court held  
21 in *Chapman v.* --

22           JUSTICE SOTOMAYOR: I'm sorry, the  
23 historical -- you said, earlier, that most of the  
24 historical evidence was that determinate sentences would  
25 be decided by juries; they found facts, and a

1 determinate sentence was given.

2 MR. DREEBEN: And there was no judicial  
3 discretion, which I think makes --

4 JUSTICE SOTOMAYOR: So what is the judicial  
5 discretion now? You find by a preponderance of the  
6 evidence, and a mandatory minimum makes you give seven.  
7 So where is the judicial discretion?

8 MR. DREEBEN: The judicial discretion is  
9 what the defendant is losing. He is not losing the  
10 right to a jury trial because the very same verdict  
11 authorizes the judge to find brandishing and impose  
12 seven years.

13 JUSTICE SOTOMAYOR: You think, for a  
14 defendant in a constitutional right, that they are  
15 more -- that it's constitutional to have a determinate  
16 sentence at seven and still constitutional -- and make  
17 the jury find it by a -- beyond a reasonable doubt and  
18 that it's still constitutional to have a determinative  
19 sentence of seven years, but have the jury find it by a  
20 preponderance of the evidence?

21 MR. DREEBEN: To have the jury find it by a  
22 preponderance of the --

23 JUSTICE SOTOMAYOR: Those are equal? Those  
24 are -- those are equal?

25 MR. DREEBEN: It's not just my position that

1 it's constitutional for a -- a judge to find mandatory  
2 minimum triggering facts by a preponderance. I'm sure  
3 that a legislature could allocate that to a jury, if it  
4 wishes to.

5 JUSTICE SOTOMAYOR: No, I know we said it in  
6 Harris.

7 MR. DREEBEN: Yes.

8 JUSTICE SOTOMAYOR: The question here before  
9 us today is --

10 MR. DREEBEN: Yes. And I think that -- that  
11 not only does it not contradict any decision of this  
12 Court to allow the judge to make those findings, it  
13 doesn't contradict the principle behind the jury trial  
14 right or the right to proof beyond a reasonable doubt.

15 JUSTICE BREYER: Look, look, here's another  
16 way of putting the same point: With the mandatory  
17 minimum, the judge can't go below the five years, okay?

18 But you say, well, he could have gone below  
19 the five years anyway, couldn't he have? I mean, you --  
20 he could have given you the five years anyway -- sorry.  
21 He could have given you the five years anyway. That's  
22 your point.

23 MR. DREEBEN: Correct.

24 JUSTICE BREYER: All right. He could have  
25 given you the five years -- he could have given you the

1 five years if you'd been -- if you had been convicted of  
2 a different crime.

3 MR. DREEBEN: And that's the difference  
4 between this and Appendi.

5 JUSTICE BREYER: But why does that make a  
6 difference? The best way I thought of putting it is the  
7 heading on page 6 of their reply brief is almost right,  
8 I think.

9 I mean, I -- it says it's -- it's permitting  
10 judges to find facts by a preponderance of the evidence  
11 that compels sentences higher than a set of those  
12 permitted by the jury's verdict.

13 That's exactly what's going on here.

14 MR. DREEBEN: Well --

15 JUSTICE BREYER: And -- and I -- I want to  
16 know, what is it? And the trouble is --

17 MR. DREEBEN: That's --

18 JUSTICE BREYER: You're just going to say,  
19 well, he could have given the same sentence anyway. And  
20 I'm going to say, well, so what, why does that matter?

21 MR. DREEBEN: It's descriptively accurate,  
22 but it says nothing about the constitutionality of the  
23 procedure. And I think that it's very important to  
24 focus not only on the fact that stare decisis is in  
25 play, but that Appendi has been a very history-driven

1 area of the law. Last term, when the Court extended  
2 Apprendi to fines, it has found an ample historical basis  
3 for doing so.

4 In this case, by comparison, there is no  
5 historical showing that would justify extending Apprendi  
6 to fines. Not only is there no direct analogy to a  
7 924(c) type statute, but the three pillars of their  
8 historical argument are extremely weak and strained  
9 analogies.

10 The first one is simply that, to get a  
11 statutory crime that was parallel to a common law crime,  
12 but differed, the prosecutor had to charge all of the  
13 elements of the statutory crime in the indictment. That  
14 says nothing about mandatory minimum sentencing.

15 The sentence -- second pillar of their  
16 historical argument is the procedure called benefit of  
17 clergy, which was a form of what Blackstone called a  
18 statute pardon, that allowed a defendant to avoid a  
19 capital sentence.

20 In the First Crimes Act, in Section 31, in  
21 1790, Congress said, "Benefit of clergy shall not exist  
22 in the United States for any crime punishable by a  
23 capital sentence." Benefit of clergy has never been  
24 part of this -- this country's Sixth Amendment heritage.  
25 It was abolished before the Sixth Amendment was even

1 ratified.

2           And the third pillar of their historical  
3 argument are three late 19th Century cases, Jones,  
4 Garcia, and Lacy, each of which involve statutes that  
5 both raised the maximum and the minimum, not a single  
6 one of them spoke about the Constitution. None of them  
7 purported to define what a legislature could do if it  
8 wanted to raise only the minimum, and that's it.

9           And I would suggest to the Court that this  
10 kind of Gertrude Stein history, where there's really no  
11 "there" there, is not sufficient to overturn the  
12 legislative prerogative to make uniform the findings of  
13 fact within a range --

14           JUSTICE KAGAN: Mr. Dreeben, could I take  
15 you back to the principles involved? Let's suppose  
16 that, instead of this statute, which is 579, you had a  
17 statute which was five for carrying, five up to life, and  
18 then, for brandishing, 40. All right? And maybe if  
19 we're discharging, 60. All right. So a very large gap.  
20 Is your argument still the same?

21           MR. DREEBEN: The constitutional argument is  
22 the same. I think this Court's decision in O'Brien  
23 suggests that, unless the legislature were absolutely  
24 clear about it, the Court would conclude that those  
25 would be deemed elements.

1 JUSTICE KAGAN: But suppose the  
2 legislature --

3 JUSTICE SCALIA: I'm sorry. I didn't hear  
4 your last word. Those would be?

5 MR. DREEBEN: "Deemed elements." Under the  
6 decision in O'Brien, where the machine gun finding  
7 raised the minimum to 30 years, the Court held that it  
8 should be deemed to be an element, but --

9 JUSTICE KAGAN: But suppose -- suppose that  
10 Congress is absolutely clear about it, and you say --  
11 and I think that you're right, you've got to be right  
12 about this -- it's a constitutional matter, it's the  
13 same, but the hypothetical sort of suggests exactly what  
14 you said our inquiry ought to be, is that, in a world  
15 like that, the jury is, in fact, functioning only as a  
16 low-level gatekeeper; isn't that right?

17 MR. DREEBEN: No.

18 JUSTICE KAGAN: And that the only reason we  
19 see it in the hypothetical a little bit more clearly is  
20 because the numbers are a bit more dramatic.

21 MR. DREEBEN: I wouldn't suggest that the  
22 jury is being a low-level gatekeeper in that situation  
23 because the jury's verdict alone -- and this is a  
24 serious crime -- exposes the defendant to a life  
25 sentence. This is a crime that involves either a

1 predicate Federal crime of violence or a Federal drug  
2 trafficking crime, plus the use of the gun in it.

3           And I think Congress could reasonably expect  
4 that the worse the use of the gun, the more extreme, the  
5 higher the corresponding penalty. And, indeed, if a  
6 924(c) violation is charged by itself, and a defendant  
7 is an armed career criminal, then his sentencing range  
8 goes up to 360 months to life --

9           JUSTICE KAGAN: I mean, there's something  
10 deeply incongruous, isn't there, where you have an  
11 Apprendi rule which says if the maximum is -- you know,  
12 if it's five to seven, and then the -- the judge says  
13 seven years and a day, we're going to take that out, but  
14 as a mandatory minimum that will leapfrog you from five  
15 to 40 doesn't get the same result?

16           MR. DREEBEN: It's not incongruous if you  
17 look at it from the point of view of the fact that the  
18 jury verdict itself allows a life sentence. And if the  
19 defendant draws the proverbial hanging judge who, in his  
20 discretion -- or her discretion, wants to give that life  
21 sentence, the defendant knew, from day one, when he  
22 committed the crime, that, if the jury finds him guilty  
23 of it, he's exposed to a life sentence.

24           And the Court, in Apprendi, said structural  
25 democratic constraints will preclude legislatures -- or



1 at least discourage them from assigning maximum  
2 sentences to crimes that are higher than what the  
3 legislature deemed --

4 JUSTICE SOTOMAYOR: So how about in O'Brien,  
5 if the legislature had said 40 years for a machine gun?  
6 Would we -- how do we justify saying, no, that has to  
7 remain an element? Under your theory, the democratic  
8 process didn't work.

9 MR. DREEBEN: No, I think that --

10 JUSTICE SOTOMAYOR: So how -- what would we  
11 do in that situation?

12 MR. DREEBEN: In that situation, the  
13 democratic process would have concluded that firearms  
14 brandishing, discharge, or use of a machine gun is an  
15 extremely serious component of this crime. We know  
16 judges will take that into account in sentencing. We  
17 simply want them to take that into account in the same  
18 particularly harsh way.

19 And in -- in trying to achieve uniformity  
20 among judicial actors, when finding facts at sentencing,  
21 which everybody knows that they will do, does not  
22 deprive the defendant of a right to a jury trial on the  
23 elements of the crime; it deprives him of the right to a  
24 judge who might show mercy under a particular set of  
25 facts.

1                   And that simply is not the right that's  
2 embodied in the Sixth Amendment.

3                   JUSTICE BREYER: That -- that's -- I don't  
4 know if you can add anything to this, but, remember, I  
5 agree with you about the history, but I just apply it to  
6 Apprendi, too. So the one --

7                   JUSTICE SCALIA: It is so bad he wants to  
8 extend it.

9                   (Laughter.)

10                  JUSTICE BREYER: I thought -- are you sure  
11 it was Gertrude Stein and not Dorothy Parker? But I  
12 think you're probably right about that.

13                  But the -- the -- I'm thinking of this as,  
14 well, Apprendi, I see what they're thinking. They're  
15 thinking that, once you have to add the extra fact to  
16 get above the otherwise ceiling, it's like a new crime.  
17 It isn't really a new crime, but it's like a new crime.

18                  Okay. But then I can say, well, once you  
19 have to really cut off that five years and less and  
20 really send him to jail for five years, hey, that's just  
21 like a new crime. It isn't really a new crime, but it's  
22 like a new crime.

23                  So why can't I say everything that we said  
24 about Apprendi here, except I can't deny what you say,  
25 the judge could have given the sentence anyway. That's

1 absolutely right. But all the other things, I can say.  
2 Is that true?

3 MR. DREEBEN: Well, I agree that you can say  
4 them, Justice Breyer --

5 JUSTICE BREYER: But, I mean, are they true?  
6 (Laughter.)

7 MR. DREEBEN: Respectfully, no.  
8 We -- the critical point about Apprendi is,  
9 by assigning the role of constitutional element status  
10 to a fact that increases the maximum, the Court has  
11 preserved the jury trial right against its reduction to,  
12 essentially, a formality on a particular subset of  
13 elements. And the relationship of a crime that's  
14 covered by Apprendi and the so-called base crime is like  
15 a greater included offense and a lesser included  
16 offense.

17 Whereas, in the mandatory minimum situation,  
18 we know that the judge will be engaged in sentencing.  
19 We know that the judge will find facts that extend  
20 beyond the elements of the crime to inform himself about  
21 how the basic crime is committed. We also know that  
22 different judges may treat those facts differently after  
23 finding them by the preponderance of the evidence.

24 The mandatory minimum changes only one  
25 thing. It says, Judge, if you find this fact,

1 brandishing or discharge, you will impose the same  
2 sentence as your neighboring judge down the hall, not a  
3 different one based on your different perception of  
4 sentencing philosophy.

5           So it allows the legislature to intervene  
6 after having defined a sufficiently serious enough crime  
7 and determine how the judges will treat those facts.

8           JUSTICE SOTOMAYOR: Why is the legislature  
9 being deprived of that right, if they give it to the  
10 jury?

11           MR. DREEBEN: The legislature --

12           JUSTICE SOTOMAYOR: I mean, it seems to me  
13 that, whether you give it to a jury or a judge, the  
14 legislature protects itself by declaring a minimum  
15 sentence.

16           MR. DREEBEN: There are many ways --

17           JUSTICE SOTOMAYOR: It determines the  
18 sentence, really.

19           MR. DREEBEN: There are many ways that a  
20 legislature could achieve a goal that allows the judge's  
21 factfinding to carry more weight. For one thing, it  
22 could extend the maximum punishments and convert  
23 everything into an affirmative defense, which this Court  
24 said last week is constitutional.

25           The point is whether the defendant has

1 really been divested of a jury trial right when he loses  
2 the right to the mercy of a judge.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Dreeben.

6 Ms. Maguire, you have five minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF MARY E. MAGUIRE

9 ON BEHALF OF THE PETITIONER

10 MS. MAGUIRE: It is the effect of the  
11 factfinding that is important, not what it is called. A  
12 mandatory minimum does, in fact, increase the exposure  
13 that a defendant is -- is exposed to because his range  
14 then goes from five to life, which was wholly authorized  
15 by the jury's verdict in this case, to seven to life,  
16 and that is an increase.

17 And we are not talking about a right to  
18 leniency, but a right for the judge to consider the full  
19 range that the jury authorized. And I would note the  
20 language in Apprendi did, in fact, address this issue of  
21 range when it said, "One need only look to the kind,  
22 degree, or range of punishment to which the prosecution  
23 is, by law, entitled for a given set of facts."

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

(Whereupon, at 10:59 a.m., the case in the  
above-entitled matter was submitted.)

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